



# Port Terminal Services Access Undertaking

by

**Emerald Logistics Pty Ltd** (ABN 39 087 280 260) of Level 4/600 Victoria St Richmond, Victoria 3121  
("Port Operator")

in favour of

**Australian Competition and Consumer Commission**  
being a body corporate established under **section 6A** of the CCA ("ACCC")

9 September 2013 (as varied)

# Port Terminal Services Access Undertaking

<b>1. Interpretation</b>	<b>4</b>
1.1 Definitions .....	4
1.2 Interpretation .....	6
<b>2. Background</b>	<b>7</b>
2.1 Introduction .....	7
2.2 Objectives .....	7
<b>3. Structure</b>	<b>8</b>
3.1 Components .....	8
3.2 Priority .....	8
<b>4. Term and variation</b>	<b>8</b>
4.1 Commencement Date .....	8
4.2 Expiry .....	8
4.3 Early withdrawal of the Undertaking .....	9
4.4 Variations to this Undertaking .....	9
4.5 Other variations .....	9
<b>5. Scope</b>	<b>10</b>
5.1 Application .....	10
5.2 Meaning of Port Terminal Services .....	10
5.3 Meaning of Port Terminal Facility .....	10
5.4 What this Undertaking does not cover .....	11
<b>6. Standard Terms and Reference Prices</b>	<b>11</b>
6.1 Access to Standard Port Terminal Services .....	11
6.2 Reference Prices .....	11
6.3 Standard Terms .....	12
6.4 Non-discriminatory access .....	12
6.5 Variation to Reference Prices and Standard Terms .....	12
<b>7. Negotiating for access</b>	<b>12</b>
7.1 Good faith negotiation .....	12
7.2 Framework .....	13
7.3 Preliminary inquiry .....	13
7.4 Eligibility to apply .....	14
7.5 Application Process for Access Application .....	15
7.6 Standard Access Agreements .....	15
7.7 Access to Standard Port Terminal Services before an Access Agreement is executed .....	15
7.8 Negotiation of Access Agreement .....	16
7.9 Access Agreement .....	16
<b>8. Dispute resolution</b>	<b>17</b>
8.1 Disputes .....	17
8.2 Negotiation .....	17
8.3 Mediation .....	17
8.4 Referral to arbitration .....	18
8.5 Appointment of arbitrator .....	18
8.6 Arbitration procedure if the ACCC is the arbitrator .....	19
8.7 Arbitration procedure if the ACCC is not the arbitrator .....	19
<b>9. Confidentiality</b>	<b>21</b>

9.1	Treatment of Confidential Information .....	21
<b>10.</b>	<b>Capacity management</b>	<b>22</b>
10.1	Continuous Disclosure Rules .....	22
10.2	Loading Protocol.....	22
10.3	Variation of the Port Operator's Loading Protocol.....	22
10.4	Objection notice.....	23
10.5	No hindering access .....	24
<b>11.</b>	<b>Publication of other information</b>	<b>24</b>
11.1	Information on stock at the port.....	24
11.2	Publication of vessel booking applications .....	24
<b>12.</b>	<b>Report on Performance and Capacity Indicators</b>	<b>24</b>
<b>13.</b>	<b>Cooperation with ACCC</b>	<b>25</b>
<b>14.</b>	<b>Contact details</b>	<b>25</b>
<b>Schedule 1 – Indicative Access Agreement</b>		
<b>Schedule 2 – Access Application Information</b>		
<b>Schedule 3 – Audit</b>		
<b>Schedule 4 – Port Terminal Facility</b>		
<b>Schedule 5 – Loading Protocol</b>		

# 1. Interpretation

## 1.1 Definitions

In this Undertaking unless the context otherwise requires:

**Access Agreement** means an agreement between a User and the Port Operator for the provision of Port Terminal Services;

**Access Application** means an application for Port Terminal Services as described in clause 7;

**Applicant** means a person seeking access to the Port Terminal Services under clause 7;

**Associated Entity** has the meaning given to that term by the *Corporations Act 2001* (Cth)

**Available Capacity** means the Port Operator's estimate of loading capacity available for a Bulk Wheat Booking after taking into account, amongst other things, the shipping stem and any known constraints or limitations on labour, machinery, infrastructure or supply chain logistics for the period in question.

**Booking** has the same meaning as in the Loading Protocol;

**Bulk Wheat** means wheat for export from Australia other than wheat that is exported in a bag or a container that is capable of holding not more than 50 tonnes of wheat;

**Business Day** means a day which is not a Saturday, Sunday or public or bank holiday in Victoria;

**CCA** means the *Competition and Consumer Act 2010* (Cth);

**Code** means a code of conduct that applies to the Port Operator:

- (a) in respect of which the Minister has published a notice in the Gazette under s12(1) of the WEMA; and
- (b) which has been declared by regulations under section 51AE of the CCA to be a mandatory industry code.

**Confidential Information** means information exchanged between the Port Operator and an Applicant or User 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:

- (i) is comprised solely of the name, address and contact details of a person; or
- (ii) was in the public domain at the time when it was supplied; or
- (iii) subsequently becomes available other than through a breach of confidence or breach of this provision; or
- (iv) was in lawful possession of the a party prior to being provided by the party; or
- (v) must be disclosed under the Continuous Disclosure Rules under the WEMA; or

(vi) ceases to be confidential in nature by any other lawful means.

**Continuous Disclosure Rules** means the continuous disclosure rules as defined in subsection 9(4) of WEMA;

**Country Facilities** means the facilities in New South Wales and Victoria other than the Port Terminal at which the Port Operator receives and stores Bulk Wheat and other commodities.

**Credit Support** means either:

- (a) a Parent Guarantee; or
- (b) Security;

**Dispute** means a bona fide dispute between an Applicant or User and the Port Operator arising under this Undertaking;

**Dispute Notice** means a written notice provided by an Applicant or User to the Port Operator or by the Port Operator to an Applicant or User specifying the Dispute and requiring the Dispute to be dealt with under clause 8;

**Eligibility Requirements** are as set out in clause 7.4(a);

**Indicative Access Agreement** means the indicative access agreement in Schedule 1;

**Loading Protocol** means the policies and procedures published by the Port Operator from time to time in accordance with the Continuous Disclosure Rules and clause 10.2. The Loading Protocol as at the commencement date of this Undertaking is set out in Schedule 5;

**Material Default** means any breach of a fundamental or essential term or repeated breaches of any of the terms of an Access Agreement or any agreement for the provision of services by the Port Operator;

**Negotiation Period** means the period during which negotiation in relation to a final Access Agreement is undertaken as specified in clause 7.8(b);

**Parent Guarantee** means a guarantee given by a Related Body Corporate of the Applicant or User who has an investment grade credit rating or is otherwise acceptable to the Port Operator (acting reasonably);

**Port Operator** means Emerald Logistics Pty Ltd.

**Performance Indicators** means the performance indicators set out in clause 12;

**Port Terminal** means the seaboard terminal at Appleton Dock Port Melbourne.

**Port Terminal Facility** has the meaning given in clause 5.3;

**Port Terminal Services** has the meaning given in clause 5.2;

**Reference Prices** has the meaning given in clause 6.2;

**Related Body Corporate** has the meaning given in the *Corporations Act 2001 (Cth)*;

**Security** means an unconditional and irrevocable bank guarantee, letter of credit, performance or insurance bond issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by the Port Operator and which is in a form reasonably satisfactory to the Port Operator;

**Shipping Stem** has the meaning given in clause 11.2;

**Solvent** means that, in the last five years:

- (a) the Applicant has been able to pay all its debts as and when they become due and has not failed to comply with a statutory demand under section 459F(1) of the *Corporations Act 2001* (Cth);
- (b) a meeting has not been convened to place it in voluntary liquidation or to appoint an administrator;
- (c) an application has not been made to a court for the Applicant to be wound up without that application being dismissed within one month;
- (d) a controller (as defined in the *Corporations Act 2001* (Cth)) of any of the Applicant's assets has not been appointed; and
- (e) the Applicant has not proposed to enter into or enters into any form of arrangement with its creditors or any of them, including a deed of company arrangement;

**Standard Terms** means the standard terms and conditions described in clause 6.3, or as varied in accordance with clause 6.5;

**Trading Business** means a business unit or division of the Port Operator or its Related Bodies Corporate which has responsibility for the trading and marketing of Bulk Wheat;

**User** means a person who has entered into an Access Agreement with the Port Operator in relation to Bulk Wheat;

**Variation Date** means the date the variations to extend the term of this Undertaking until 30 September 2015 (unless it expires earlier) come into operation in accordance with clause 4.4(c);

**Web Site** means: [www.emeraldgrain.com.au](http://www.emeraldgrain.com.au)

**WEMA** means the *Wheat Export Marketing Act 2008* (Cth) (as amended).

## 1.2 Interpretation

In this undertaking, 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 associates;
- (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 this Undertaking;
- (e) a reference to a, clause, Part or a Schedule is a reference to a clause, Part of Schedule of this Undertaking;
- (f) a reference to a party includes its successors and permitted assigns;
- (g) a reference to any act includes all statutes, regulations, codes, by-laws or ordinances and any notice, demand, order, direction, requirement or obligation under that Act (and vice versa) and unless otherwise provided in that Act includes all consolidations, amendments, re-enactments or replacements from time to time of that Act and a reference to "law" includes a reference to any Act and the common law;
- (h) the words "including", "for example" or "such as" when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
- (i) a reference to \$ and dollars is to Australian currency; and
- (j) a requirement to provide notification or information in writing can be satisfied by email communication.

## 2. Background

### 2.1 Introduction

- (a) The Port Operator operates the Port Terminal Facility at the Port Terminal.
- (b) The Port Terminal Facility provides services relating to the export of Bulk Wheat and other commodities.
- (c) The Port Operator has historically provided access to services provided by the Port Terminal to third parties under fair access policies.
- (d) The 'access test' under the WEMA requires:
  - (i) the person to comply with the continuous disclosure rules in relation to a port terminal service; and
  - (ii) there is, either:
    - (A) an access undertaking in operation (under Division 6 Part IIIA of the CCA) relating to the provision of access to the port terminal service for purposes relating to export of Bulk Wheat; or
    - (B) a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the CCA) and under that regime wheat exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.
- (e) The ACCC approved on 26 September 2013 an undertaking from the Port Operator under Part IIIA of the CCA which satisfied the 'access test' (**Undertaking**). .
- (f) The ACCC has approved under Part IIIA of the CCA an application by the Port Operator to extend and vary the Undertaking for the purpose of continuing to satisfy the 'access test' from the Variation Date until 30 September 2015.
- (g) It is intended that this Undertaking will cease to apply if the WEMA (including the "access test") is repealed, including if the WEMA is repealed and the Code is declared by regulations under s 51AE of the CCA to be a mandatory industry code.

### 2.2 Objectives

The Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminal in relation to the export of Bulk Wheat;
- (b) establishing a workable, transparent, non-discriminatory and efficient process for lodging and processing Access Applications;
- (c) providing a non-discriminatory approach to pricing and the provision of Port Terminal Services under which the Port Operator publishes reference prices annually and offers access to standard services on the terms and conditions contained in Schedule 1;
- (d) operating consistently with the objectives and principles in Part IIIA of the CCA and the Competition Principles Agreement between the Commonwealth and States and Territories of Australia dated 11 April 1995;
- (e) reaching an appropriate balance between:

- (i) the legitimate business interests of the Port Operator, including:
  - (A) recovery of all efficient costs associated with the provision of access to the Port Terminal Services;
  - (B) a fair and reasonable return on the Port Operator's investment in the Port Terminal Facility commensurate with its commercial risk;
  - (C) the export of grain (other than Bulk Wheat) and non-grain commodities using the Port Terminal Facility; and
- (ii) the public interest, including:
  - (A) the efficient use of resources; and
  - (B) the promotion of economically efficient investment, use and operation of the Port Terminal; and
- (iii) the interest of Applicants wanting access to the Port Terminal Services, including providing access:
  - (A) on non-discriminatory price and non-price terms; and
  - (B) in a transparent, open, efficient and non-discriminatory manner;
- (f) providing an efficient, effective and binding dispute resolution process in the event that the Port Operator and an Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (g) in accordance with the objective in s44AA(b) of the CCA, providing for a consistent approach to access to the Port Terminal Services at the different port terminals to the extent practicable.

### **3. Structure**

#### **3.1 Components**

This Undertaking applies in relation to access to Port Terminal Services provided by means of the Port Terminal Facility at the Port Terminal.

#### **3.2 Priority**

To the extent of any inconsistency between them, the terms outside of the Schedules take priority over the terms in the Schedules.

#### **3.3 Obligation to procure**

If the performance of an obligation under this Undertaking requires a Related Body Corporate of the Port Operator to take some action or refrain from taking some action, the Port Operator must procure that Related Body Corporate to take that action or refrain from taking that action.

### **4. Term and variation**

#### **4.1 Commencement Date**

For the purposes of the WEMA, this Undertaking commences on 1 October 2013 and the Port Operator will comply with the Undertaking on and from that date.

#### **4.2 Expiry**

This Undertaking expires on the earlier of:

- (a) 30 September 2015;
- (b) the date on which the WEMA (including the “access test”) is repealed, the Code having been declared by regulations under s51AE of the CCA as a mandatory industry code;
- (c) the date on which the WEMA is repealed or amended such that there is no longer any requirement for the Port Operator to have in place an access undertaking under Part IIIA of the CCA in order for the Port Operator or its associated entities to export Bulk Wheat (and there is no requirement for the Port Operator to have in place an access undertaking for this purpose under any other legislation); or
- (d) the day the ACCC consents to the Port Operator withdrawing the Undertaking in accordance with Part IIIA of the CCA.

#### 4.3 Early withdrawal of the Undertaking

The Port Operator may seek the approval of the ACCC to the withdrawal of this Undertaking at any time including if

the Port Operator and any Associated Entity of the Port Operator ceases to be a person who exports wheat under the WEMA.

#### 4.4 Variations to this Undertaking

- (a) If, during the term of the Undertaking, the Port Operator is of the opinion that circumstances have changed such that this Undertaking:
  - (i) is no longer commercially viable for the Port Operator or becomes inconsistent with the objectives set out in clause 2.2; or
  - (ii) is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA,the Port Operator may seek the approval of the ACCC to vary this Undertaking.
- (b) Prior to seeking the approval of the ACCC under clause 4.4(a), the Port Operator will first consult with counterparties to Access Agreements and Applicants regarding the proposed variation.
- (c) If the ACCC consents to any variation to this Undertaking, those variations will come into operation at the time specified in section 44ZZBA(4) of the CCA.

