

## ATTACHMENT D — THE PROPOSED CONDITIONS OF AUTHORISATION

### 1 ACCESS CONDITIONS

#### 1.1 AAT to offer access

AAT must offer to supply an Applicant such Port Terminal Services as required by the Applicant on terms no less favourable than the terms offered to any User currently obtaining equivalent Port Terminal Services.

#### 1.2 AAT to publish Stevedore Licence Application Form, Reference Tariffs , Terms and Authorisation Conditions

- (a) AAT must publish on AAT's website:
  - (i) the Stevedore Licence Application Form;
  - (ii) current reference tariffs (**Reference Tariffs**) for each Port Terminal Service; and
  - (iii) the terms and conditions on which Port Terminal Services are offered (the **Terms**),
  - (iv) a copy of these Authorisation Conditions, clearly marked and visible on the first webpage (**Home Page**), together with a plain English summary of the obligations contained therein (**Summary**).
- (b) AAT must give the ACCC copies of the Stevedore Licence Application Form, the Reference Tariffs and the Terms within 5 Business Days of publication.
- (c) Clause 1.2(b) does not prevent AAT and any Applicant from negotiating non-standard tariffs and terms for Port Terminal Services.
- (d) AAT will ensure that within one month of the commencement of the Authorisation, the Authorisation Conditions and the Summary are brought to the attention of:
  - (i) its staff concerned with the management and operation AAT;
  - (ii) Stevedores;
  - (iii) Applicants;
  - (iv) all port authorities from AAT leases Port Terminals; and
  - (v) Terminal End-users, insofar as AAT is aware, including all shipping lines who berth at AAT Terminals, importers and exporters who import or export goods through AAT terminals, and their representative associations, to the extent known to AAT.
- (e) Nothing in this clause prevents AAT from:
  - (i) varying the Stevedore Licence Application Form, Reference Tariffs and the Terms from time to time; or
  - (ii) publishing different Stevedore Licence Application Forms, Reference Tariffs or Terms for each Port Terminal.

### **1.3 Pricing**

1.3.1 AAT undertakes to notify the relevant port authority of any increase to its Reference Tariffs for Port Terminal Services.

1.3.2 Any Applicant, Stevedore or Terminal End-user may lodge a complaint with the relevant port authority regarding an unjustifiable increase in AAT's Reference Tariffs for Port Terminal Services.

1.3.3 The relevant port authority may determine whether AAT's Reference Tariffs referred to in clause 1.3.1 above are reasonable and justified, having regard to the following principles:

- (a) AAT is entitled to generate a reasonable rate of return on the amount of funds invested; and
- (b) AAT's Reference Tariffs should be entitled to be set on a terminal by terminal basis taking in to account:
  - (1) all input costs, including terminal lease costs, among others;
  - (2) an appropriate allocation to that terminal of head office costs;
  - (3) expected volumes, including where appropriate any split between committed / uncommitted volume and associated risks;
  - (4) the level of capital invested at that terminal; and
  - (5) AAT's overall weighted average cost of capital.

### **1.4 Non-discriminatory access**

In providing access to Port Terminal Services, AAT must not discriminate in any material respect between different Applicants or Stevedores in favour of its Related Bodies Corporate or either of them, except to the extent that the costs of providing access to other Applicants or Stevedores is higher, or to the extent that the relevant conduct by AAT was necessary having regard to the operational imperatives of AAT's facilities and AAT's conduct was reasonable in all the circumstances.

### **1.5 No hindering access**

AAT, or its Related Bodies Corporate, must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by any Applicant or Stevedore in the exercise of a right to access to the Port Terminal Services.

