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Co-operative Bulk Handling Limited

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# Port Terminal Services Access Undertaking

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Date

# Port Terminal Services Access Undertaking

by

**Co-operative Bulk Handling Limited** ABN 29 256 604 947 of 30 Delhi Street, West Perth, Western Australia (**Port Operator**)

in favour of

**Australian Competition and Consumer Commission** being a body corporate established under section 6A of the *Trade Practices Act 1974* (Cth) (**ACCC**)

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## Background

- A The Port Operator operates the Port Terminal Facilities.
- B The Port Terminal Facilities provide 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 Facilities to third parties under open access policies.
- D The Port Operator or its Related Body Corporate has applied to become an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth).
- E Under section 24 of the WEMA, a person who is also the provider of one or more port terminal services (as defined under that Act) must satisfy the 'access test' to be eligible for accreditation to export bulk wheat.
- F The 'access test' under the WEMA requires:
  - (a) the person to comply with the Continuous Disclosure Rules in relation to a port terminal service; and
  - (b) either there is:
    - (i) an access undertaking in operation (under Division 6 Part IIIA of the *Trade Practices Act 1974*) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or
    - (ii) 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 TPA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.

- G The Port Operator has submitted this Undertaking to the ACCC for approval under Part IIIA of the TPA for the purpose of satisfying the 'access test'.
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## Agreed terms

### 1 Interpretation

#### 1.1 Definitions

In this Undertaking unless the context otherwise requires:

**Access Agreement** means an agreement containing provisions requiring the Port Operator to supply Port Terminal Services to a party, whether made before, on or after the Commencement Date.

**Access Agreement Variation** is defined in **clause 4.3(a)**.

**Access Application** is defined in **clause 7.3(a)**.

**Accredited Wheat Exporter** means a person having accreditation as an accredited wheat exporter under the WEAS.

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

**Auction Rules** means the Auction Rules set out in **Schedule 1** to the Port Terminal Rules (or as varied under **clause 10.2**).

**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 Western Australia.

**Commencement Date** means the date specified in **clause 4.1**.

**Competition Principles Agreement** means the agreement entered into by the Commonwealth of Australia and each State and Territory of Australia in 1995 to implement the national competition policy of Australia.

**Confidential Information** means information of the Port Operator or an Applicant or a User (or any of their nominated representatives) in relation to the business of any of those persons that:

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

but excludes information that:

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

**Continuous Disclosure Rules** means the continuous disclosure rules as defined in subsection 24(4) of the WEMA.

**Credit Support** means either:

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

**Dispute** means a dispute between an Applicant and the Port Operator in relation to access to the Port Terminal Services under this Undertaking and includes disputes arising in the course of the negotiation process in **clause 7** but does not include disputes in relation to an executed Access Agreement.

**Dispute Notice** is defined in **clause 8.1(b)**.

**Eligibility Requirements** means the requirements prescribed in **clauses 7.4(a)(iii) to 7.4(a)(vi)**.

**Effective Date** is defined in **clause 10.3(a)(vi)**.

**Exceptional Circumstances** means circumstances in which urgent variation/s to the Port Terminal Rules are necessary to prevent or reduce systemic or technical deficiencies or errors in the process or rules for the conduct of capacity auctions.

**Exceptional Circumstances Variation Notice** is defined in **clause 10.4(a)**.

**Government Agency** means any applicable Western Australian or Australian Federal Government department, authority, instrumentality or agency having jurisdiction in respect of any matter affected by this Undertaking.

**IAMA** is defined in **clause 8.3(a)(i)**.

**Legislative Requirements** means present and future obligations arising under:

- (a) applicable laws, statutes, regulations, by-laws, orders, ordinances, proclamations and decrees;
- (b) any binding requirement, instruction, direction or order of a Government Agency.

**Material Default** means any breach of a fundamental or essential term, or repeated breaches of any of the terms of:

- (a) an Access Agreement; or
- (b) any agreement for the provision of services by the Port Operator.