#### 4.5 Other variations

- (a) A User or the Port Operator may seek a variation to the provisions of an Access Agreement relating to the supply of Port Terminal Services (**Access Agreement Variation**).
- (b) A User’s request for an Access Agreement Variation will be dealt with as a new application for access to the Port Terminal Services, to which the process in this Undertaking will apply.
- (c) The Port Operator’s request for an Access Agreement Variation will be dealt with as a request for negotiation of an Access Agreement under clause 7.
- (d) Upon the Port Operator and the User agreeing the terms of the Access Agreement Variation, the Access Agreement will be varied accordingly.
- (e) For the avoidance of doubt, the provisions of the existing Access Agreement relating to the supply of Port Terminal Services will continue to apply until the Port Operator and the User agree the Access Agreement Variation or the Access Agreement expires or is terminated.

## 5. Scope

### 5.1 Application

- (a) This Undertaking applies to:
  - (i) the negotiation of new Access Agreements; and
  - (ii) the negotiation of access to Port Terminal Services.
- (b) This Undertaking does not apply to the negotiation of any Access Agreement with a commencement date after the expiry of this Undertaking.

### 5.2 Meaning of Port Terminal Services

- (a) This Undertaking applies only to access to Port Terminal Services.
- (b) **Port Terminal Services** means the services provided by means of the Port Terminal Facility which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facility, including:
  - (i) unloading and receipt by the Port Operator of a User's Bulk Wheat at the Port Terminal Facility;
  - (ii) sampling and classification by the Port Operator of a User's Bulk Wheat received at the Port Terminal Facility;
  - (iii) weighing by the Port Operator of a User's Bulk Wheat using the Port Operator's weighing facilities;
  - (iv) transfer of a User's Bulk Wheat to storage and storage of a User's Bulk at the Port Terminal Facility;
  - (v) administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
  - (vi) wheat hygiene and quality management, including access to inspectors from the Australian Quarantine and Inspection Service for inspection of a User's Bulk Wheat received and held at the Port Terminal Services;
  - (vii) vessel loading;
  - (viii) shipping stem maintenance;
  - (ix) out-turning by the Port Operator of a User's Bulk Wheat received at the Port Terminal Facility and loading onto the User's nominated vessel; and
  - (x) insurance for all general physical risk (i.e. fire, flood, storm, etc.).

### 5.3 Meaning of Port Terminal Facility

**Port Terminal Facility** means a ship loader that is:

- (a) at a Port Terminal;
- (b) capable of handling Bulk Wheat; and
- (c) is owned, operated and controlled by the Port Operator,

and includes any of the following facilities:

- (d) an intake/receival facility;
- (e) a grain storage facility;
- (f) a weighing facility;
- (g) a shipping belt;

that is

- (h) at the Port Terminal; and
- (i) associated with the ship loader; and
- (j) capable of dealing with Bulk Wheat.

#### 5.4 What this Undertaking does not cover

- (a) This Undertaking does not apply to:
  - (i) access to services in relation to Bulk Wheat provided by the Port Operator which are not Port Terminal Services;
  - (ii) facilities owned by the Port Operator which are not a Port Terminal Facility;
  - (iii) the transportation by the Port Operator of Bulk Wheat to port;
  - (iv) grains which are not wheat;
  - (v) wheat which is not Bulk Wheat.
- (b) Nothing in this Undertaking prevents the Port Operator from agreeing with an Applicant or User to provide access to port terminal services for grains other than Bulk Wheat and other services related to Port Terminal Services.

## 6. **Standard Terms and Reference Prices**

### 6.1 Access to Standard Port Terminal Services

On request by an Applicant in accordance with clause 7, the Port Operator will offer to supply the Port Terminal Services to the Applicant:

- (a) at the Reference Prices published under clause 6.2; and
- (b) on the Standard Terms under clause 6.3,

and this Undertaking recognises the ability of an Applicant to negotiate for access to:

- (i) prices other than Reference Prices for Port Terminal Services; and
  - (ii) non Standard Terms for Port Terminal Services.
- (c) The Port Operator is under no obligation to provide access to a Port Terminal Service (or to enter into an Access Agreement for them) beyond the term of this Undertaking.

### 6.2 Reference Prices

- (a) By no later than 30 September of each year, the Port Operator must, for access to each Port Terminal Service, publish reference prices (**Reference Prices**) on the Port Operator's Web Site.
- (b) Unless varied in accordance with clause 6.5 the Reference Prices must apply for a period not ending before 31 October of the next year.
- (c) The Port Operator must give the ACCC notice of Reference Prices within three Business Days following publication.

### 6.3 Standard Terms

- (a) The Standard Terms are the terms and conditions set out in the Indicative Access Agreement to the extent that those terms and conditions relate to the provision of Port Terminal Services (**Standard Terms**).
- (b) Unless varied in accordance with clause 6.5, the Standard Terms must apply for the term of the Undertaking.
- (c) The Standard Terms offered to an Applicant must include the Loading Protocol, as varied from time to time.
- (d) Nothing in this Undertaking prevents the parties agreeing to include terms relating to access to the Port Terminal Services in an agreement also applying to access to other services provided by the Port Operator but this Undertaking will only apply to the terms relating to the provision of access to Port Terminal Services.

### 6.4 Non-discriminatory access

- (a) In providing access to Port Terminal Services, the Port Operator must not discriminate between different Applicants or Users in favour of its own Trading Business, except to the extent that the cost of providing access to other Applicants or Users is higher.
- (b) During the Term of this Undertaking, but not more than twice in every 12 month period, the ACCC may by notice in writing require the Port Operator to appoint an Independent Auditor to provide a report in relation to the Port Operator's compliance with clause 6.4(a). If the ACCC requires the Port Operator to appoint an Independent Auditor, Schedule 3 will apply.
- (c) Within five Business Days of executing an Access Agreement with a Trading Business, the Port Operator must provide to the ACCC a copy of that Access Agreement.

### 6.5 Variation to Reference Prices and Standard Terms

- (a) The Port Operator may vary the Reference Prices from time to time. The Port Operator must provide the ACCC with copies of variations to the Reference Prices within three Business Days following publication.
- (b) The Port Operator may vary the Standard Terms with approval from the ACCC in accordance with the procedure in Division 6 of Part IIIA of the CCA.
- (c) Any variation under clause 6.5(a) or 6.5(b) must be published at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Reference Prices and Standard Terms.
- (d) Any variations to the Reference Prices or Standard Terms do not automatically override the terms of existing Access Agreements.

## 7. **Negotiating for access**

### 7.1 Good faith negotiation

The Port Operator will negotiate with an Applicant for the provision of access to Port Terminal Services in good faith in accordance with this Undertaking.

## 7.2 Framework

- (a) This part of the Undertaking outlines the process to be followed for an Applicant to gain access to the Port Terminal Services. It provides for:
- (i) **Preliminary inquiry** – preliminary exchanges of information and meeting to enable an Access Application to be lodged;
  - (ii) **Access Application** – submission of a formal Access Application by an eligible Applicant;
  - (iii) **Standard Access Agreements** – procedure where the Applicant wants the Port Terminal Services under the Standard Terms and Reference Prices;
  - (iv) **Negotiation and Acceptance** – negotiation, acceptance and execution of an Access Agreement.
- (b) If, at any time during this process, a Dispute arises between the parties, then either party may seek to resolve the Dispute in accordance with the Dispute resolution process in clause 8.

## 7.3 Preliminary inquiry

- (a) Provision of information
- (i) Subject to clause 7.3(a)(iv), the Port Operator will provide any information requested by an Applicant which is related to access to the Port Terminal Services and which is reasonably required by the Applicant to assist in negotiations in relation to an Access Application, within five Business Days of receiving the request.
  - (ii) If the Applicant's request for information is not sufficiently clear or detailed to enable the Port Operator to identify and collate the information sought by the Applicant, the Port Operator must notify the Applicant within three Business Days and seek further clarification of the Applicant's request.
  - (iii) Upon receiving clarification from the Applicant, the Port Operator will provide the information requested to the Applicant within a further four Business Days. To avoid doubt, the Applicant may seek further information in accordance with clause 7.3(a)(i) at any time prior to the completion of an Access Agreement.
  - (iv) The Port Operator's obligation under clause 7.3(a)(i) and 7.3(a)(iii) is subject to:
    - (A) the Port Operator not disclosing any information which would breach a confidentiality obligation binding on it or which it reasonably considers is commercially sensitive in relation to its own operations; and
    - (B) the Port Operator being able to refuse the request if:
      - (1) it is unduly and manifestly onerous to the Port Operator, having regard to the following:
        - the operational, commercial and logistical information that is required by grain exporters around the world for use of port terminal services for the exporting of Bulk Wheat;
        - whether the Port Operator has access to and control of the information requested, or whether compliance with the Applicant's request would require the Port Operator to

engage third party consultants or advisers in order to gather, collate or present the information;

- the Port Operator's staffing, technical and financial capability to obtain and provide the information requested by the Applicant;
- the volume of, and timeframe within which, information is requested by the Applicant; or

(2) the information requested by the Applicant is not ordinarily and freely available to the Port Operator.

#### 7.4 Eligibility to apply

(a) The Port Operator's obligation to:

- (i) negotiate with an Applicant under this Undertaking; and
- (ii) enter into an Access Agreement;

is subject to the Applicant demonstrating, within seven Business Days of a written request by the Port Operator and to the Port Operator's reasonable satisfaction, that it satisfies the following Eligibility Requirements:

- (iii) the Applicant is Solvent;
- (iv) the Applicant and its Related Bodies Corporate are not currently in, and in the previous two years have not been in, Material Default;
- (v) the Applicant:
  - (A) has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including the ability to pay access charges and insurance premiums when they fall due; or
  - (B) provides Credit Support.

(b) The Applicant must be entitled to export Bulk Wheat under the laws of Australia, and it is the Applicant's responsibility to ensure that it complies with the relevant legal requirements for that purpose.

(c) The Port Operator reserves the right to negotiate only with an Applicant who complies with the Eligibility Requirements under clause 7.4(a). the Port Operator may give a written request to the Applicant to demonstrate that it satisfies the Eligibility Requirements:

- (i) within five Business Days of the Port Operator receiving the Applicant's Access Application; and
- (ii) after that time, within five Business Days of the Port Operator becoming aware of any credible grounds which give rise to a reasonable assumption that the Applicant may no longer satisfy the Eligibility Requirements.

(d) If the Port Operator refuses or ceases to negotiate with an Applicant, for any reason, it will, on the day of the decision to refuse or cease to negotiate, provide to the Applicant written reasons for such refusal.

(e) If the Applicant considers that the Port Operator has unreasonably refused to commence, unreasonably delayed or unreasonably ceased negotiation for any reason, then the Applicant may refer the matter to the arbitrator under clause 8. the Port Operator will comply with the arbitrator's determination.

## 7.5 Application Process for Access Application

- (a) An Applicant's request for access to the Port Terminal Services (Access Application) is to be submitted to the Port Operator and must include the information contained in Schedule 2.
- (b) Upon receiving an Access Application from an Applicant, the Port Operator will acknowledge receipt of the Access Application in writing to the Applicant within three Business Days of its receipt, or such longer period in accordance with clause 7.5(e).
- (c) If the Application is incomplete, prior to acknowledging the Access Application, the Port Operator may seek in writing:
  - (i) such additional information; or
  - (ii) clarification of the information that has been provided in the Access Application,to the extent that such additional information or clarification is reasonably required to enable the Port Operator to consider the Access Application.
- (d) If the Port Operator seeks additional information or clarification in accordance with clause 7.5(c), it will advise the Applicant of the additional information or the clarification required within three Business Days of receipt of the Access Application.
- (e) Upon receiving the required information or clarification from the Applicant, the Port Operator will provide written acknowledgement of the receipt of the completed Access Application within three Business Days.

## 7.6 Standard Access Agreements

- (a) If an eligible Applicant requires the Port Terminal Services to be provided in accordance with the Standard Terms and Reference Prices, then:
  - (i) when the Applicant submits its Access Application, or at any time after submitting its Access Application, the Applicant may give the Port Operator written notice of that fact; and
  - (ii) within five Business Days of the Port Operator receiving a notice under clause 7.6(a)(i), the Port Operator and the Applicant must execute an Access Agreement in accordance with the Standard Terms and Reference Prices.
- (b) If an eligible Applicant requires the Port Terminal Services to be provided under terms other than the Standard Terms and Reference Prices, then the Port Operator and the Applicant must comply with the negotiation procedures and arbitration procedures (if required) under clauses 7 and 8.

## 7.7 Access to Standard Port Terminal Services before an Access Agreement is executed

- (a) If an Applicant lodges an Access Application and requests access to Port Terminal Services prior to finalising and executing an Access Agreement, the Port Operator will, subject to the Applicant satisfying the Eligibility Requirements set out in clause 7.4(a), within three Business Days of receiving the request, offer to provide access to the Standard Port Terminal Services on the Standard Terms and at the Reference Prices.
- (b) The Applicant may accept the Port Operator's offer to provide access to the Standard Port Terminal Services on the Standard Terms and at the Reference Prices by executing an **Interim Agreement** consisting of the Standard Terms and Reference Prices.
- (c) The Interim Agreement will terminate on the earlier of:
  - (i) the date on which an Access Agreement is entered into;

- (ii) the date on which the parties agree otherwise;
  - (iii) a date determined by an arbitrator under clause 8; or
  - (iv) if, by the end of the Negotiation Period, neither party has lodged a Dispute Notice, the end of the Negotiation Period.
- (d) The Interim Agreement does not preclude the parties from entering into an Access Agreement.
- (e) If an Interim Agreement terminates under clause 7.7(c), and an Applicant lodges a new Access Application, an Applicant may again request access to Port Terminal Services and clauses 7.7(a) to 7.7(d) and clause 7.7(f) will apply.
- (f) An Access Agreement once executed will apply retrospectively from the later of:
- (i) the date on which the Interim Agreement was executed; or
  - (ii) a date determined by an Arbitrator under clause 8,
- and will replace the Interim Agreement.