### **1.6 Negotiating for access**

- (a) AAT must negotiate with an Applicant for the provision of access to Port Terminal Services in good faith. Applicants must also negotiate with AAT in relation to the provision of access to Port Terminal Services in good faith.
- (b) Applications for access to the Port Terminal Services are to be submitted to AAT in the form of a Stevedoring Licence Application Form.
- (c) Upon receiving a Stevedoring Licence Application Form from an Applicant, AAT must acknowledge receipt of the Stevedoring Licence Application Form in writing to the Applicant within 5 Business Days.
- (d) If an Applicant believes that the Stevedore Licence Application form has the effect of reasonably preventing the Applicant from making an application for the provision of Port Terminal Services, the Applicant may give AAT a notice under clause 1.7.1 and the provisions of clause 1.7 will apply.

## 1.7 Resolution of Access Disputes

### 1.7.1 Access Disputes

- (a) Any Access Dispute will, unless otherwise expressly agreed to the contrary by both parties, be resolved in accordance with this clause 1.7. Either party may give to the other party to the Access Dispute notice in writing (**Dispute Notice**) specifying the Access Dispute and requiring it to be dealt with in the manner set out in this clause 1.7. AAT and the Applicant must act in good faith to seek to resolve the Access Dispute in accordance with this clause 1.7.
- (b) An Applicant or Stevedore may raise an Access Dispute in accordance with this clause 1.7. For the avoidance of doubt, an Access Dispute can be raised in relation to discrimination and/or the hindering of access to Port Terminal Services.

### 1.7.2 Negotiation

- (a) Within 15 Business Days of a party giving the other a Dispute Notice, senior representatives from each party will meet and use reasonable endeavours acting in good faith to resolve the Access Dispute by joint discussions.

### 1.7.3 Mediation

- (a) If the Access Dispute is not resolved in accordance with clause 1.7.2 within 15 Business Days of the date the Dispute Notice it will be referred to mediation pursuant to this clause 1.7.3.
- (b) The Access Dispute will be referred to the chief executive officers of each party who will attempt to resolve the Access Dispute, including by informal mediation.
- (c) If the Access Dispute is not resolved within 15 Business Days after being referred to the chief executive officers under clause 1.7.3(b) (or such longer period as is agreed between the chief executive officers), the Access Dispute will be referred to formal mediation in the State in which the Port Terminal Services to which the Applicant is seeking access are located. If the Applicant is seeking access to Port Terminal Services in more than one State, then the Access Dispute will be referred to formal mediation in the State of the Applicant's choosing.
- (d) An Access Dispute referred to mediation in accordance with clause 1.7.3(c) will be mediated by a single mediator appointed by agreement of the parties or, if they fail to agree within 10 Business Days, a mediator appointed by the President of the Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) in the State in which the mediation will be conducted acting on the request of either party.
- (e) Unless the parties agree otherwise:
  - (i) the mediation, by either a mediator appointed by the parties or a mediator appointed by the President of the Chapter of IAMA in the State in which the mediation will be conducted, will be conducted under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);
  - (ii) the parties may appoint a person, including a legally qualified person to represent it or assist it in the mediation;
  - (iii) each party will bear their own costs relating to the preparation for and attendance at the mediation;
  - (iv) the costs of the mediator will be borne equally by the parties;

- (v) AAT and the Applicant or Stevedore will use reasonable endeavours to ensure that the mediation is completed within 30 Business Days from the date the mediator is appointed, or such longer period as agreed between the parties,
- (f) The parties will execute a deed to indemnify the mediator against any loss or damage incurred by the mediator in the course of carrying out his or her functions in accordance with his or her terms of appointment.

#### **1.7.4 Final determination by an expert or arbitrator**

If the relevant Access Dispute is not resolved under clause 1.7.3, then either party may refer the dispute to be determined by

- (a) a retired judge who is practicing in dispute resolution (**Expert**), in accordance with the procedures set out below in clause 1.7.5; or
- (b) an arbitrator, in accordance with the arbitration procedures set out below in clauses 1.7.6 and 1.7.7.