**Negotiation Period** is defined in **clause 7.6(c)**.

**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** means the ports of:

- (a) Albany;
- (b) Esperance;
- (c) Geraldton; and
- (d) Kwinana.

**Port Schedules** means **schedules 4 to 7**.

**Port Terminal Facility** is defined in **clause 5.2(a)**.

**Port Terminal Rules** means the rules, policies and procedures in **Schedule 3** (or as varied under **clause 10.2**) and includes the Auction Rules.

**Port Terminal Services** is defined in **clause 5.1**.

**Price and Non-Price Terms Documents** is defined in **clause 6.1(a)**.

**PTR Variation Notice** is defined in **clause 10.3(a)**.

**PTSA** means the standard terms and conditions for the supply of Port Terminal Services by the Port Operator.

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

**Season** means the period between 1 October of one year and the next 30 September.

**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.

**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 the Applicant 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; or
- (e) the Applicant has not proposed to enter into or entered into any form of arrangement with its creditors or any of them, including a deed of company arrangement.

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

**Trading Business** means a:

- (a) business unit or division of the Port Operator; or
- (b) Related Body Corporate of the Port Operator, or any business unit or division of the Related Body Corporate,

which has responsibility for the trading and marketing of Bulk Wheat, and includes Grain Pool Pty Ltd and Agracorp Pty Ltd.

**User** means a party being supplied with, or with a right to be supplied with, Port Terminal Services under an Access Agreement.

**Varied Terms of Access** is defined in **clause 4.3(d)**.

**WEAS** means the Wheat Export Accreditation Scheme 2008.

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

## 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 associations;
- (c) a reference to a consent of a party means the prior written consent of that party;
- (d) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
- (e) a reference to a clause or a schedule is a reference to a clause, or schedule of this Undertaking;
- (f) a reference to an item in a schedule is a reference to the items in that schedule;
- (g) a reference to a party includes its successors and permitted assigns;
- (h) notices that are required to be given in writing to Port Operator may, if so agreed by Port Operator, be provided in electronic form;
- (i) 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;
- (j) 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; and
  - (k) a reference to \$ and dollars is to Australian currency.

## 2 Objectives

This Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by the Port Terminal Facilities 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 under which the Port Operator publishes reference prices and terms and conditions for the provision of certain standard services annually;
- (d) operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- (e) reaching an appropriate balance between:
  - (i) the legitimate business interests of the Port Operator, including:
    - (A) the recovery of efficient costs associated with the granting 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 Port Operator's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities; and
  - (ii) the interest of the public, including:
    - (A) ensuring efficient use of resources; and
    - (B) the promotion of economically efficient investment, use and operation of the Port Terminal Facilities; and
  - (iii) the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
    - (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 resolution process in the event that the Port Operator and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (g) in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminal Facilities to the extent practicable having regard to the different characteristics of the Port Terminal Facilities.

## **3 Structure**

### **3.1 Components**

This Undertaking comprises this document (including all schedules) which apply to Port Terminal Services provided by means of each Port Terminal Facility and apply only to Port Terminal Services provided by means of that particular Port Terminal Facility.

### **3.2 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 shall procure that Related Body Corporate to take that action or refrain from taking that action.

## **4 Term and variation**

### **4.1 Commencement Date**

The Commencement Date for the purposes of section 24 of the WEMA is 1 October 2009 and the Port Operator will comply with this Undertaking on and from that date.

### **4.2 Expiry**

This Undertaking expires on the earlier of:

- (a) 30 September 2011; or
- (b) the day the ACCC consents to the Port Operator withdrawing this Undertaking in accordance with Part IIIA of the TPA.

### **4.3 Variation of Access Agreements**

- (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 and the provisions of **clause 7.6** shall apply.
- (d) Upon the Port Operator and the User agreeing the terms of the Access Agreement Variation (**Varied Terms of Access**), the provisions of the Access Agreement relating to the supply of Port Terminal Services will be replaced by the Varied Terms of Access.
- (e) Until the Port Operator and the User agree the Varied Terms of Access, the provisions of the Access Agreement relating to the supply of Port Terminal Services will continue to apply.