#### 7.8 Negotiation of Access Agreement

- (a) Following the Port Operator's acknowledgement under clause 7.5(b), the Port Operator will offer to commence negotiations as soon as reasonably possible, but no later than five Business Days (or such longer period as agreed between the parties), to progress towards an Access Agreement.
- (b) The Negotiation Period will commence upon the Port Operator acknowledging the Access Application under clause 7.5(b) and will cease upon any of the following events:
- (i) execution of an Access Agreement by the Port Operator and the Applicant;
  - (ii) written notification by the Applicant that it withdraws its Access Application;
  - (iii) the expiration of three months from the commencement of the Negotiation Period, or if both parties agree to extend the Negotiation Period, the expiration of the agreed extended period;
  - (iv) following referral to arbitration in accordance with clause 8.4, the arbitrator determines that the Applicant is not negotiating in good faith; or
  - (v) following a determination or direction by the arbitrator in accordance with clause 8, where an Applicant does not comply with a determination or direction of the arbitrator, and that determination or direction is not the subject of review.
- (c) Upon cessation of the Negotiation Period, the Port Operator will be entitled to cease negotiations with the Applicant.
- (d) If, for any reason, the Negotiation Period ceases and an Access Agreement has not been executed, the Applicant may submit a new Access Application at any time and this Undertaking will apply to the new Access Application.

#### 7.9 Access Agreement

- (a) Once the Applicant has notified the Port Operator that it is satisfied with the terms and conditions of the Access Agreement as drafted, the Port Operator will within two Business Days provide a final Access Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.

- (b) If the Port Operator offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, the Port Operator will execute the Access Agreement within five Business Days of the Port Operator providing a final Access Agreement to the Applicant under clause 7.9(a), or such longer period as is agreed by the parties.

## 8. Dispute resolution

### 8.1 Disputes

- (a) This clause 8 applies to any Dispute arising in relation to:
  - (i) the negotiation of new Access Agreements;
  - (ii) the negotiation of access to Port Terminal Services in addition to Port Terminal Services already the subject of an executed Access Agreement.
- (b) An Applicant is not entitled to raise a Dispute in relation to the terms of the Loading Protocol applying at the time of the Access Application.
- (c) Any Dispute will, unless otherwise expressly agreed by both parties, be resolved in accordance with this clause and either party may give to the other party to the Dispute Notice in writing.
- (d) Other than as set out in clause 8.1(a)(ii), any Disputes in relation to an Access Agreement once executed (including the application of the Loading Protocol) will be dealt with in accordance with the provisions of that Access Agreement.
- (e) The Port Operator will by 31 July of each year provide a report to the ACCC on any material disputes in relation to an Access Agreement and any Disputes raised by Applicants or Users or the Port Operator in the last 12 months (except for the first year in which case the report will apply to the period from the commencement of this Undertaking) including the details of any resolution and the status of unresolved matters.

### 8.2 Negotiation

Within five 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 Dispute by joint discussions.

### 8.3 Mediation

- (a) If the Dispute is not resolved under clause 8.2 within five Business Days of the date the Dispute Notice is received by the recipient then the provisions specified in subparagraphs (b) to (f) inclusive, below, apply.
- (b) If the parties agree to resolve the Dispute by mediation, the Dispute will be referred to the chief executive officers of each party who will attempt to resolve the Dispute, including by informal mediation.
- (c) If the Dispute is not resolved within 5 Business Days after being referred to the chief executive officers under clause 8.3(b) (or such longer period as is agreed between the chief executive officers), the Dispute will be referred to formal mediation in Victoria.
- (d) A Dispute referred to mediation in accordance with clause 8.3(c) will be mediated by a single mediator appointed by agreement of the parties or, if they fail to agree within 3 Business Days, a mediator appointed by the President of the Victorian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) acting on the request of either party.
- (e) Unless the parties agree otherwise:

- (i) the mediation will be conducted under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);
  - (ii) a party may appoint a person, including a legally qualified person, to represent it or assist it in the mediation;
  - (iii) each party will bear its 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; and
  - (v) the parties will use reasonable endeavours to ensure that the mediation is completed within 28 Business Days from the date the mediator is appointed, or such longer period as agreed between the parties.
- (f) If the parties do not wish to resolve the Dispute by mediation, either party may, by notice in writing to the other, refer the Dispute to be determined by arbitration under clause 8.4.

#### 8.4 Referral to arbitration

- (a) Notwithstanding any other provision of this Undertaking, either party may, by notice in writing to the other (**Arbitration Notice**), refer a Dispute to arbitration in accordance with this clause at any time following the issue of a Dispute Notice. The Arbitration Notice must specify the nature of the Dispute, the matters in respect of which the party is seeking arbitration and the contact details of both parties and whether the parties have agreed or are likely to agree upon a private arbitrator if the ACCC does not arbitrate the Dispute.
- (b) If the Dispute referred to in the Arbitration Notice is already the subject of mediation in accordance with clause 8.3, that mediation will cease immediately.
- (c) Any arbitration will be conducted in accordance with clauses 8.5 to 8.7.

#### 8.5 Appointment of arbitrator

- (a) If a Dispute is referred to arbitration in accordance with clause 8.4, the Port Operator must, within two Business Days, provide the ACCC with a copy of the relevant Dispute Notice and Arbitration Notice. All correspondence with the ACCC under this clause 8 must be addressed to:  
  
The General Manager  
Fuel, Transport and Prices Oversight  
Australian Competition and Consumer Commission  
Level 35, The Tower  
360 Elizabeth Street  
Melbourne VIC 3000  
**Fax:** (03) 9663 3699
- (b) If within five Business Days of receiving notice in accordance with clause 8.5(a), the ACCC advises the Port Operator and any other party to the Dispute in writing that it wishes to be the arbitrator in respect of the Dispute, then the ACCC will be appointed to arbitrate the dispute and the arbitration will be conducted in accordance with clause 8.6.
- (c) If, within five Business Days of receiving notice in accordance with clause 8.5(a), the ACCC:
  - (i) advises each party to the Dispute in writing that it does not wish to be the arbitrator in respect of the Dispute; or
  - (ii) does not advise each party to the Dispute in writing that it wishes to be the arbitrator in respect of the Dispute,

then, subject to clause 8.5(e), the arbitration will be conducted by an arbitrator appointed by the agreement of the parties to the Dispute.

- (d) Within two Business Days of the parties agreeing an arbitrator, the Port Operator must notify the ACCC.
- (e) If the parties fail to agree an arbitrator within five Business Days of the expiry of the five Business Days referred to in clause 8.5(c), or such longer period as may be agreed by the parties, then either party may request the President of the Victorian Chapter of IAMA to appoint an arbitrator.

#### 8.6 Arbitration procedure if the ACCC is the arbitrator

- (a) If the ACCC is the arbitrator, then except as set out in clause 8.6(b), the arbitration will be conducted in accordance with the procedures, and the ACCC will have the powers, set out in Subdivisions C-E and G of Division 3 of Part IIIA of the CCA and any references to a “final determination” or “interim determination” in those Subdivisions will be taken to mean a final or interim determination made by the ACCC under clause 8.6.
- (b) In any arbitration conducted by the ACCC in accordance with this Undertaking:
  - (i) the ACCC may not make a determination which would have any of the effects described in section 44W of the CCA;
  - (ii) the ACCC may not make a determination which would have the effect of setting terms and conditions of access to a Port Terminal Service in respect of any period following the expiry of this Undertaking;
  - (iii) the ACCC must have regard to the provisions of this Undertaking;
  - (iv) sections 44Z0(1)-(4) of the CCA will not apply. A determination or direction of the ACCC will be final and binding, subject to any rights of review, and will have effect on and from the date specified by the ACCC. Any or all of the provisions of a final determination may be expressed to apply from a specified day that is earlier than the day on which the final determination is made. However, that specified day may not be earlier than the date of the Access Application.
- (c) Other than in circumstances where the determination or direction is the subject of review, if an Applicant or User does not comply with a determination or direction of the ACCC, the Port Operator will not be obliged to continue negotiations for the provision of access to Port Terminal Services for the Applicant.

#### 8.7 Arbitration procedure if the ACCC is not the arbitrator

- (a) If the arbitrator of a Dispute is not the ACCC, 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 issues the Arbitration Notice has agreed to pay the arbitrator’s and other costs as determined in accordance with clause 8.7(h) and provided in any indemnity as required in accordance with clause 8.7(j);
  - (ii) the arbitrator may make an interim determination granting access but only to Standard Port Terminal Services on the Standard Terms and at the then current Reference Prices;
  - (iii) subject to the involvement of and disclosures to the ACCC, unless the Port Operator and the Applicant agree otherwise, the arbitration must be conducted in private;
  - (iv) a party may appoint any person, including a legally qualified person, to represent it or assist it in the arbitration;

- (v) the arbitrator must observe the rules of natural justice but is not bound by the rules of evidence;
  - (vi) the arbitrator must act as speedily as a proper consideration of the Dispute allows, having regard to the need to carefully and quickly enquire into and investigate the Dispute and all matters affecting the merits, and fair settlement, of the Dispute;
  - (vii) 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 Dispute, and may require that the cases be presented within those periods;
  - (viii) 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;
  - (ix) the arbitrator may call on any party the arbitrator believes necessary to give evidence;
  - (x) the arbitrator will present their determination in a draft form to the parties and give the parties opportunity to comment before making a final determination;
  - (xi) the arbitrator will hand down a final determination in writing which includes their 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;
  - (xii) unless the parties to the Dispute agree otherwise, any information received by the parties during the course of an arbitration, the content of the arbitration and any determination by the arbitrator will be confidential;
  - (xiii) the arbitrator may make any determination or direction in relation to the Dispute that they consider appropriate. For the avoidance of doubt, such determination or direction may include making a binding determination in relation to the Dispute, or requiring the parties to continue or re-commence negotiations.
- (b) The arbitrator may at any time terminate the arbitration (without making an award) if they think that:
- (i) the notification of the Dispute is vexatious;
  - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (iii) the party who notified the Dispute has not engaged in negotiations in good faith.
- (c) In deciding a Dispute, the arbitrator must have regard to:
- (i) the provisions of this Undertaking (including clause 6.4);
  - (ii) the matters set out in section 44X(1) of the CCA;
  - (iii) any guidance published by the ACCC;
  - (iv) any submissions provided by the ACCC; and
  - (v) the objectives and principles in Part IIIA of the CCA.
- (d) In deciding a Dispute, the arbitrator may have regard to any other matters that they think are relevant.
- (e) In deciding a 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) make a determination which would have the effect of setting terms and conditions of access to a Port Terminal Service in respect of any period following the expiry of this Undertaking;
  - (iii) make a determination which would have any of the effects described in sections 44V(2)(d) or (da) of the CCA; or
  - (iv) make a determination which would have any of the effects described in section 44W of the CCA.
- (f) 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 that is earlier than the day on which the final determination is made. However, that specified day may not be earlier than the date of the Access Application.
- (g) Other than in circumstances where the determination or direction is the subject of review by a court of law, if an Applicant or User does not comply with a determination or direction of the arbitrator, the Port Operator will not be obliged to continue negotiations for the provision of access to Port Terminal Services for that Applicant.
- (h) 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.
- (i) The parties' appointment of the arbitrator must provide that:
- (i) the arbitrator must keep the ACCC advised, not less frequently than fortnightly, about the process 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 three Business Days; and
  - (iii) the ACCC will have the right to make submissions to the arbitrator in respect of the Dispute (subject only to complying with the procedures and timeframes for submissions determined by the arbitrator).
- (j) The arbitrator may require the parties to indemnify them from any claims made against the arbitrator arising in connection with the performance by the arbitrator of their duties under this clause 8, such indemnity excluding circumstances where the conduct of the arbitrator constitutes negligence or dishonest or unlawful conduct.
- (k) The Port Operator must send a copy of any determination made by the arbitrator to the ACCC within two Business Days of the determination being made.
- (l) The *Commercial Arbitration Act* 1984 (VIC) will apply to any arbitration undertaken in accordance with this clause 8.7. To the extent of any inconsistency, the provisions of the Undertaking will have priority over the provisions of the *Commercial Arbitration Act* 1984 (VIC).

## 9. Confidentiality

### 9.1 Treatment of Confidential Information

- (a) Subject to clause 9.1(b), if a party provides Confidential Information to another party as part of the negotiation or dispute resolution or arbitration processes under this Undertaking, the recipient of that Confidential Information will treat it 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 Dispute in accordance with this Undertaking.

- (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 or arbitrator appointed under clause 8 for the purposes of that mediation 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);
  - (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: or
  - (v) to a Related Body Corporate of the party.
- (c) Nothing in clause 9 prevents a party or an arbitrator from, or limits the extent to which a party or arbitrator may, provide information to the ACCC.

## 10. Capacity management

10.1 Continuous Disclosure Rules. The Port Operator must, as a condition of this Undertaking, comply with the Continuous Disclosure Rules under the WEMA from time to time as they relate to Port Terminal Services.

### 10.2 Loading Protocol

- (a) As at the Variation Date, the Loading Protocol which applies to the provision of Port Terminal Services at the Port Terminal is set out in Schedule 5.
- (b) The Loading Protocol must be, and continue to be, a comprehensive statement of the Port Operator's policies and procedures for managing demand for Port Terminal Services (including the Port Operator's policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Services).
- (c) The Port Operator must comply with the Loading Protocol as varied from time to time.

### 10.3 Variation of the Port Operator's Loading Protocol

- (a) The Port Operator may vary the Loading Protocol from time to time subject to clause 10.3(b) and subject to the following conditions:
  - (i) any variations to the Loading Protocol must be consistent with:
    - (A) the objectives of this Undertaking set out in clause 2.2;
    - (B) the Port Operator's obligations to provide non-discriminatory access under clause 6.4;
  - (ii) the Loading Protocol must include an expeditious dispute resolution mechanism for dealing with disputes relating to decisions made by the Port Operator under the Loading Protocol (but need not include independent binding dispute resolution);
  - (iii) before the Port Operator can vary the Loading Protocol, it must conduct a consultation process which involves:

- (A) preparing and circulating proposed changes to interested parties, and to the ACCC, along with an explanation for the amendment;
  - (B) publishing a copy of the proposed changes and explanation for the amendment on its Web Site (with the proposed variation shown in mark-up) together with a contact name and address for written responses to be addressed to the Port Operator;
  - (C) allowing Users, Applicants and interested parties at least 10 Business Days to review and provide written responses to the proposed changes;
  - (D) collating, reviewing and actively considering in good faith the responses from interested parties;
  - (E) publishing on the Port Operator's website any written response received from an interested party under clause 10.3(a)(iii)(D) within five Business Days of receiving that response, provided that the Port Operator is not required to publish any response which it reasonably considers to contain material which is offensive, confidential or otherwise inappropriate for publication;
- (iv) any variation must be published on the Port Operator's website at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Loading Protocol.
- (b) At any time during the consultation process under clause 10.3(a)(iii), the Port Operator may prepare and circulate a further variation to the proposed changes to take into account feedback from interested parties or from the ACCC. To avoid doubt, this clause does not require the Port Operator to recommence the consultation process under clause 10.3(a)(iii).
  - (c) This clause does not prevent the Port Operator unilaterally amending the Loading Protocol on a temporary basis during the period of Force Majeure, as defined in the Standard Terms.
  - (d) The Port Operator must provide the ACCC with copies of variations to the Loading Protocol promptly following publication.
  - (e) The Loading Protocol (as varied from time to time) is available at the Web Site or such other domain as notified from time to time.