#### **1.7.5 Referral to an Expert**

If the Access Dispute is referred to an Expert for expert determination pursuant to clause 1.7.4(a), then the following provisions apply:

- (a) The parties will use all reasonable endeavours to ensure that the Expert provides the Expert's determination on the Access Dispute within 40 Business Days of its commencement.
- (b) The Expert will decide the Access Dispute as an Expert not an arbitrator and the Expert's decision will be final and binding on both AAT and the Applicant or Stevedore.
- (c) The cost of the expert determination will be shared equally between the parties, unless agreed otherwise.
- (d) AAT and the Applicant or Stevedore will use all reasonable endeavours to ensure that the expert is provided with
  - (i) all relevant information available to AAT and the Applicant or Stevedore; and
  - (ii) all reasonable assistance,in a timely manner, to enable the expert to make a determination in relation to the Access Dispute within the period mentioned in clause 1.7.5(a).
- (e) AAT and the Applicant or Stevedore will execute a deed to indemnify the Expert for against any loss or damage incurred by the Expert in the course of carrying out his or her functions in accordance with his or her terms of appointment.

#### **1.7.6 Referral to arbitration**

- (a) A party may, by notice in writing to the other (**Arbitration Notice**), refer an Access Dispute to arbitration in accordance with this clause 1.7.4, in the event that the parties have failed to resolve the dispute under clauses 1.7.1 - 1.7.3 above. The Arbitration Notice must specify:
  - (i) the nature of the Access Dispute;
  - (ii) the matters in respect of which the party is seeking arbitration; and
  - (iii) the contact details of the person issuing the Dispute Notice (and, if that person is AAT, the contact details of the party to whom the Dispute Notice is issued); and

- (iv) whether the parties have agreed, or are likely to agree, upon a private arbitrator.
- (b) Any arbitration will be conducted in accordance with the procedures in clauses 1.7.6 to 1.7.7.
- (c) If an Access Dispute is referred to arbitration in accordance with clause 1.7.6, AAT must, within 2 Business Days, provide the ACCC with a copy of the relevant Dispute Notice and Arbitration Notice, addressed to:

The General Manager  
 Adjudication Branch  
 Australian Competition and Consumer Commission  
 23 Marcus Clarke Street  
 Canberra ACT 2600  
 Fax: (02) 6243 1211

### 1.7.7 Arbitration procedures

- (a) If the parties fail to agree an arbitrator within 10 Business Days of the expiry of the Date of the Arbitration Notice, then either party may request the ACCC to appoint an arbitrator. AAT must notify the ACCC of the identity of the arbitrator within 2 Business Days of the parties agreeing on the arbitrator in the event that the parties do so. .
- (b) The ACCC may authorise a member of the ACCC to make a decision or to exercise any powers under clauses 1.7.7(a).
- (c) The parties may agree on the terms on which the arbitration will be conducted.
- (d) If the parties are unable to reach agreement on the terms on which the arbitration will be conducted within 10 Business Days of the arbitrator being appointed, the arbitration will be conducted in accordance with the following procedures:
  - (i) the arbitrator will not be required to proceed with the arbitration unless and until the party that issued the Arbitration Notice has agreed to pay the arbitrator's and other costs as determined in accordance with clause 1.7.7(l) and provided any indemnity as required in accordance with clause 1.7.7(n);
  - (ii) unless the parties to the Access Dispute agree otherwise, the arbitration will be conducted in private;
  - (iii) a party may appoint a person, including a legally qualified person, to represent it or assist in the arbitration;
  - (iv) the arbitrator must observe the rules of natural justice, but is not bound by technicalities, legal forms or rules of evidence;
  - (v) the arbitrator must act as speedily as a proper consideration of the Access Dispute allows, having regard to the need to carefully and quickly enquire into and investigate the Access Dispute and all matters affecting the merits, and fair settlement, of the Access Dispute;
  - (vi) the arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to a Access Dispute, and may require that the cases be presented within those periods;
  - (vii) the arbitrator may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument;
  - (viii) the arbitrator will present its determination in a draft form to the parties and allow opportunity to comment from the parties before making a final determination;