## 5 Scope

### 5.1 Meaning of Port Terminal Services

**Port Terminal Services** means the services provided by means of the Port Terminal Facilities which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facilities, including:

- (a) unloading and receipt by the Port Operator of a User's Bulk Wheat at the Port Terminal Facilities, for the purpose of loading onto a vessel scheduled to arrive at the Port Terminal Facility;
- (b) sampling by the Port Operator of a User's Bulk Wheat received and out-turned, to check for visible evidence of the presence of chemical residue, insect activity and live insects or other contaminants, and providing the User with a composite shipping sample of the User's Bulk Wheat;
- (c) weighing by the Port Operator of a User's Bulk Wheat received and out-turned, using the Port Operator's weighing facilities, and providing the User with a weighbridge ticket or other statement certifying the weight and quantity of Bulk Wheat delivered;
- (d) storage by the Port Operator of a User's Bulk Wheat at the Port Terminal Facility for the purpose of export accumulation in a restricted time period and loading onto vessels at the Port Terminal Facility; and
- (e) fumigation in response to evidence of insect infestation;
- (f) accumulating and assembling Bulk Wheat for the purpose of loading cargo onto a vessel scheduled to arrive at the Port Terminal Facility;
- (g) administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
- (h) access to inspectors from the Australian Quarantine and Inspection Service, for inspection of the User's Bulk Wheat received and held at the Port Terminal Facilities; and
- (i) 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.

## **5.2 Meaning of Port Terminal Facility**

- (a) **Port Terminal Facility** means a ship loader and associated infrastructure that is:
  - (i) at a Port;
  - (ii) capable of handling Bulk Wheat; and
  - (iii) owned, operated and controlled by the Port Operator, including:
    - (iv) an intake/receival facility;
    - (v) a grain storage facility;
    - (vi) a weighing facility; and
    - (vii) a shipping belt;that is:
  - (viii) at the port; and
  - (ix) associated with the ship loader; and
  - (x) capable of dealing with wheat in bulk.
- (b) The Port Terminal Facilities at each Port include those described in the Port Schedules.

## **5.3 What this Undertaking does not cover**

This Undertaking does not apply:

- (a) to access to services in relation to Bulk Wheat provided by the Port Operator which are not Port Terminal Services; or
- (b) in relation to facilities owned by the Port Operator which are not Port Terminal Facilities, such as up country receival and accumulation facilities; or
- (c) to fumigation of grain by the Port Operator as a preventative measure; or
- (d) to the transportation by the Port Operator of Bulk Wheat to port; or
- (e) to grains which are not wheat; or
- (f) to wheat which is not Bulk Wheat.

## **5.4 Obligation to offer access**

- (a) The Port Operator must offer access to the Port Terminal Services in accordance with the provisions of this Undertaking.
- (b) Access is available by means of the following obligations:
  - (i) If required to do so by an eligible Applicant in accordance with **clause 7.5(a)**, the Port Operator is obliged by **clause 7.5(a)** to execute an Access Agreement in the form of the Price and Non-Price Terms Documents;

- (ii) If required to do so by an eligible Applicant in accordance with **clause 7.5(b)**, the Port Operator is obliged by **clause 7.5(b)** to negotiate in good faith under the process in **clause 7.6** for terms that differ from the Price and Non-Price Terms Documents; and
- (iii) Disputes may be referred to arbitration under **clause 8**.

## 6 Price and non-price terms

### 6.1 Obligation to publish price and non-price terms

- (a) Subject to **clause 6.1(b)**, by no later than 31 August of each year the Port Operator must publish on its website (and provide a copy to the ACCC within two Business Days of publication):
  - (i) a single set of reference prices; and
  - (ii) the PTSA,
 which will apply to access to the Port Terminal Services for the Season commencing in that year (together the **Price and Non-Price Terms Documents**).
- (b) For the first year of term of this Undertaking, the Port Operator must publish the Price and Non-Price Terms on its website (and provide a copy to the ACCC) within three Business Days of the Commencement Date.
- (c) The Price and Non-Price Terms Documents must be consistent with **clause 6.2** and the objectives set out in **clause 2**.
- (d) **Schedule 2** sets out an indicative PTSA for the term of this Undertaking.