#### 10.4 Objection notice

- (a) If the Port Operator seeks to vary the Loading Protocol in accordance with clause 10.3, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to the Port Operator stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 10.4(a) on the ACCC website.
- (b) Any notice issued under clause 10.4(a) must be issued at least ten Business Days prior to the date on which the variation is proposed to become effective.
- (c) At least five Business Days before issuing a notice under clause 10.4(a), the ACCC must provide the Port Operator with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.
- (d) In issuing a draft notice under clause 10.4(c) or a final notice under clause 10.4(a), the ACCC must have regard to whether the proposed variation:
  - (i) is material; and/or

- (ii) amounts to a breach of the anti-discrimination provision in clause 6.4 and/or the no hindering access provision in clause 10.5.
- (e) The ACCC may withdraw a draft notice issued under clause 10.4(c) or a notice issued under clause 10.4(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 10.4(c) or the notice issued under clause 10.4(a) no longer exist.
- (f) If the ACCC issues a notice under clause 10.4(a), the Port Operator will, within three Business Days:
  - (i) withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the Port Operator website and notifying the ACCC in writing; or
  - (ii) withdraw the proposed variation and confirm the status of the existing Loading Protocol by publishing a notice in a prominent place on the Port Operator website and notifying the ACCC in writing.

#### 10.5 No hindering access

- (a) The Port Operator, or a Related Body Corporate of the Port Operator, must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by any other User in the exercise of a right of access under this Undertaking.
- (b) The Port Operator, or a Related Body Corporate of the Port Operator, may be taken to have engaged in conduct for the purpose referred to in clause 10.5(a) even though, after all the evidence has been considered, the existence of the purpose is ascertainable only by inference from the conduct of the Port Operator, or a body corporate related to the Port Operator, or from other relevant circumstances. This clause 10.5(b) does not limit the manner in which the purpose of the Port Operator may be established for the purposes of clause 10.5(a).

### 11. **Publication of other information**

#### 11.1 Information on stock at the port

- (a) The Port Operator will publish and update monthly in a prominent position on its website the following:
  - (i) total stocks of Bulk Wheat held at the Port Terminal Facility;
  - (ii) total stocks of all other grain held at the Port Terminal Facility on an aggregated basis;
  - (iii) cargo nominations; and
  - (iv) Available Capacity for the following six months on a month by month basis..
- (b) To avoid doubt, the Port Operator will not publish information relating to Country Facilities.

#### 11.2 Publication of vessel booking applications

- (a) The Port Operator will publish the following details of any booking applications that it receives for the export of grain on the Shipping Stem at the time that the Shipping Stem is next updated:
  - (i) the name of the exporter;
  - (ii) the volume of grain to be exported; and
  - (iii) shipment period.

### 12. **Report on Performance and Capacity Indicators**

- (a) The Port Operator will publish the following key service performance and capacity indicators:
- (i) in the case of the period from 1 October 2013 to 31 March 2014, by no later than 31 May 2014;
  - (ii) in the case of the period from 1 April 2014 to 30 September 2014, by no later than 30 November 2014;
  - (iii) in the case of the period from 1 October 2014 to 31 March 2015, by no later than 31 May 2015;
  - (iv) in the case of the period from 1 April 2015 to 30 September 2015, by no later than 30 November 2015;

in each case, providing details on the following key service standards and capacity indicators in respect of the provision of Port Terminal Services for Bulk Wheat at the Port Terminal during the relevant period:

- (v) total capacity;
  - (vi) Bookings received (tonnage);
  - (vii) spare available capacity;
  - (viii) monthly tonnes shipped;
  - (ix) capacity utilisation (percentage);
  - (x) stock on hand at the end of month;
  - (xi) average daily receipts by road and rail.
- (b) The Port Operator will publish its report to the ACCC in a prominent position on its website within five Business Days of the date on which it provides it to the ACCC.

### 13. **Cooperation with ACCC**

- (a) The ACCC may, by written notice, request The Port Operator to provide information or documents that are required by the ACCC for the reasons specified in the written notice to enable it to exercise its powers or functions specified in this Undertaking.
- (b) The Port Operator will provide any information requested by the ACCC under clause 13(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.
- (c) The ACCC may approve the Regulated Access, Pricing and Monitoring Committee or a member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that approval may be subject to any condition which the ACCC may impose.

### 14. **Contact details**

- (a) Persons wishing to contact the Port Operator for further information or to apply for access to the Port Terminal Services should contact the Port Operator at the following address:

*General Manager  
Emerald Logistics Pty Ltd  
Level 4/600 Victoria St  
Richmond VIC 3121*

- (b) Applicants are also encouraged to review the Port Operator's Web Site which includes information relevant to the Port Terminal Services including:

- (i) storage capacity;
- (ii) shipping berth; and
- (iii) terms and conditions on which the Port Terminal Services are provided.

END

**SCHEDULE 1 INDICATIVE ACCESS AGREEMENT**



Emerald Logistics Pty Ltd  
ABN 39 087 280 260

**For Melbourne Bulk Commodity Terminal at the Port of Melbourne.**

**Indicative Access Agreement  
2014/15**

**Client Name:  
ABN:**

---

This **AGREEMENT** is dated the \_\_\_\_\_ day of \_\_\_\_\_ 2014

**BETWEEN**

–Emerald Logistics Pty Ltd  
“**Company**”  
Level 4/600 Victoria St  
RICHMOND VIC 3121

AND

**Legal Entity Name:** \_\_\_\_\_  
“**Client**”

**Client ABN:** \_\_\_\_\_  
(*must be inserted*)

**Postal Address:** \_\_\_\_\_

\_\_\_\_\_

**Client’s Short Code –**

**BACKGROUND**

- (a) The Company carries on the business of receiving, handling storing and loading Grain and other commodities at the Port Terminal.
- (b) The Client purchases Grain and desires to access the Services at the Port Terminal
- (c) This Indicative Access Agreement (“**Agreement**”) sets out the standard minimum terms and conditions upon which the Company is willing to provide the Client with access to the Services at the Port Terminal in respect of Bulk Wheat for the 2014-15 season.
- (d) Alternatively the Client may negotiate and enter into an agreement, with the Company for the Services, which has different terms and conditions to this Indicative Access Agreement (such negotiated agreement being a “**Port Terminal Storage & Handling Agreement**”);
- (e) The Company may at its discretion offer these terms and conditions to the Client for the provision of Services at the Port Terminal in respect of Grain other than Bulk Wheat.
- (f) The Client has accepted the Company’s offer to provide the Services on the terms and conditions contained in this Indicative Access Agreement.

**This Agreement between**

Emerald Logistics Pty Ltd, - "**Company**"

Level 4/600 Victoria St

RICHMOND VIC 3121

and

**The Client** as described above

The Parties agree to be bound by the provisions of this Agreement and by signing the signatories warrant that they each have the authority and to enter into this Agreement on behalf of their respective organisations.

Executed as an Agreement.

---

**General Manager, Commercial & Business Development**

---

**Signature of Witness**

**Date:** \_\_\_\_/\_\_\_\_/\_\_\_\_

---

**Signature of Client's Authorised Representative**

---

**Full Name of Client's Authorised Representative**

---

**Title of Client's Authorised Representative**

---

**Signature of Witness**

<b>1.Interpretation</b>	<b>5</b>
<b>2.Term and Services</b>	<b>9</b>
<b>3.Purchase Options</b>	<b>10</b>
<b>4.Receival Standards</b>	<b>10</b>
<b>5.Testing</b>	<b>10</b>
<b>6.Receipt and Storage</b>	<b>11</b>
<b>7.Outturn</b>	<b>12</b>
<b>8.Transport and Freight</b>	<b>14</b>
<b>9.Port Loading Protocols</b>	<b>14</b>
<b>10.Stored Grain</b>	<b>14</b>
<b>11.Charges and Invoices</b>	<b>15</b>
<b>12.Books and Records</b>	<b>16</b>
<b>13.Lien</b>	<b>16</b>
<b>14.Security</b>	<b>17</b>
<b>15.Risk and Insurance</b>	<b>17</b>
<b>16.Liability</b>	<b>18</b>
<b>17.Indemnity</b>	<b>19</b>
<b>18.Variations</b>	<b>19</b>
<b>19.Termination</b>	<b>19</b>
<b>20.Force Majeure</b>	<b>19</b>
<b>21.Disputes</b>	<b>21</b>
<b>22.Notices</b>	<b>22</b>
<b>23.Assignment</b>	<b>22</b>
<b>24.Costs</b>	<b>22</b>
<b>25.Compliance with Laws</b>	<b>22</b>
<b>26.Governing Law</b>	<b>22</b>
<b>27.No Endorsement</b>	<b>22</b>
<b>28.Severability</b>	<b>23</b>
<b>29.Waiver</b>	<b>23</b>
<b>30.No Partnership</b>	<b>23</b>

# 1. Interpretation

## 1.1 Definitions

The following definitions apply in this Agreement:

**"AQIS"** means DAFF Biosecurity Australia or such other body that is responsible for Australian quarantine and inspection service.

**"Binned Grade"** means the Grade of Grain stored in a Cell. The Binned Grade may contain different Grades.

**"Blending"** means either the mixing of originally segregated Binned Grades within a Facility or during the outturn process.

**"Bulk Wheat"** means wheat for export from Australia other than wheat that is exported in a bag or a container capable of holding not more than 50 tonnes of wheat.

**"Business Day"** means any day on which the principal office of the Company is open for business and does not include a Saturday, Sunday or day that is a public holiday in the State of Victoria.

**"Cargo Assembly Plan"** means the document of that title provided by the Client to the Company from time to time setting out the Client's plan for marshalling, freighting and accumulating at port sufficient Grain to meet the Client's cargo requirement.

**"Cell"** means a physical unit for storage of Grain.

**"Charges"** means those charges for the 2014/15 season calculated in accordance with the Reference Prices, which, if available at the date of this Agreement, are set out in Schedule A.

**"client"** means a person that uses the Port Terminal for Services.

**"Client"** means the party to this agreement that is not the Company and where applicable its contractors and agents and their successors and permitted assigns.

**"Client Grain"** means that quantity of Grain held by the Company for the Client within the Port Terminal.

**"Commingling"** is the situation where different Grades of Grain are stored in the same Cell.

**"Company"** means Emerald Logistics Pty Ltd ABN 39 087 280 260.

**"Damaged Grain"** means Grain that has been damaged in an incident or event to such an extent that it can no longer be classified by any Receiving (Classification) Standards and is only of salvage value or suitable for disposal.

**"Delivered"** means, in respect of Grain, the point and time at which Grain first arrives at the Port Terminal and is accepted into storage.

**"Dust"** means Grain dust attributable to the Client Grain extracted from dust collection plants in a Facility, but excluding Damaged Grain.

**"Facility"** means any Grain receival, storage and handling facilities used by the Company in connection with the provision of Receival or other services to the Growers and/or the provision of the Services to the Client, including the Receival Stations and the Port Terminal.

**"GMO"** or **"Grain Movement Order"** means an authorisation to Outturn Grain issued by the Client:

- (a) in writing, or
- (b) by electronic mail, or
- (c) via the Company's grain management system accessible through the Company's website.

**"Grade"** means a grade of Grain of a given Season specified in the Receival Standards of that same Season, or any other grade agreed by the Parties.

**"Grain"** means the seed of any crop or pasture species including Pulses.

**"GTA"** means Grain Trade Australia the organisation previously known as the National Agricultural Commodities Marketing Association.

**"Grower"** means any person or entity involved in the growing of Grain, the contact details for whom have been registered by the Client or the Company or a national grower register.

**"GST"** means the tax imposed by the GST Law.

**"GST Law"** has the same meaning as in A New Tax System (Goods and Services Tax) Act 1999 (Commonwealth).

**"Harvest"** means the period of time during which grain may be harvested and Delivered, this is usually between 1 October in the first year and the end of February in the following year.

**"Industrial Dispute"** includes a strike, stop-work, boycott or lockout.

**"Insolvency Event"** means in relation to a Party:

- (a) a receiver, receiver and manager, administrator, trustee or similar official is appointed over the whole or a substantial part of the assets or undertaking of the Party and is not removed within 30 days;
- (b) the Party suspends payment of its debts generally;
- (c) the Party is insolvent within the meaning of the Corporations Act 2001 (Cth);
- (d) the Party enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;
- (e) an application (other than a vexatious application) or order is made for the winding up or dissolution of, or the appointment of a provisional liquidator to, the Party or a resolution is passed or steps are taken to pass a resolution for the winding up or dissolution of the Party otherwise than for the purpose of an amalgamation or reconstruction which has the prior written consent of the other Party and, in the case of an application, the application is not withdrawn or dismissed within 60 days; or
- (f) an administrator is appointed under Division 2 of Part 5.3A of the Corporations Act 2001 (Cth) and, except in the case of an appointment by the Party or its directors, is not withdrawn or removed within 14 days.

**"Interest"** means in respect of a client, the portion of the Stored Grain to which legal title as client is held, and which is equivalent to the percentage the grain of the relevant type and grade received from that client makes up of the total Stored Grain.

**"Non Company Facilities"** means bulk storage facilities which are not owned, either in whole or in part, by the Company or are not affiliated with the Company via operating agreements. "Non Company Facility" has a corresponding meaning.

**"Outturn"** means:

- (a) to cause Grain to physically leave the Company's custody at the Port Terminal when the Grain exits the delivery spout into a ship at which point physical possession passes from the Company to the Client or a third party authorised by the Client to receive the Grain;
- (b) the disposal of Damaged Grain; or
- (c) any other outturn from the Port Terminal required and directed by the Client; and
- (d) as evidenced by a GMO.

**"Outturn Entitlement"** has the meaning given to it in clause 7.1.

**"Outturn Protocols"** means the document/s of that title as published on the Company website as amended from time to time,

**"Outturn Standards"** means, in respect of a Grain outturned from the Port Terminal, the Receival Standards for that Grain, adjusted for the variances and allowances specified in the Outturn Protocols at the date of receipt of the Grain.

**"Party"** means, depending upon the context, either the Company or the Client.

**"Port Terminal"** means the Company's seaboard terminal at 18-20 Enterprize Road West Melbourne or such other port terminals as may be operated by the Company.

**"Port Loading Protocols"** means the document of that title as published on the Company website at the time of the relevant activity.