- (ix) the arbitrator will hand down a final determination in writing which includes its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based;
  - (x) unless the parties to the Access Dispute agree otherwise, any determination by the arbitrator will be confidential, subject to the requirement to notify the ACCC in clause 1.7.7(o) below;
  - (xi) the arbitrator may make any determination or direction in relation to the Access Dispute that it considers appropriate. For the avoidance of doubt, such determination or direction may include making a binding determination in relation to the Access Dispute, or requiring the parties to continue or re-commence negotiations.
- (e) The arbitrator may at any time terminate an arbitration (without making an award) if he or she thinks that:
- (i) the notification of the Access Dispute is vexatious;
  - (ii) the subject matter of the Access Dispute is trivial, misconceived or lacking in substance; or
  - (iii) the party who notified the Access Dispute has not engaged in negotiations in good faith.
- (f) In deciding an Access Dispute, the arbitrator must have regard to:
- (i) this Authorisation; and
  - (ii) the matters set out in section 44X(1) of the Act.
- (g) In deciding an Access Dispute, the arbitrator may have regard to any other matters that he or she thinks are relevant.
- (h) In deciding an Access Dispute, the arbitrator must not:
- (i) without the consent of all parties, make a determination which relates to matters which were not specified in the Arbitration Notice;
  - (ii) without the consent of all parties, allow any other party to join or intervene in the arbitration (except as set out in clause 1.7.7(m)(iii)); or
  - (iii) make a determination which would have any of the effects described in section 44W of the Act.
- (i) A determination or direction of the arbitrator will be final and binding, subject to any rights of review by a court of law, and will have effect on and from the date specified by the arbitrator. Any or all of the provisions of a final determination may be expressed to apply from a specified day which is earlier than the day on which it takes effect.
- (j) Other than in circumstances where the determination or direction is the subject of review by a court of law, if an Applicant or Stevedore does not comply with a determination or direction of the arbitrator, AAT will not be obliged to continue negotiations for the provision of access to Port Terminal Services for that Applicant.
- (k) Other than where the determination or direction is the subject of review by a court of law, AAT will comply with the lawful determination or directions of the arbitrator.
- (l) The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make

submissions to the arbitrator on the issue of costs at any time prior to the arbitrator's costs determination.

- (m) The parties' appointment of the arbitrator must provide that:
  - (i) the arbitrator must keep the ACCC advised, not less frequently than fortnightly, about the progress of the arbitration, including timelines and processes;
  - (ii) the arbitrator must provide a copy of any correspondence between the arbitrator and the ACCC relating to procedural or other matters to the parties within 3 Business Days; and
  - (iii) the ACCC will have the absolute right to make submissions to the arbitrator in respect of the Access Dispute (subject only to complying with the procedures and timeframes for submissions determined by the arbitrator).
- (n) The arbitrator may require the parties to indemnify it from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 1.7.7, such indemnity excluding circumstances where the conduct of the arbitrator constitutes negligence (whether wilful or otherwise), dishonest or unlawful conduct.
- (o) AAT must send a copy of any determination made by the arbitrator to the ACCC within 2 Business Days of the determination being made.
- (p) Any laws relating to arbitrations applying in the jurisdiction in which any arbitration undertaken in accordance with this clause 1.7.7 is conducted will apply to the arbitration. Subject to any legal requirement to the contrary, to the extent of any inconsistency between those laws and this Authorisation, this Authorisation will prevail.

## 2 REPORTING ABOUT DISPUTES

### 2.1 Requirement to report on Active Disputes

- (a) On an annual basis for the duration of this Authorisation, AAT must provide the ACCC with a report about Active Disputes for the previous calendar year (**Active Dispute Report**).
- (b) AAT must provide the first Active Dispute Report on 1 February 2011. The first Active Dispute Report will concern Active Disputes for the period commencing on the date this Authorisation becomes effective and ending on 31 December 2010. All subsequent Active Dispute Reports must be submitted to the ACCC prior to 1 February of each year and will concern Active Disputes for the previous calendar year (**Reporting Period**).