### 6.2 Non-discriminatory access

- (a) Subject to **clause 6.2(b)**, in providing access to the Port Terminal Services, the Port Operator must not discriminate between different Applicants or Users (including its own Trading Business) in favour of its own Trading Business including discrimination based on the location or identity of the storage custodian, handler or transporter of the Applicants' or Users' Bulk Wheat.
- (b) The Port Operator shall not be in breach of its obligation under **clause 6.2(a)** where, in providing access to the Port Terminal Services, the Port Operator differentiates between different Applicants or Users (including its own Trading Division) on the basis that the cost of providing access to an Applicant or User is higher than the cost of providing access to other Applicants or Users.

### 6.3 Audit

- (a) During the term of this Undertaking, the ACCC may by notice in writing require the Port Operator to appoint an Auditor to provide a report in relation to the Port Operator's compliance with **clause 6.2**. If the ACCC

requires the Port Operator to appoint an Auditor, the provisions set out in **Schedule 8** will apply.

- (b) The ACCC may authorise a Member of the ACCC to exercise any powers under **clause 6.3(a)** of this Undertaking on behalf of the ACCC.

## 7 Application and negotiating for access

### 7.1 Framework

- (a) This **clause 7** outlines the process to be followed for an Applicant to gain access to the Port Terminal Services. It provides for:
  - (i) **Preliminary inquiry:** requests by the Applicant for information to enable an Access Application to be lodged;
  - (ii) **Access Application:** submission of an Access Application by the Applicant;
  - (iii) **Standard Access Agreements:** procedure where the Applicant wants the Port Terminal Services under the Price and Non-Price Terms Documents; and
  - (iv) **Negotiation:** negotiations where an Applicant wants the Port Terminal Services under terms other than the Price and Non-Price Terms Documents.
- (b) For the avoidance of doubt, if a Dispute arises at any time during the processes described in **clauses 7.2, 7.3 and 7.6**, either party may seek to resolve the Dispute in accordance with the process described in **clause 8.4**.

### 7.2 Preliminary inquiry

- (a) An Applicant may request the Port Operator to provide information reasonably required by the Applicant to formulate and lodge its application for access to the Port Terminal Services.
- (b) Within five Business Days of receiving a request for information under **clause 7.2(a)**, the Port Operator must, subject to **clause 7.2(c)**, provide the Applicant with the requested information.
- (c) In responding to a request for information under **clause 7.2(a)**, the Port Operator is not required to disclose any Confidential Information.
- (d) Before submitting an Access Application under **clause 7.3(a)**, an Applicant may give written notice to the Port Operator requesting a preliminary meeting to:
  - (i) seek clarification of the processes described in this **clause 7.2** and **clauses 7.3 and 7.6**, particularly the required form of the proposed Access Application under **schedule 1**; and
  - (ii) discuss the proposed Access Application.

- (e) The Port Operator must be available to meet with the Applicant within five Business Days of receiving a notice under **clause 7.2(d)**.