**"Port Terminal Storage & Handling Agreement"** means an agreement entered into by the Company and the Client in lieu of this Indicative Access Agreement.

**"Pulses"** means chickpeas, lupins, field peas, faba beans, lentils, vetch, broad beans and any other grain legumes.

**"Receival"** means the process of Testing, weighing, tipping, inwardly elevating and placing the Grain into the storage facilities on behalf of a Client. "Receive" has a corresponding meaning.

**"Receival Standards"** means the standards as published on the Company website, in respect of Receival, at the time the Grain is received, and in respect of Outturn, at the time of Outturn.

**"Receival Station"** means a Company facility for Receival from Growers and storage of Grain, other than the Port Terminal.

**"Reference Prices"** means the standard prices charged by the Company for the Services provided between 1 October 2014 and September 2015, as published by the Company no later than 30 September 2014 and as may be varied from time to time in accordance with the Undertaking.

**"Regrade"** means the re-grading of Grain of the Grade of one Season to the same Grade of Grain of another Season or as the case may be the re-grading of Grain of one Grade of a Season to a different Grade of Grain of the same or different Season.

**"Sampling Methods"** means the document of that title as published on the Company website, in respect of Receival, at the time the Grain is received, and in respect of Outturn, at the time of Outturn. In the absence of specific reference to any particular sampling methods published by the Company, Grain Trade Australia sampling methods apply.

**"Season"** means the period in which most of the Grower's Grain is harvested and delivered to Company sites, typically commencing in November in one year and going through to the February of the following year.

**"Segregation"** means the physical separation of the storage of Grain by type, Grade, variety or such other distinguishing quality as may be determined by the Company.

**"Services"** means the Port Terminal services for Bulk Wheat provided by the Company to the Client as specified in Schedule B and similar services for such other Grains as the Company may agree in writing with the Client to be subject to this Agreement.

**"Shrinkage"** means that quantity of Client Grain, which is lost in:

- (a) the normal storage and handling process including loss of mass through changes in moisture content;
- (b) handling; and
- (c) Waste,

but does not include Grain lost as Dust or Damaged Grain.

**"Shrinkage Allowance"** means the allowance for Shrinkage specified in Schedule A or such other allowance for Shrinkage as may be agreed between the Company and the Client from time to time.

**"Storage"** means warehousing, control and movement of Grain. "Store" has a corresponding meaning.

**"Stored Grain"** means, in respect of a particular type and grade of Grain, all of the grain of that type and grade Stored by the Company in which clients have an Interest.

**"Testing"** means testing as described in clause 5.

**"Undertaking"** means an undertaking (as varied) regarding access for exporters of Bulk Wheat to Services during the period 1 October 2013 to 30 September 2015 offered by the Company and accepted by the Australian Competition and Consumer Commission pursuant to Division 6 Part IIIA of the *Competition and Consumer Act 2010* (Cth).

**"Washout Price"** means the price determined in clause 7.3.

**"Waste"** means Grain that as a result of the normal handling process has been downgraded to Grain of no commercial value, for example mouldy grain, grain mixed with dirt and stones.

**"Weather Working Day"** means a day on which weather permits continuous work.

**"Working Days"** means all days except Saturday, Sunday and Public Holidays of the State in which the relevant Facility is located.

## 1.2 Rules for interpreting this Agreement

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Agreement, except where the context makes it clear that a rule is not intended to apply.

A reference to:

- (a) legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
- (b) a document, terms and conditions, or a provision of a document or terms and conditions, is to that document, terms and conditions or provision as amended, supplemented, replaced or novated;
- (c) a Party to this Agreement or to any other document or terms and conditions includes a permitted substitute or a permitted assign of that Party;
- (d) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person;
- (e) anything (including a right, obligation or concept) includes each part of it;
- (f) 'A\$', '\$A', 'dollar', '\$' or any charge making reference to a monetary amount is a reference to Australian currency; and
- (g) to a clause, part, schedule or annexure is a reference to a clause, part, schedule or annexure of this Agreement unless otherwise stated.

In addition:

- (a) a singular word includes the plural, and vice versa;
- (h) a word which suggests one gender, includes the other genders;
- (i) if a word or phrase is defined, a matching word or phrase containing another part of speech has a corresponding meaning, whether or not the word or words in the matching phrase commence with a capital letter;
- (j) if an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing;
- (k) the word "agree" includes an undertaking or other binding arrangement or understanding, and, unless otherwise qualified in this terms and conditions, whether or not in writing;
- (l) a provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement; and
- (m) in the event of an inconsistency or conflict between the provisions of the main body of the Agreement and the relevant schedule, the provisions of the relevant schedule shall prevail.

## 2. Term and Services

2.1 Subject to this Agreement and in consideration of the Client paying the Company the Charges, the Company agrees to provide the Services to the Client from 1 October 2014 to 30 September 2015 (the "**Term**").

2.2 The Client is bound by the terms and conditions of this Agreement from the earlier of:

- (a) the date of execution of this Agreement; or

- (b) the date, during the term, that the Company provides Services to the Client, including in respect of Grain of Seasons prior to the 2014/2015 Season.
- 2.3 This Agreement supersedes any previous agreement between the Company and the Client for the provision of the Services or services similar to the Services.
- 2.4 This Agreement will not apply to the 2014/15 season if and from the point when the Client and the Company have negotiated and entered into a Port Terminal Storage & Handling Agreement in respect of the Services or services similar to the Services.
- 2.5 This Agreement will terminate on 30 September 2015 and, in the absence of having agreed and signed a new 2015/16 Access Agreement, the Client must ensure that arrangements are made to outturn all the Client's Grain prior to this date.

### **3. Receival**

- 3.1 The Company will make available to the Client facilities to receive Bulk Wheat (and by agreement other Grains):
  - (a) by road and rail from Company Facilities and Non-Company Facilities;
  - (b) by road ex-farm if the Grain has been pre-contracted by a Client to fill a Cargo Assembly Plan and otherwise in accordance with this Agreement.

### **4. Receival Standards**

- 4.1 All Grain that is to be received and stored by the Company for the Client must comply with the Receival Standards. If Grain has characteristics which do not comply with the Receival Standards the Company may, in its absolute discretion, refuse to receive that Grain.
- 4.2 The Company may, in its discretion, refuse to Receive Grain known or suspected to contain chemical contaminants or residues or undeclared genetically modified ("GM") organisms or events.
- 4.3 The Client must not deliver, and must ensure that none of its suppliers deliver, Grain known or suspected to contain nil tolerance contaminants, chemical contaminants or residues, to the Port Terminal..
- 4.4 The Client indemnifies the Company against all loss (including consequential and indirect loss) resulting from the delivery by it or its suppliers of Grain containing chemical contaminants or residues or nil tolerance contaminants.

### **5. Testing**

- 5.1 The Company will conduct Testing on Grain:
  - (a) delivered by the Client, for the purpose of classifying the Grain into a Grade and determining whether to Receive the Grain (**Receival Tests**) ; and
  - (b) intended for Outturn (**Outturn Tests**).
- 5.2 Testing will be undertaken in accordance with the Receival Standards and Sampling Methods as published by the Company from time to time.
- 5.3 The Client will be provided with the results of the Testing. If the Client does not agree with the results of the Testing the Client must immediately notify the Company. The Client is deemed to have accepted the results of the Testing as final and binding:

- (a) in the case of Receival Tests, if the Client fails to immediately so notify the Company, or
  - (b) in the case of Outturn Tests, immediately upon Outturn.
- 5.4 For wheat and barley only: protein, moisture, test weight, screenings, defective grains and contaminants testing will be undertaken.
- 5.5 For Canola only: oil content, test weight, impurity, defective seed and contaminant testing will be undertaken. Free fatty acid testing will not be undertaken.
- 5.6 The Client acknowledges that:
- (a) Testing is conducted on a sample taken in accordance with the Receival Standards and the Sampling Methods,
  - (b) Testing is indicative of the quality of Grain, it is not determinative of the quality of all of the Grain Delivered,
  - (c) variation in results between the Receival Tests and Outturn Tests is not abnormal.
  - (d) Test results that fall within the margin of error for the sample size are acceptable as meeting the grade specifications
  - (e) The Company applies a definition of "NIL" as meaning less than or equal to 0.05% by weight where a NIL tolerance is specified in Receival Standards or Outturn Standards.
- 5.7 The Company warrants only that it will conduct the Testing in accordance with the Receival Standards. The Company makes no other warranty or guarantee in relation to the Testing, including but not limited to, that malting barley will germinate after Outturn.
- 5.8 The Client agrees to comply with the Outturn Protocols and accepts the quality variances on outturn set out in the Outturn Protocols as they applied on the date of receipt of the relevant Grain.

## **6. Receipt and Storage**

- 6.1 The Company will:
- (a) receive Bulk Wheat (and by agreement other Grains) Delivered at the Port Terminal during the Term provided that in the sole opinion of the Company the Grain in each case complies with the Receival Standards, is in fit condition for safe and hygienic storage and, in the opinion of the Company, storage space permits;
  - (b) store the Grain for the Client at the Port Terminal ; and
  - (c) Outturn the Grain for the Client at such time or times and in such quantities as the Client requires in accordance with Clause 7.
- 6.2 The Client must, in addition to compliance with all other requirements of this clause 6:
- (a) notify the Company that the Client wishes to Deliver Grain to the Port Terminal, including the expected time of Delivery,
  - (b) obtain the agreement of the Company to Deliver the Grain to the Port Terminal; and
  - (c) use best endeavours to ensure that the Grain delivered to the Port Terminal meets the quality specifications for the respective GMO and indemnify the Company against all losses, costs and claims made against the Company as a result of grain delivered by the client that is subsequently found not to comply fully with the Grade standards.

- 6.3 The Client will ensure that where a Grain is Delivered by a Grower or agent on behalf of the Client the Grower or agent will clearly state in writing the Client's name at the time of delivery ("**Nomination**"). The Client will also ensure that a Nomination contains a statement to the effect that the Grower or agent transfers all of the right, title and interest to and in the Grain to the Client. All Nominations are final and irrevocable and the Company may rely on the details of the Nomination without any further enquiries.
- 6.4 The Client will ensure that where Grain is Delivered from a Non Company Facility, it provides written confirmation to the Company of:
- (a) fumigation clearance, and
  - (b) grain treatment details for the period of time Grain was at a Non Company Facility,
- 6.5 Unless specifically agreed otherwise, the Company reserves the right to mix the whole or any part of any Grain delivered to it by any client or Growers with Grain of similar specification and any and all such Grains so received will be Stored Grain.
- 6.6 If the Client Grain is not Outturned on or prior to 30 September 2015, the Company may do any or all of the following:
- (a) Regrade the Client Grain and
  - (b) the provisions of the Company's then current standard Indicative Access Agreement for the coming season will apply to the storage and handling of such Client Grain, whether signed by the Client or not.
- 6.7 Where Client Grain of a particular type and grade of Grain at the Port Terminal is between or equal to the values  $-1.00$  and  $+1.00$  tonne, the Client Grain of that particular type and grade of Grain will be deemed to have no value and will be removed from the Client's Outturn Entitlement and neither party will have any liability for any Claim or Loss to the other for that amount of Grain.
- 6.8 Only in respect of malting barley:
- (a) if the Client Grain is in the Facility after 1 September 2015 and in the Company's opinion it is impractical to maintain the Grain Segregation, the Company may regrade malting barley to feed barley grade where the germination quality is less than 95%; and
  - (b) if the Client Grain is in the Facility on or after 1 July 2016 the Company may Regrade malting barley to feed barley grade.

and in each case the Client indemnifies the Company against any claims arising out of or related to the Regrading.

## 7. Outturn

### Outturn Entitlement

- 7.1 The Client will be entitled to an Outturn by weight of the Client Grain initially received on behalf of the Client after deduction of the Shrinkage Allowance and Dust ("**Outturn Entitlement**"). The Client may access the whole or part of the Outturn Entitlement by issuing a GMO.
- 7.2 When all Client Grain has been Outturned from the Port Terminal the Company will advise the Client of any variation between the Outturn Entitlement and the tonnage actually outturned ("**Variation**"). If the Outturn Entitlement has not been completely received by the Client, the Company will, in its absolute discretion, either

- (a) replace the physical short Outturn Entitlement of the Client, or
  - (b) determine, acting reasonably, the value of the Variation including any freight component base grade quality.
- 7.3 If the Company determines in accordance with clause 7.2(b), that, there is a difference between the Client's Outturn Entitlement and the tonnage actually Outturned to the Client:
- (a) For Client Grain, unless otherwise agreed, a Season average price will be calculated based on Season average cash prices posted by the Client and all Other Clients over harvest at the non-port Company Facilities.
  - (b) If the actual tonnage Outturned to the Client exceeds the Client's Outturn Entitlement, the Client must either pay the Company for the excess at the average price calculated under clause 7.3 (a) (Washout Price) or replace the shortfall by using other grades as negotiated and agreed with the Company.
  - (c) If the actual tonnage Outturned to the Client is less than the Client's Outturn Entitlement, the Company may, at its discretion, either replace the physical Grain shortfall in the Client's Outturn Entitlement, or pay the Client for the deficiency in the Outturn Entitlement at the Washout Price.
- 7.4 The Company is not required to Outturn Grain if it has received notice from a person holding a security interest over that Client Grain until;
- (a) The person holding the security interest has consented to; or
  - (b) The Company receives a court order requiring it to.
- 7.5 The Client will indemnify the Company against all losses, costs, damages, expenses, charges and surcharges the Company incurs or sustains as a result of a claim made against the Company by any person holding a security interest over Client Grain.

#### In-Store Transfer

- 7.6 The Client may elect to transfer title to all or part of the Outturn Entitlement at the Port Terminal to another client by providing prior notice of such transfer ("**In-Store Transfer**"). The Company may refuse an In-Store Transfer if the In-Store Transfer would result in the Client's Outturn Entitlement going into a negative position at the Port Terminal.
- 7.7 An In-Store Transfer is effective from the date of the notice by the Client. The Client remains liable for all Charges incurred up to the date of the In-Store Transfer.

#### Outturn

- 7.8 The Company undertakes to Outturn Grain in accordance with the Outturn Protocols.
- 7.9 The Company will, to the extent practicable taking into account clients' requirements, prioritise the Outturn of Outturn Entitlements for the loading of the Client's vessels (where applicable) in accordance with the Cargo Assembly Plan.
- 7.10 The Company's obligations in respect of the care of the Grain cease immediately upon Outturn of the Grain from the Port Terminal.