### 2.2 Contents of Active Dispute Reports

- (a) Each Active Dispute Report must include a description of each Active Dispute including:
  - (i) a description of the issue the subject of the Active Dispute;
  - (ii) the outcome sought by the Applicant or Stevedore in relation to the Active Dispute;
  - (iii) whether the Active Dispute has been resolved or not;
  - (iv) if the Active Dispute has been resolved, the action taken by AAT and the Applicant or Stevedore to resolve the Active Dispute;
  - (v) if the Active Dispute has been resolved, how the Active Dispute was resolved;
  - (vi) if the Active Dispute has been resolved, the time taken to resolve the . Active Dispute; and
  - (vii) if the Active Dispute is resolved, the costs associated with resolving the Active Dispute and the apportionment of the costs to the parties to the Active Dispute.
- (b) The ACCC will place all Active Dispute Reports on the public register of authorisations maintained in accordance with section 89 of the Act.



### 3 DEFINITIONS, INTERPRETATION AND CONFIDENTIALITY

#### 3.1 Definitions

In these Conditions:

**"Access Dispute"** means a bona fide dispute between an Applicant, or Stevedore and AAT relating to access on non-discriminatory terms to Port Terminal Services but excludes any dispute in relation to the terms of any agreement relating to Port Terminal Services between the parties once executed. For the avoidance of doubt, an Access Dispute does not include a dispute about price levels.

**"Act"** means the Trade Practices Act 1974 (Cth).

**"Active Dispute"** means a Dispute which is:

- (i) notified to AAT by an Applicant or Stevedore during the Reporting Period; or
- (ii) resolved during the Reporting Period; or
- (iii) not notified during the Reporting Period, and remaining unresolved at the conclusion of the Reporting Period.

**"Applicant"** means a person seeking access to Port Terminal Services under clause 1.6.

**"Arbitration Notice"** has the meaning given in clause 1.7.6.

**"Auditor"** means the independent auditor appointed at the direction, of the ACCC in accordance with clause 1.5.

**"Authorisation"** means this determination of AAT's applications A91141, A91142, A91181 and A91182 for authorisation.

**"Business Day"** means a day that is not a Saturday, Sunday or public holiday in the Australian Capital Territory, except that if used in relation to a specific Port Terminal means the State in which the relevant Port Terminal is located.

**"Conditions"** means these conditions on which the Authorisation is granted.

**"Confidential Information"** means information exchanged between AAT and an Applicant or Stevedore in relation to the business of those persons that:

- (a) is by its nature confidential;
- (b) is specified to be confidential by the person who supplied it; or
- (c) is known, or ought to be known, by a person using or supplying it to be confidential or commercially valuable,

but excludes information that:

- (d) is comprised solely of the name, address and contact details of a person; or
- (e) was in the public domain at the time when it was supplied; or
- (f) subsequently becomes available other than through a breach of confidence or breach of this provision; or
- (g) was in lawful possession of the a party prior to being provided by the party; or
- (h) ceases to be confidential in nature by any other lawful means.

**"Dispute"** means an Access Dispute.

**"Dispute Notice"** means a written notice provided by an Applicant or Stevedore to AAT or by AAT to an Applicant or Stevedore specifying the Access Dispute and requiring the Access Dispute to be dealt with in the manner set out in clause 1.7.1(a).

**"Expert"** has the meaning given in clause 1.7.5.

**"IAMA"** has the meaning given in clause 1.8.3(d).

**"Port Terminal"** means each of the terminals presently operated by AAT and located at Port of Brisbane, Port Kembla and any other port where AAT is the only provider of terminal services for the loading and unloading of automotive cargo.

**"Port Terminal Services"** means:

- (a) the use of facilities and infrastructure owned, operated or controlled; or
- (b) services and anything else provided,

by AAT at a Port Terminal which in each case AAT makes available to allow a Stevedore to facilitate export and import motor vehicles and which, at a minimum, includes those services AAT currently makes available to Stevedores.

**"Proposed Auditor"** means a proposed independent auditor to undertake the independent audit as outlined in clause 1.5.