### **7.3 Access Application**

- (a) An Applicant's request for access to the Port Terminal Services must be submitted to the Port Operator in the form prescribed in **schedule 1 (Access Application)**.
- (b) Within two Business Days of receiving an Access Application, the Port Operator must provide the Applicant with written notice:
  - (i) acknowledging receipt of the Access Application and confirming that it contains sufficient information to enable the Port Operator to consider the Access Application; or
  - (ii) acknowledging receipt of the Access Application and requiring the Applicant to provide the Port Operator with such:
    - (A) additional information; and
    - (B) clarification of any information provided in the Access Application,as is reasonably necessary for the Port Operator to consider the Access Application.
- (c) Within five Business Days of receiving a notice under **clause 7.3(b)(ii)**, the Applicant must provide the requested additional information or clarification.
- (d) Within two Business Days of receiving the additional information or clarification under **clause 7.3(c)**, the Port Operator must provide the Applicant with written notice confirming whether the additional information or clarification enables the Port Operator to consider the Access Application.
- (e) If the additional information or clarification is insufficient to enable the Port Operator to consider the Access Application, the process in **clauses 7.3(b)(ii) and 7.3(c)** and this **clause 7.3(d)** will be repeated until:
  - (i) the Applicant provides the information and clarifications required to enable the Port Operator to consider the Access Application; or
  - (ii) the Applicant or the Port Operator serves a Dispute Notice in relation to the Access Application; or
  - (iii) the Applicant withdraws the Access Application.

### **7.4 Eligibility**

- (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:

- (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;
- (vi) the Applicant is an Accredited Wheat Exporter; and
- (b) 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.
- (c) the following information may be regarded as sufficient evidence of solvency for the purpose of this clause:
  - (i) the information required to be provided on a CBH credit application form; and
  - (ii) the Applicant's audited financial statements for the last financial year, including an audited statement of profit and loss and an audited statement of assets and liabilities; and
  - (iii) credit check from an independent credit reporting agency.
- (d) If the Port Operator decides that under this Undertaking it is entitled to refuse or cease to negotiate with the Applicant for any reason, including because the Applicant fails or ceases to satisfy the Eligibility Requirements, within two Business Days of that decision the Port Operator must give written notice of that fact to the Applicant, including the reasons for its decision.
- (e) If after receiving a notice under **clause 7.4(d)** the Applicant disagrees that the Port Operator is entitled under this Undertaking to refuse or cease to negotiate with the Applicant, then that matter will constitute a Dispute and the Applicant may within ten Business Days of receiving the notice refer the Dispute to arbitration under **clause 8.4**. Subject to any other directions by the arbitrator, if the arbitrator determines that the Port



Operator is not entitled under this Undertaking to refuse or cease to negotiate with the Applicant:

- (i) the Port Operator must commence or recommence negotiations immediately; and
- (ii) where the Negotiation Period had commenced before the Port Operator ceased negotiations, the Negotiation Period will be deemed to have been suspended from the date of cessation until the date of the arbitrator's determination.

## **7.5 Standard Access Agreement**

- (a) If an eligible Applicant requires the Port Terminal Services to be provided under the terms offered in the Price and Non-Price Terms Documents, 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 7.5(a)(i)**, the Port Operator and the Applicant must execute an Access Agreement in the form of the Price and Non-Price Terms Documents.
- (b) If an eligible Applicant requires the Port Terminal Services to be provided under terms other than those offered in the Price and Non-Price Terms Documents, then the Port Operator and the Applicant must comply with the negotiation procedures and arbitration procedures (if required) under **clause 7.6**.

## **7.6 Negotiation of Access Agreement**

- (a) This **clause 7.6** applies only when:
  - (i) the eligible Applicant requires the Port Terminal Services to be provided under terms other than those offered in the Price and Non-Price Terms Documents; or
  - (ii) the Port Operator seeks an Access Agreement Variation under the provisions of **clause 4.3**.
- (b) Each of the Port Operator and the eligible Applicant must negotiate for the Applicant's access to the Port Terminal Services or the Port Operator's request for an Access Agreement Variation in good faith and in accordance with this **clause 7.6**.
- (c) The period during which the Port Operator and the eligible Applicant must negotiate the Applicant's Access Application or the Port Operator's request for an Access Agreement Variation (**Negotiation Period**):
  - (i) commences on the later date of:
    - (A) a notice under **clause 7.3(b)(i)**;