#### Client Warranties

- 7.11 The Client warrants and represents to the Company that it is the sole legal and beneficial owner of all of its Commodities held by the Company on behalf of the Client with full right, title and interest, free from any mortgage, charge, lien, option, encumbrance or other adverse claim or interest other than as notified in writing to the Company prior to:

- (a) Outturn of that Grain; or
- (b) receipt of a notice of an In-Store Transfer.

## **8. Transport and Freight**

- 8.1 The Client indemnifies the Company for all labour costs incurred by the Company due to train or road truck arrivals later than thirty (30) minutes of the original estimated time of arrival in cases where the Client has failed to notify the Company of the delay by 1.00pm on the Working Day immediately prior.
- 8.2 Except where otherwise agreed in writing, the Client accepts all risks of transport used by the Client to deliver or outturn Grain at the Port Terminal.

## **9. Port Loading Protocols**

- 9.1 The Client and the Company undertake to comply with the requirements of:
  - (a) the Company's published Port Loading Protocols when the Client engages the Company to load a Bulk Wheat vessel at the Port Terminal or
  - (b) Container Packing Protocols when the Client engages the Company to pack grain into container at the Port Terminal.
- 9.2 The Client acknowledges that the efficient operation of the Port Terminal relies on a supply chain based predominantly on rail movements and the optimisation of Grain positioning. Accordingly:
  - (a) the Client may not be able to book a shipping slot if it is not able to demonstrate access to rail resources for the movement of grain to port;
  - (b) where necessary to facilitate efficient loading of the Client's ships and the ships of others, the Client will be expected to explore in good faith stock swap opportunities with other clients of the Company on terms agreeable to the Client,
- 9.3 Unless otherwise agreed with the Company, only wheat will be shipped out of the Port Terminal.
- 9.4 The Client acknowledges that the Company has the right to mitigate dust emissions at the Port Terminal. Such mitigation may include moisture conditioning of grain paths.

## **10. Stored Grain**

- 10.1 The Client acknowledges that when the Company receives the Client Grain, it becomes Stored Grain and the Client maintains an Interest in the Stored Grain.
- 10.2 Except if the Company suffers an Insolvency Event, the Client does not have the right to nominate any particular parcel Stored Grain as being owned by the Client.
- 10.3 While the Company has possession of the Client Grain:
  - (a) the relationship between the Company and the Client in respect of the possession of the Grain is one of bailment only;

- (b) that relationship will continue to exist despite the Grain losing its identity by being part of Stored Grain, or despite the inability of the Company to redeliver to the Client Grain the subject of the bailment; and
- (c) unless specifically agreed otherwise, the Company as bailee may manage, use, deal with or otherwise control the Grain in its possession in any manner consistent with the Outturn Entitlement.

10.4 Where the Company suffers an Insolvency Event the Client will be entitled, upon reasonable notice and subject to the provisions of this Agreement relating to Stored Grain, to re-take possession of the Client Grain from the Port Terminal.

## 11. Charges and Invoices

11.1 The Client will pay the Charges in accordance with this clause 11.

11.2 The Client will pay to the Company within 14 days of the date of an invoice or statement from the Company the Charges set out therein.

11.3 Where parts of an invoice are disputed, the Client will pay to the Company the undisputed amounts in accordance with clause 11.2. Upon resolution of the disputed amounts the Client will pay to the Company those amounts within 30 days of the date of dispute resolution.

11.4 Payment must be made by either:

- (a) direct credit into the company's bank account as follows or any other account notified to the Client in writing:

Account name	Emerald Logistics Pty Limited
BSB	033 039
Account	365462

- (b) cheque or money order by post.

11.5 The Client must submit a remittance advice clearly identifying the invoice/s being paid:

- (a) in the case of clause 11.4 (b) to any of the following on the same day that payment is made:

Email	accounts@ emeraldgrain.com
Fax	03 9274 8889
Mail	Emerald Logistics Pty Limited Attention: Accounts Level 4, 600 Victoria St Richmond VIC 3121

- (b) in the case of clause (b) to attached to the cheque or money order:

Mail	Emerald Logistics Pty Limited Attention: Accounts Level 4, 600 Victoria St Richmond VIC 3121
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- 11.6 If the Client purchases Grain, including through an In-Store Transfer, the Company may invoice the Client for all Charges remaining unpaid at the time of the In-Store Transfer and the Client must pay those Charges in accordance with this clause 11.
- 11.7 The Client agrees to pay any charges levied by the Port Authority or AQIS, relating to the Commodities or the provision of Services (including, but not limited to, wharfage, berth hire, harbour dues and quarantine inspection fees). In addition, to the extent that the Company has any liability to pay those charges, the Client agrees to indemnify the Company against that liability, unless the Company specifically agrees to pay these charges on the Client's behalf.
- 11.8 The Company and the Client acknowledge that all fees and charges payable as stated in this Agreement have been calculated on a GST exclusive basis unless otherwise stated.
- 11.9 Any reimbursement of money pursuant to this Agreement paid by a Party to a third party shall be net of the benefit of GST input tax credits claimable by the Party in respect of the payment.
- 11.10 If the Client fails to pay any amounts owing under this Agreement by the due date any amount outstanding will bear simple interest at the rate of interest being 5% higher than the 90 day Bank Bill Rate offered by the Commonwealth Bank as at the due date, calculated from the due date to the date of actual payment in full.

## **12. Books and Records**

- 12.1 The Company will keep at its principal place of business records, books of account and documents relating to transactions in the Grain and such books of account, records and documents will be available for inspection by officers of the Client at any reasonable time upon request.
- 12.2 All information provided to the Client by the Company will be treated as conclusive evidence of the correctness of the details set out in that information unless:
- (a) the Client notifies the Company in writing, setting out the detailed reasons, within 14 days of receipt of that information that there exists a bona fide dispute concerning the correctness of that information; or
  - (b) it is demonstrated at any time that there is a clear and manifest error in that information.

## **13. Lien**

- 13.1 Notwithstanding that the Grain received by the Company under this Agreement may be deemed to be Stored Grain, the Company shall have a first and paramount lien on the Client Grain for all monies payable (on any account whatsoever) by the Client to the Company under this Agreement or otherwise.
- 13.2 In the case of Stored Grain, the Company may nominate and identify any particular quantity of Grain comprising the Stored Grain as being the Client Grain for the purposes of enforcing its lien.
- 13.3 Subject to any requirement of law the Company will be entitled for the purpose of enforcing such lien to retain possession of the whole or any part of the Client Grain until all amounts due and payable are paid, or to sell all or any of the Client Grain in such manner as it thinks fit (after giving the Client at least 7 days prior notice) whereupon the proceeds of such sale will be applied in or towards the satisfaction of the moneys due to the Company and the costs of effecting the sale and the balance (if any) will be paid by the Company to the Client. Where the

Company sells all or any of the Client Grain for the purpose of enforcing its lien, the Client irrevocably appoints the Company as its agent and attorney.

- 13.4 In enforcing a lien in respect of any client Grain the Company will ensure that its actions do not affect the right of the Client to receive the Outturn Entitlement under this Agreement.

## **14. Security**

- 14.1 If in the reasonably held opinion of the Company, the Client does not have a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities of the Client under this Agreement, the Client will, if required by the Company:
- (a) arrange for its directors and/or shareholders to personally guarantee the Client's performance of this Agreement by signing a written guarantee in a form and on conditions specified by the Company; and/or
  - (b) obtain or deposit with the Company an unconditional bank guarantee or bond in a form and for an amount and given by a bank or insurer approved by the Company by way of guarantee for the performance of this Agreement ("security").
- 14.2 Any written guarantee or security required by the Company must be established:
- (a) prior to the Company receiving Grain for storage on behalf of the Client; and
  - (b) within 7 days after it has been requested by the Company.
- 14.3 If the Client defaults, then the Company may call up, draw on, use, appropriate and apply the whole or part of the security as may be necessary in the opinion of the Company to compensate the Company for loss or damage suffered by the Company by reason of the Client's default, and:
- (a) any use or appropriation of the security by the Company does not operate to waive the default and does not affect the Company's other rights; and
  - (b) if the security or any part of it is used or appropriated by the Company, the Client must within seven (7) days from receipt of a request by the Company pay to or deposit with the Company new or additional security in a form and for an amount as specified by the Company.
- 14.4 On termination of this Agreement and if the Client has complied with this Agreement, the security less any sums drawn on, used or appropriated by the Company and not reinstated by way of further security, must be refunded, returned or cancelled.

## **15. Risk and Insurance**

- 15.1 The Company bears all usual insurable risks of accidental loss or damage to Client Grain during the provision of the Services (such as storm water ingress, fire and theft).
- 15.2 The Company must, for the entire period that Client Grain is stored at the Port Terminal, keep Client Grain insured against the risks it bears pursuant to clause 15.1.
- 15.3 The Client must, and must cause any person entering the Port Terminal for or on behalf of the Client, to hold:
- (a) public liability insurance,
  - (b) workers' compensation insurance required by law, and

(c) if driving a vehicle, third party motor vehicle insurance covering person and property.

15.4 The Company must, upon request of the Client, provide evidence that the Company has complied with clause 15.2.

## **16. Liability**

16.1 The Company will only be liable for failing to Outturn the Client Grain if such failure is:

- (a) a direct result of the Company's gross negligence, fraud or wilful default; or
- (b) a direct consequence of an insurable event as described in clause 15.1.

16.2 Except as expressly contained in this Agreement, the Company will not be liable for any other loss or damage, including but not limited to:

- (a) any special or unusual event or any natural process (as determined by the Company) which is not covered by the Company's insurance, causing loss or damage to the Grain;
- (b) any loss or damage arising out of or related to the incidence or effect or both of any delays in the loading or unloading of trains, trucks, containers or ships;
- (c) any loss or damage arising out of or related to Grain passing or failing to pass inspection by the AQIS inspectors, AQIS authorised officers, or similar;
- (d) any loss or damage arising out of or related to any quality or quantity deficiencies claimed after Outturn from the Port Terminal;
- (e) any loss or damage arising out of or related to toxic or other chemical residues, other contamination or genetic modification;
- (f) any indirect or consequential loss (including but without limitation loss of profit, loss of opportunity or loss of reputation), cost, damage or expense suffered or incurred directly or indirectly by the Client as a result of any loss or downgrade of or damage to Grain

however caused (including without limitation any loss, cost, damage or expense caused by the failure of the Company to comply with any of its obligations under this Agreement or any negligent act or omission on the part of the Company, its employees or Agents).

16.3 Notwithstanding clauses 16.1 and 16.2, the Company's liability in any event will not exceed the greater of

- (a) \$250,000 in total in respect of all events occurring within the Term and \$100,000 per event; and
- (b) any proceeds of insurance payable under the insurance taken out by the Company pursuant to clause 15.1.

16.4 To the extent permitted by law the Company excludes all conditions and warranties implied at law or by statute relating to the obligations of the Company under this Agreement.

16.5 The Company's liability under any non-excludable implied condition or warranty is limited to:

- (a) in the case of services, the lowest of the costs of supplying the services again and having the services supplied again; and
- (b) in the case of goods, the lowest of the costs of replacing the goods, acquiring equivalent goods or having the goods repaired.

## **17. Indemnity**

17.1 The Client will indemnify the Company and keep the Company indemnified from and against all losses, costs, damages, expenses, charges and surcharges suffered or incurred by the Company arising directly or indirectly out of or in relation to:

- (a) any breach non-observance or non-performance by the Client of any of its obligations under this Agreement;
- (b) any claim by a third party relating to the Client Grain;

except to the extent that the gross negligence of the Company contributed to the losses, costs, damages, expenses, charges or surcharges.

## **18. Variations**

18.1 No variation to this Agreement is valid or has any effect unless agreed in writing by both the Client and the Company.

## **19. Termination**

19.1 This Agreement may be terminated by either Party:

- (a) giving to the other at least 3 months prior written notice in that regard, or
- (b) if the other Party suffers an Insolvency Event.

19.2 This Agreement may be terminated by the Company with immediate effect:

- (a) if the Client commits a breach of any term of this Agreement, and
- (b) the Client fails to remedy that breach within a period of not less than 30 days after the Company gives the Client written notice of that breach.

19.3 Subject to clause 2.4, within 28 days of termination of this Agreement, the Client must remove any Client Grain from the Port Terminal. The Company may dispose of any Client Grain still remaining after that time. Surplus proceeds, from the sale of that Client Grain after deducting costs incurred by the Company in its disposal and for amounts owing to the Company, will be returned to the Client.

19.4 Termination will not affect any rights or remedies accrued to a party under this Agreement.

19.5 Notwithstanding any other provisions of this Agreement, the Company may refuse to provide Services, including to Outturn Client Grain, if the Client has not paid any amounts owing to the Company pursuant to clause 11 of this Agreement.

## **20. Force Majeure**

20.1 Force Majeure Event

For the purpose of this Agreement, a "Force Majeure Event" affecting a Party means anything outside that Party's reasonable control including without limitation:

- (a) accident, fire, adverse extreme weather conditions, flood, tidal conditions, earthquake, explosion, blockages of ports, civil commotion, outbreak of hostilities, terrorist act, declaration of war, war, invasion, rebellion, epidemic, or declarations of a state of emergency;

- (b) strikes, stop works, lockouts, boycotts or any other form of labour dispute or labour shortage;
- (c) breakdown, damage or destruction of the Port Terminal or ship-loader;
- (d) failure, disruption or delay in transportation;
- (e) executive or administrative order or act of either general or particular application of any Government or any official purporting to act under the authority of that Government, prohibitions or restrictions by domestic or foreign laws, regulations or policies, quarantine or custom restrictions or prohibitions on export; and
- (f) acts or omissions of any third party (including without limitation Governments, Government agencies, subcontractors or Clients).

## 20.2 Suspension of Obligations

If a party is wholly or partially precluded from complying in the normal manner required by this Agreement with its obligations under this Agreement by a Force Majeure Event (in this clause 24 called the "Affected Party"), then the Affected Party's obligations to perform in accordance with the terms of this Agreement, will be suspended for the duration of the Force Majeure Event.

## 20.3 Notice

As soon as possible after the Force Majeure Event arises, the Affected Party must notify the other party of:

- (a) the nature of the Force Majeure Event;
- (b) the cause of the Force Majeure Event;
- (c) which obligations the Affected Party believes it is wholly or partially precluded from complying with as a result of the Force Majeure Event (in this clause 24 called the "Affected Obligations");
- (d) the extent to which the Force Majeure Event precludes the Affected Party from performing the Affected Obligations;
- (e) the expected duration of the delay arising as a result of the Force Majeure Event;
- (f) the steps that are being taken to minimise the impact of the Force Majeure Event; and
- (g) the steps which would be taken (subject to the Parties reaching an agreement as to the payment of any additional costs involved) to minimise the impact of the Force Majeure Event.