**"Reference Tariffs"** means the reference tariffs described in clause 1.2(a).

**"Related Body Corporate"** has the same meaning as in the Corporations Act 2001 (Oh).

**"Reporting Period"** has the meaning given to that term in clause 3.1 (b).

**"Stevedore"** means a person who has entered into a contract, arrangement or understanding with AAT in relation to the provision by AAT of Port Terminal Services to that person and for the avoidance of doubt:

- (a) includes a person carrying on, or proposing to carry on, a stevedoring business or business as a stevedore;
- (b) includes any Related Body Corporate of AAT who currently obtain Port Terminal Services from AAT; and
- (c) excludes a Terminal End-user.

**"Stevedore Licence Application Form"** means the application form AAT requires Applicants to complete in order to obtain access to Port Terminal Services.

**"Terminal End-user"** means a person, other than an Applicant, who as a consequence of their requirement for access to Port Terminals has an interest in the terms and conditions of use of the Port Terminals and:

- (a) who has a direct contractual relationship with AAT; and
- (b) does not include a person carrying on, or proposing to carry on, a stevedoring business or business as a stevedore.

**"Terms"** has the meaning given in clause 1.2.

## 3.2 Interpretation

In these Conditions, unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to a person includes companies and associations;
- (c) a reference to a consent of a party means the prior written consent of that party;
- (d) headings are for convenient reference only and do not affect the interpretation of these Conditions;
- (e) a reference to a clause is a reference to a clause of these Conditions;
- (f) a reference to a party includes its successors and permitted assigns;
- (g) a reference to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (h) a reference to the word "include" or "including" is to be construed without limitation; and
- (i) a reference to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced.

## 3.3 Confidentiality

### 3.3.1 Treatment of Confidential Information

- (a) Subject to clause 3.3.1(b), if a party provides Confidential Information to another party either:
  - (i) as part of the negotiation process for access to the Port Terminal Services; or
  - (ii) for the purpose of resolving any Access Dispute,the recipient of that Confidential Information will treat that Confidential Information as confidential, the property of the provider of that information, and will use that information solely for the purpose of negotiating access to the Port Terminal Services or resolving any Access Dispute in accordance with this Authorisation.
- (b) A party is permitted to disclose Confidential Information:
  - (i) to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants or professional advisers, provided they are under a legal obligation not to disclose the Confidential Information to any third party;
  - (ii) to any mediator, expert or arbitrator appointed in accordance with clause 1 for the purposes of that mediation, expert determination or arbitration (and, if the ACCC is the arbitrator, subject to the ACCC's standard confidentiality protocols and procedures);
  - (iii) to the ACCC to the extent necessary for a party to comply with any written request by the ACCC (subject to the ACCC's standard confidentiality protocols and procedures); or
  - (iv) if and to the extent required by law, provided that it first consults with the party that provided the Confidential Information in relation to the manner and timing of that disclosure.

### 3.3.2 Dispute resolution

- (a) If Confidential Information is provided to a mediator, expert or arbitrator for the purpose of assisting in the resolution of any Dispute in accordance with clauses 1, the mediator, arbitrator or expert as the case may be must (and the terms and conditions of appointment of the mediator, arbitrator or expert must require them to) take all reasonable steps to protect the confidentiality of information that any party to the dispute has identified as confidential or commercially sensitive. This clause 3.3.2(a) is subject to the ACCC's obligations under legislation.
- (b) For the purpose of clause 3.3.2, any arbitrator appointed in accordance with clause 1 may require the parties to a Dispute to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
  - (i) requiring each party and their, advisers to give confidentiality undertakings to each other party; and
  - (ii) limiting access to Confidential Information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (c) Any expert or arbitrator appointed in accordance with clause 1, may make confidential and non-confidential versions of his, her or its determination and limit access to the confidential versions to specific individuals.
- (d) The ACCC shall keep confidential any information it receives from the parties in relation to a Dispute, including any arbitration, unless parties consent otherwise and subject to any disclosure required by law.