## 20.4 Minimisation of Impact

Upon receiving a notice under clause 20.3 the Parties will meet to discuss and agree:

- (a) what action can be taken to minimise the effect of the Force Majeure Event on the performance by the Affected Party of the Affected Obligation;
- (b) whether the Affected Party is able to work around the Force Majeure Event either to prevent the delay in the performance of the Affected Obligations or to minimise the impact of that delay; and
- (c) what modifications or additions to the terms of this Agreement or any other agreements between the Parties (including without limitation any modifications or additions relating to

the appointment of any additional costs) are required to give effect to any proposal to minimise the effect of the Force Majeure Event.

#### 20.5 Obligation to Mitigate

The Affected Party must:

- (a) keep the other party fully informed of its plan to minimise the effect of the Force Majeure Event; and
- (b) subject to reaching agreement concerning any modifications or addition required to give effect to any proposal to minimise the effect of the Force Majeure Event;
- (c) comply with all reasonable requests made by the other Party relating to the prevention or minimisation of the impact of the Force Majeure Event; and
- (d) use all reasonable endeavours to resolve, and minimise the impact of, the Force Majeure Event.

#### 20.6 Payments

An obligation to pay money is never excused by a Force Majeure Event.

#### 20.7 Labour Disputes

The requirement to use all reasonable endeavours to resolve or minimise the impact of the Force Majeure Event will not require either Party to settle any strike, lockout, boycott or other dispute or claim, or any demand by a third party, on the terms contrary to the wishes of that Party.

### 21. Disputes

21.1 The parties will endeavour to resolve any dispute concerning the terms of this Agreement between themselves, including where necessary escalating the dispute for negotiation between both parties' chief executives.

21.2 If the Parties cannot resolve the dispute within 30 days of one party giving notice of the dispute to either Party may refer the matter to arbitration in accordance with the Commercial Arbitration Act 1984 (VIC) by an arbitrator nominated by the President of the Law Society of Victoria except that:

- (a) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;
- (b) a party may have legal representation; and
- (c) the arbitrator must apportion costs of the arbitration and each party's costs of and incidental to the arbitration as the arbitrator sees fit.

21.3 During any dispute resolution process, the pre-dispute status quo will continue. Accordingly:

- (a) each party will comply with its obligations, and may exercise its rights under this Agreement; and
- (b) the fact that a party ceases to do anything in dispute will not be taken to be an admission by that party that it had breached, or had been in breach of, this Agreement.

## **22. Notices**

Any notice to be served under this Agreement will be sufficiently served personally or if delivered or left addressed to the relevant party at or forwarded by pre-paid post to its registered office for the time being or last known place of business and a notice sent by post will be deemed to have been given at the time when it ought to have been delivered in the ordinary course of post.

## **23. Assignment**

The Client must not assign or novate this Agreement or any part of it. The Company may assign this Agreement or any part of it or otherwise delegate all or any of its rights and obligations under this agreement upon notice to the Client.

## **24. Costs**

The Company and the Client must pay their own cost of preparation of this Agreement. The Client must pay any stamp duty and other taxes payable in respect of this Agreement or anything arising under it.

## **25. Compliance with Laws**

25.1 The Company will at its cost (with the Client's assistance if necessary):

- (a) obtain and maintain any necessary licenses and approvals; and
- (b) comply with all Acts, Regulations, By-laws and other Legislation; and
- (c) comply with all lawful restrictions, directions, orders, notices or instructions given or made by any Body, Authority, Port Authority or the like acting under any Acts, Regulations, By-laws or other Legislation,

relating to the provision of Services by the Company, including any requirements relating to any environmental risk or damage or contamination of land that may be caused by or relate to the storage or loading of the Grain under this Agreement.

25.2 The Client will at the Client's cost (with the Company's assistance if necessary);

- (a) obtain and maintain any necessary licenses and approvals; and
- (b) comply with all Acts, Regulations, By-laws and other Legislation; and
- (c) comply with all lawful restrictions, directions, orders, notices or instructions given or made by any Body, Authority, Port Authority or the like acting under any Acts, Regulations, By-laws or other Legislation, relating specifically to the Grain and the export of the Grain.

## **26. Governing Law**

This Agreement and the rights and liabilities of the parties under this Agreement will be governed by the law of the State of Victoria. The courts of Melbourne will possess territorial jurisdiction to hear and determine any cause of action arising under this Agreement.

## **27. No Endorsement**

27.1 The Client must not (without the prior written consent of the Company):

- (a) make any reference, comment or statement either written or oral, that could be construed as an endorsement by the Company of the Client or of the Client's products or services; or
- (b) refer to the Company or the services provided by the Company to the Client in any publication, promotional or advertising material.

27.2 The Client acknowledges that:

- (a) the Company will treat the obligation provided by the Client to the Company in clause 27.1 as a serious undertaking; and
- (b) it is aware that any breach of this serious undertaking may result in the Company suffering damage.

## **28. Severability**

Any provision of this Agreement which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Agreement enforceable, unless this would materially change the intended effect of this Agreement.

## **29. Waiver**

29.1 The failure by any Party at any time to enforce any of its powers, remedies or rights under this Agreement will not constitute a waiver of those powers, remedies or rights or affect the Party's rights to enforce those powers, remedies or rights at any time.

29.2 Any single or partial exercise of any power, remedy or right does not preclude any other or further exercise or partial exercise of any other power, remedy or right under this Agreement.

## **30. No Partnership**

This Agreement does not create a partnership, agency, fiduciary or any other relationship, except the relationship of contracting parties, between the Parties.

**Schedule A –  
2014/15 Storage and Handling Charges**

## **Schedule B –Port Terminal Services**

**Services** means the services provided by means of the Port Terminal which enable the export of Bulk Wheat through the Port Terminal Facility, including:

1. unloading and receipt by the Company of a Client's Bulk Wheat at the Port Terminal Facility;
2. sampling and classification by the Company of a Client's Bulk Wheat received at the Port Terminal Facility;
3. weighing by the Company of a Client's Bulk Wheat using the Company's weighing facilities;
4. transfer of a Client's Bulk Wheat to storage and storage of a Client's Bulk at the Port Terminal;
5. administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
6. wheat hygiene and quality management, including access to inspectors from the Australian Quarantine and Inspection Service for inspection of a Client's Bulk Wheat received and held at the Port Terminal;
7. vessel loading;
8. shipping stem maintenance;
9. out-turning by the Company of a Client's Bulk Wheat received at the Port Terminal and loading onto the Client's nominated vessel; and
10. insurance for all general physical risk (i.e. fire, flood, storm, etc.).

## **Schedule 2 – Access Application Information**

Access Applications are to be submitted to the Port Operator in written form and clearly state that the Access Application is made in accordance with this Undertaking and must be accompanied by the following information:

Request details:

1. Season

Application details:

1. Company name
2. ABN/ACN
3. Website (if available)
4. Address
5. Contact details
6. Details of authorised company representative (including authorisation)
7. Duration of the Access Agreement sought
8. Creditworthiness information (such as audited financial statements for the previous 3 years)

## **Schedule 3 – Audit**

### **1. Appointment of Auditor**

#### 1.1 Appointment by the Port Operator

If, at any time during the term of this Undertaking, the ACCC issues a notice under clause 6.4(b) of the Undertaking, the Port Operator must, within five Business Days, advise the ACCC in writing of the identity of the person that it proposes to appoint as the auditor, together with such information or documents (including the proposed terms of engagement) that the ACCC requires to assess the skill and independence of the auditor.

#### 1.2 Independence

The proposed auditor must be a person who has the relevant skill to perform the role of auditor and is independent of the Port Operator. Without limitation, an auditor is not independent if he or she:

- (a) is a current employee or officer of the Port Operator or a Related Body Corporate of the Port Operator;
- (b) has been an employee or officer of the Port Operator or a Related Body Corporate of the Port Operator in the past 36 months;
- (c) in the opinion of the ACCC, holds an interest in the Port Operator or a Related Body Corporate of the Port Operator;
- (d) has within the past 36 months been a professional adviser to the Port Operator or a Related Body Corporate of the Port Operator;
- (e) has a contractual relationship, or is an employee or contractor of a firm or company that has a contractual relationship, with the Port Operator or a Related Body Corporate of the Port Operator;
- (f) is a supplier, or is an employee or contractor of a firm or company that is a supplier, of the Port Operator or a Related Body Corporate of the Port Operator; or
- (g) is a customer, or is an employee or contractor of a firm or company that is a customer, of the Port Operator or a Related Body Corporate of the Port Operator.

#### 1.3 Notification of ACCC

If, within five Business Days of receipt by the ACCC of the information or documents from the Port Operator referred to in clause 1.1 of this Schedule, or such further period as required by the ACCC and notified to the Port Operator:

- (a) the ACCC does not object to the proposed auditor, the Port Operator must appoint the proposed auditor as auditor as soon as practicable thereafter (but in any event within five Business Days) on terms approved by the ACCC and consistent with the performance by the auditor of its functions under this Undertakings and forward to the ACCC a copy of the executed terms of appointment of the auditor; or
- (b) the ACCC does object to a proposed auditor, the Port Operator must as soon as practicable (but in any event within five Business Days) appoint a person identified by the ACCC at its absolute discretion as the auditor on terms approved by the ACCC and consistent with the performance by the auditor of its function under this Undertaking.

### **2. Scope of the audit**

#### 2.1 Audit report

the Port Operator must, within 30 Business Days of the date on which the auditor is appointed in accordance with clause 1.3 of this Schedule, provide to the ACCC a written report from the auditor in relation to the Port Operator's compliance with its obligations under clause 6.4 of the Undertaking.

## 2.2 Assistance

- (a) the Port Operator must provide to the auditor any information or documents requested by the auditor that the auditor reasonably considers necessary and relevant for fulfilling its obligations in relation to compliance by the Port Operator with its obligations under clause 6.4 of the Undertaking or for reporting to or otherwise advising the ACCC.
- (b) the Port Operator must procure the auditor to provide information or documents or access to the ACCC, as required by the ACCC to ensure compliance with the Undertaking.
- (c) In complying with the obligations in clause 2 of this Schedule, the Port Operator must:
  - (i) take any steps directed by the ACCC in relation to any matter arising from the report of the auditor referred to in paragraph 2.1 of this Schedule within 10 Business Days of being so directed (or such longer period agreed with the ACCC);
  - (ii) direct its personnel, including directors, managers, officers, employees and agents to act in accordance with the obligations set out in clause 2 of this Schedule and ensure such personnel are aware of the auditor and its role; and
  - (iii) provide access, information and/or documents required by the auditor.

## 2.3 Audit costs etc

the Port Operator must maintain and fund the auditor and must indemnify the auditor for reasonable expenses and any loss, claim or damage arising from the proper performance by the auditor of functions required to be performed by the auditor under this Undertaking.

## 3. Limits on the audit process

The ACCC must not require the Port Operator to appoint an Auditor to undertake an audit in relation to the Port Operator's compliance with its obligations under clause 6.4 of the Undertaking more often than twice in each 12 month period during the term of the Undertaking.

## Schedule 4 – Port Terminal Facility

### Melbourne Port Terminal

#### 1. Description

Location	18-20 Enterprize Road West Melbourne Victoria
Facilities	<ul style="list-style-type: none"><li>• F Berth Appleton Dock</li><li>• Road and rail intake facilities</li><li>• Shipping storage facilities</li><li>• 1 intake weighbridge</li><li>• 1 batch weigher onto 1 shipping belt</li></ul>
Storage capacity	<ul style="list-style-type: none"><li>• 48,000 mt (wheat equivalent) gas tight steel bins</li></ul>
In load capacity	<ul style="list-style-type: none"><li>• 1 road receival hopper of 450 tph</li><li>• 1 dual gauge rail receival hopper of 1,000 tph</li></ul>
Shiploading capacity	<ul style="list-style-type: none"><li>• Approximately 1,500 tph</li><li>• 1 shipping belt</li><li>• 1 mobile shiploader</li><li>• Berth length 200m</li><li>• Beam</li><li>• Draft 10.8m</li></ul>
Other	<ul style="list-style-type: none"><li>• Domestic road outturn and Container packing facility</li><li>• 24/7 operations</li></ul>

#### 2. Services

##### a. Road

- 24/7 operations available
- 1 receival hopper receiving into only one 1,500 mt steel bins
- 1 intake weighbridge, B-double capacity
- double sided sampling and quality testing facility
- pre-booking of 10 minute delivery slot – see attachment
- truck parking in surrounding Port precinct

##### b. Rail

- 24/7 operations available
- 1 push through pull back rail intake facility
- Maximum 24 wagon rake processing
- Dual gauge (standard and broad) rail line
- Rail operators required to have interface agreements

##### c. Storage

- 2 x 12,500 mt gas tight flat bottom steel bins for shipping
- 16 x 1,500 mt gas tight self emptying hopper bottom steel bins for shipping
- 4 x 750 gas tight self emptying hopper bottom steel bins for domestic/container outturns

##### d. Weighing

- Grain to be shipped is weighed via shore based batch weigher.

##### e. Shiploading

- 24/7 operations available
- 1 mobile shiploader with cascade chute to minimise dust
- See attachment re shiploading protocols

#### 3. Shipping Management

- Melbourne terminal is operated on a “Just-in-Time” basis.
- Accumulation plans and times are negotiated on a case by case basis with shipper.

- Due to inwards logistics and capacity constraints shipping performance can be adversely impacted.

#### **4. Publications**

On <http://www.emeraldgrain.com>

Ship-loading Protocols

<http://www.emeraldgrain.com/wp-content/uploads/2013/06/Port-Loading-Protocols.pdf>

Shipping Stem

-<http://www.emeraldgrain.com/industry-store-and-move-grain/shipping-stem/>

Other publications re shipping see

<http://www.portofmelbourne.com/shipping/shippingmovements.asp>

## **Schedule 5 – Loading Protocol**

**Melbourne Port Terminal**

**Port Loading Protocols**



## Introduction

1. These Port Loading Protocols provide information on how the Port Operator will allocate and provide ship loading services at Melbourne Port Terminal (MPT) and how vessels will be managed for loading.
2. The Port Operator has limited port storage, and operates on a just-in-time cargo accumulation basis. At all times the Port Operator's overriding objectives are to maximise terminal export throughput and operational efficiencies.
3. These protocols apply for all commodities, including wheat. The protocols must be read in conjunction with the current Indicative Access Agreement or the Port Terminal Storage and Handling Agreement to which the Client is a party or is otherwise bound ("**Storage & Handling Agreement**"). Capitalised terms take their meaning from the Storage and Handling Agreement. If anything in this protocol is in conflict with terms and conditions in the Storage and Handling Agreement, the terms and conditions in the Storage and Handling Agreement will prevail.
4. In order to have the Port Operator load vessels an exporter must become or continue to be a Client of the Port Operator by entering into a current Storage and Handling Agreement each year. If the Port Operator provides services to an exporter without a signed Storage and Handling Agreement the terms and conditions contained in the Port Operator's then current Indicative Access Agreement as published on its web site shall apply.
5. These protocols are at all times subject to the rules and regulations of the Port of Melbourne Corporation (POMC) and Clients must ensure that they comply with all requirements of the POMC, including contractual and regulatory.

## Shipping Stem

6. By a notice on its website the Port Operator will provide at least 10 business days' notice of the opening of its shipping stem for each year together with a statement of projected available capacity by month for such year.
7. The Port Operator will post its shipping stem on its website, currently <http://www.emeraldgrain.com>. It will be updated each business day.
8. MPT's berth is located at Appleton Dock F Berth. Although, it is a common user berth, the Port Operator has a 24 hour priority window for its vessel operations.
9. Therefore, the Port Operator's shipping stem may not include other shipping allocated to the berth by the POMC. Clients are urged to check the POMC website - <http://www.portofmelbourne.com/shipping/shippingmovements.asp> - for other shipping allocations and to contact MPT's Terminal Manager on (03) 9680 6200 to check other terminal operations which may impact ship-loading operations.

## Intent to Ship

10. To request elevation and monthly shipping capacity at MPT a Client must:
  - complete and lodge an Intent to Ship Advice (Annexure 1) and
  - pay the Booking Fee in accordance with the terms of the Storage and Handling Agreement.
11. By the close of business on the next business day after receipt of a valid Intent to Ship Advice the Port Operator will make a record of this intent on its Shipping Stem as "pending". The Port Operator will accept or reject the Intent to Ship Advice within 5 Business Days of receipt.
12. In deciding to accept or reject an Intent to Ship Advice the Port Operator may consider:
  - Existing shipping intentions
  - Un-allocated capacity at MPT
  - Whether the Client has executed a Storage and Handling Agreement

{0002927-1 } Other matters which the Port Operator reasonably

considers to be relevant, including, without limitation matters going to the efficiency and timeliness of cargo accumulation at port and of loading.

13. Subject to clause 12, Intent to Ship Advices will be dealt with in the order that they are received.
14. If the Port Operator accepts the Intent to Ship Advice it will:
  - Forward an acceptance notice to the Client
  - Forward an invoice for the applicable Booking Fee to the Client
  - Change the status on its Shipping Stem
15. A "Booking" is made upon communication of acceptance by the Port Operator of the Intent to Ship Advice. An Intent to Ship Advice which is rejected is deemed to have lapsed, and no Booking Fee shall be payable in respect thereof.
16. If the Client does not pay the Booking Fee within contractual terms the Booking will lapse.
17. If a Booking remains unused by the end of the nominated month it lapses and the Booking Fee is forfeited.
18. If the nominated or actual tonnage loaded exceeds that initially nominated then an additional Booking Fee is payable by the Client. The Client will be invoiced for the additional Booking Fee immediately after it is known that the tonnage to be loaded or that has been actually loaded is higher than the original Booked tonnes.
19. If the nominated or actual tonnage loaded is lower than that initially nominated then the Port Operator will allocate the unused nominated capacity to the nearest month with spare capacity but no later than 30 September of that calendar year. Unused nominated capacity that is re-allocated to a later time in accordance with this Clause 19 shall be deemed to be a discrete Booking for the purposes of Clauses 17 and 18 ie it is not an extension of the Booked Tonnes of another Booking that the Client may have in the month.
20. The Port Operator may, at its sole discretion, allow the deferral or splitting of a Booking. At least 3 months written notice prior to the vessel's ETA is required to defer or split a Booking. In determining acceptance or rejection of such changes to a Booking the Port Operator will consider, amongst other matters:
  - Existing shipping intentions/nominations
  - Un-allocated capacity at MPT.

The Port Operator may, at its sole discretion, consider requests of less than 3 months' notice. In such circumstances, the Port Operator's General Manager's (or his/her authorised representative's) determination is final.

21. The Client must make a written request for **Shipping Windows** when completing the Intent to Ship Advice. The **Shipping Window** will include the period within which the Client vessel ETA will occur and be either:
  - Between the 1st and 15th of the month; or
  - Between the 16th and the last day of the month.

The purpose of the Shipping Windows is to spread the shipping task evenly across the month. The Port Operator will make the final allocation of Shipping Windows at its sole discretion taking into account all other provisions of these protocols and especially clause 2.

## Vessel Nomination

22. Written nomination of a vessel name must be received at least 30 business days prior to the vessel's ETA in the form of the Vessel Nomination (Annexure 2). Vessel Nomination must be complete. Vessel nominations must be accompanied by a complying cargo assembly plan detailing the supply chain arrangements to be used to deliver the relevant Grain to the Port Terminal Facility and must include load sites, load grade, quality specifications and associated tonnages. In the absence of a complying cargo assembly plan, the

Port Operator shall consult with the Client. If the non-compliances are not then redressed by the Client in a timely manner, and, on reasonable grounds are likely to impact adversely on the efficiency and timeliness of loading at MPT, the Port Operator may at its discretion do any of the following:

- Arrange for the transport of client grain from any of its upcountry storage sites to the terminal to complete the cargo using Road or rail freight, the full cost of which will be to the client account, or;
- Reject the nomination, in which case the Booking fee will be forfeited.

23. The Port Operator may, at its sole discretion, consider Vessel Nominations received on less than 30 business days' notice.
24. Upon receipt of the Vessel Nomination the Port Operator may, at its sole discretion, accept or reject the nomination. the Port Operator will accept or reject the Vessel Nomination within 5 Business Days of receipt.
25. The Port Operator reserves the right to reject a Vessel Nomination where its estimated time of arrival (ETA) is up to one week earlier than an existing vessel nomination without the approval of the person responsible for the existing vessel nomination.

#### **Estimated Load Dates**

26. Upon acceptance of a Vessel Nomination the Client will be notified of any vessel queuing and an estimate of load dates based on:
  - Other vessels nominated to be loaded
  - Site accumulation and transport plan, including transport availability
  - Nominated vessel ETA
  - Ownership of stock
  - Impact on terminal efficiencies
27. Determination of estimated load dates is also based on MPT operating shipping and intake on a 24/7 basis (excluding closed port days) provided sufficient notice is received.
28. Estimated load dates are approximate only and are not fixed or final. Estimated load dates may change due to:
  - Changes to cargo
  - Delays in cargo accumulation
  - Delays in loading prior vessels
  - Weather
  - AQIS instructions
  - Cargo quality problems
  - POMC instructions

#### **Cargo Accumulation**

29. In order to maximize the efficiency and throughput capacity of the port, accumulation at port of a significant proportion (target minimum 50%) of the cargo by rail will be expected to be an important component of the cargo assembly plan.
30. Cargo accumulation will not commence prior to payment of the Booking Fee by the Client, or Vessel Nomination.
31. As a general rule cargo accumulation will commence not more than two weeks before vessel ETA.
32. As Melbourne Port Terminal has limited storage capacity the Port Operator will determine, at its sole discretion, the order of cargo accumulation taking into account:
  - Vessel ETA
  - Date Vessel Nomination received by the Port Operator
  - Grain availability at MPT
  - Site accumulation and transport plan
  - Ownership of stock and agreed stock swaps between

clients

- Impact on terminal efficiencies
33. Only Grain that is owned by the Client will be accepted for accumulation. The Port Operator may accept Grain for accumulation that is not owned by the Client if the owner of the Grain provides the Port Operator with written confirmation from the Seller of its intention to either:
    - Sell the Grain to the Client in port prior to vessel ETA or
    - Swap the Grain with the next exporter to use MPT.
  34. The Port Operator reserves the right not to fully accumulate a cargo in order to maximise all client vessel turnarounds where multiple vessels are arriving in a short time frame.
  35. Grain accumulated at MPT will be commingled with stock of the same grade regardless of ownership.
  36. Where grain remains at MPT after completion of ship-loading and the Client retains ownership of the grain, the Client must remove it within 2 business days. If the Port Operator reasonably considers that the presence of the grain may interfere with the receipt of grain for the next due shipment, the Port Operator may remove the residual grain to another the Port Operator site and all costs of transport and further storage will be to the Client's account.

#### **Vessel loading**

337. The order of vessel loading will generally be determined in accordance:
  - Clause 2
  - Vessel ETA
  - Date Vessel Nomination received by the Port Operator
  - Date Vessel passed Surveys
  - Grain availability at MPT
  - Site accumulation and transport plan
  - Ownership of stock and stock swaps between clients
  - Impact on terminal efficiencies.
38. The Port Operator may, at its sole discretion, determine that loading a vessel the subject of the Vessel Nomination received later or with a later ETA is in the interests of terminal efficiency.
39. Where necessary to facilitate the efficient loading of clients' ships, the Client agrees to the use of Stored Grain for efficient port loading.
40. Specific terminal and supply chain efficiencies, including an ability to fully utilise available resources and the ability to fully position stock, may result in vessels loading out of arrival order.
41. Clients may negotiate changes to accumulation and estimated load dates between them. The Port Operator may or may not, at its sole discretion, agree to implement such changes.
42. Prior to commencement of loading a vessel must have passed a Marine, AQIS or any other survey required by law.
43. Should a vessel fail such survey (or be made the subject of a detention order) the Port Operator may, at its sole discretion, change the order of loading or order the vessel removed from the berth.
44. The Port Operator reserves the right to seek costs from the client in relation to a vessel failing surveys. Such costs may include but are not limited to:
  - Cancelled labour costs
  - Treatment costs
  - Opportunity costs where the terminal is blocked and causes other clients to experience delays
45. If the Port Operator determines, at its sole discretion, that a vessel has a high risk of failing surveys it may require at the Client's cost that an "in transit" marine surveyor's report be provided prior to allowing the vessel to berth.
46. The Port Operator will not commence loading without prior written instructions from the Client to do so and without receipt from the Client of a Notice of Intention to Export Prescribed Goods.

## **Vessel Substitution or Delay**

47. In the event that a vessel is:

- Substituted, or
- Delayed,

and the substituted vessel ETA or revised ETA is greater than 5 days from the original ETA the Booking Fee may, by the issue of a notice, be forfeited to the Port Operator if, in the reasonably held opinion of the Port Operator the delay would cause significant disruption to the shipping stem. In the event of forfeiture a new Vessel Nomination, and Booking Fee, will be required and be treated accordingly.

48. The Port Operator reserves the right to seek costs from the client in relation to the cancellation of a vessel within 14 days of the original ETA, or if a substituted vessel ETA varies by more than 5 days. Such cost may include but are not limited to:

- Repositioning costs
- Storage costs
- Treatment costs
- Opportunity costs where the terminal is blocked and causes other clients to experience delays.

49. The Port Operator will use its best endeavours to mitigate such costs. However, the Client will remain ultimately responsible for such costs.

## **Dispute Resolution**

50. In the event that the Client disputes the Port Operator's adherence to these protocols (including, without limitation the acceptance or rejection of a vessel nomination, or re-prioritisation of terminal services), the following procedures will apply:

- The Client must notify the Port Operator in writing of the dispute, the reasons for the dispute and the resolution which the Client requests.
- In the case of a dispute regarding rejection of an intent to Ship or Vessel Nomination, the dispute notice must be received by the Port Operator by 16:00 Australian Eastern Standard Time on the next business day following receipt of the notice from the Port Operator of the rejection.
- The Port Operator must use its best endeavours to respond to the Client within 2 Business Days following receipt of the dispute notice. The Port Operator response must notify the Client whether the Port Operator will change its decision and, if not it must provide an explanation or basis for the Port Operator's decision.
- If the Client is not satisfied by the Port Operator's response, or if the Port Operator fails to respond to the dispute notice within one business day of its receipt, the Client may serve written notice to the Port Operator within one business day of receipt of the Port Operator's response, or within one business day of when the Port Operator's Response was due.
- Upon receipt of this escalation notice, the Port Operator must use all reasonable endeavours to arrange a meeting between the Port Operator's General Manager and the Client within two business days of receipt of the escalation notice. Where the Port Operator's General Manager is unavailable for such a meeting within the timeframe specified, the Port Operator will make available a suitable alternative authorised representative to meet with the Client within two business days of receipt of the escalation notice. To facilitate the expeditious resolution of disputes, the meeting can take place either face to face or by telephone.

- At the meeting, the Port Operator's General Manager (or appointed representative) and the Client will discuss the subject of the dispute notice and the Port Operator's response and use all reasonable endeavours to reach an agreed outcome. Where such agreed outcome cannot be achieved, given the need for clarity, efficiency and certainty in this dispute resolution process, the Port Operator's General Manager (or appointed representative) will make a final decision in relation to the dispute notice and (within 10 business days after the meeting) notify that decision and the reasons for that decision in writing to the Client.
- In reaching the final decision, the Port Operator's General Manager (or appointed representative), acting on behalf of the Port Operator, must take into account the circumstances of the dispute and details set out in the dispute notice and, acting reasonably and in good faith, reach a decision that is consistent with the wording, or if that is unclear, the intent of these Protocols (and, in the case of Bulk Wheat, the Access Undertaking). the Port Operator's General Manager (or appointed representative) may also have regard to the objectives of:
  - maximising the efficient operation of MPT;
  - maximising export throughput at the MPT;
  - ensuring the non-discriminatory treatment of clients; and
  - ensuring consistency of decisions.

**Annexure 1 - Intent to Ship Advice**

**Load details**

Projected Load Ports		
Total tonnage		
Tolerance		
Shipping month		
Shipping Window (FH / LH)		

**Quality parameters/comments**

Load Grade	Quality Specifications	Parcel 1	Parcel 1

Name.....

Signature.....

Date.....

**Annexure 2 - Vessel Nomination**

**Vessel details**

Vessel name			
Owner		Hatches	
Authority to load		Year built	
Gross tonnage		Holds	
Net tonnage		Laycan	
Vessel type		DWT	
Flags		LOA	
Draft		Beam	

**Load details**

Load ports	
Date	
Total tonnage	
Tolerance	
Contract grades	

Stowage factor	
Client reference	
Contract number	
Destination	
Discharge port	
Exporter	
Export Inspection charge	

**Quality parameters**

Load Grade	Quality Specifications	Parcel 1	Parcel 1

**Site accumulation plan**

Originating Site	Grade	Tonnes

Total		

Name.....

Signed.....

Date.....