- (B) a notice under **clause 7.3(d)** confirming that the additional information or clarification provided by the eligible Applicant enables the Port Operator to consider the Access Application; or
  - (C) a request for an Access Agreement Variation by the Port Operator under **clause 4.3** and
- (ii) ceases upon any of the following events:
  - (A) execution of an Access Agreement in respect of the Access Application or execution of Varied Terms of Access in respect of an Access Agreement Variation;
  - (B) written notification by the Applicant that it no longer wishes to proceed with its Access Application;
  - (C) written notification by the Port Operator that it no longer wishes to proceed with an Access Agreement Variation; or
  - (D) the expiration of three months from the commencement of the Negotiation Period, or if both parties agree to extend the Negotiation Period, then the expiration of the agreed extended period.
- (d) Subject to **clause 7.6(e)**, upon cessation of the Negotiation Period the obligation of the parties to negotiate will cease.
- (e) Without limiting the definition of Dispute
  - (i) if the eligible Applicant has complied with **clause 7.6(b)** throughout the Negotiation Period but the parties do not execute an Access Agreement before the conclusion of the Negotiation Period; or
  - (ii) if the Port Operator has complied with **clause 7.6(b)** throughout the Negotiation Period but the parties do not execute Varied Terms of Access before the conclusion of the Negotiation Period

that matter will constitute a Dispute which either the Port Operator or the Applicant may refer to arbitration under **clause 8.4**.

## 8 Dispute resolution

### 8.1 Disputes

- (a) Any Dispute shall, unless otherwise expressly agreed by both parties, be resolved in accordance with this **clause 8**.
- (b) Either party may give to the other party to the Dispute a notice in writing (**Dispute Notice**) specifying the Dispute and requiring it to be dealt with in the manner set out in this **clause 8**. The parties acting in good faith shall attempt to resolve the Dispute as soon as is practicable.
- (c) Any disputes in relation to an executed Access Agreement will be dealt with in accordance with the provisions of that Access Agreement.

- (d) The Port Operator will by 31 July of each year provide a report to the ACCC on any disputes in relation to an Access Agreement and any Disputes in the preceding 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 resolutions and the status of unresolved matters.

## **8.2 Negotiation**

Within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party will meet and negotiate in good faith to resolve the Dispute.

## **8.3 Mediation**

- (a) If the Dispute is not resolved under **clause 8.2** within five Business Days after the date of the Dispute Notice then:
  - (i) if the parties agree, they will attempt to resolve the Dispute by formal mediation conducted by a mediator appointed by agreement between the parties or as appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**); or
  - (ii) if the parties do not agree 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**.
- (b) Unless the parties agree otherwise:
  - (i) any mediation will be conducted by a mediator under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);
  - (ii) any mediation shall be conducted within ten Business Days of the appointment of the mediator;
  - (iii) each party may appoint a person, including a legally qualified person to represent it or assist it in a mediation;
  - (iv) each party will bear their own costs relating to the preparation for and attendance at a mediation; and
  - (v) the costs of the mediator will be borne equally by the parties.

## **8.4 Referral to arbitration**

- (a) If the Dispute is not resolved under **clause 8.2** either party may by notice in writing to the other party and to the mediator terminate any mediation proceedings and give notice that the Dispute must be referred to arbitration under this **clause 8.4**.
- (b) Where a Dispute is referred to arbitration, it shall be referred to the ACCC at the address specified in **clause 11(c)** in the first instance.
- (c) Upon referral to the ACCC of the Dispute:

- (i) within five Business Days of receipt of the referral notice, the ACCC may give notice to the parties as to whether the Dispute shall be arbitrated by the ACCC or referred to a private arbitrator; and
  - (ii) if the ACCC does not give a notice under **clause 8.4(c)(i)**, the ACCC will be deemed to have given notice to the parties confirming that the Dispute be referred to a private arbitrator.
- (d) The ACCC may authorise a member to exercise the power to:
  - (i) determine whether a Dispute shall be arbitrated by the ACCC or referred to a private arbitrator; and
  - (ii) give a notice under **clause 8.4(c)(i)**.
- (e) Where the ACCC determines that it shall conduct the arbitration such arbitration shall be conducted by the ACCC in accordance with the arbitration provisions of Part IIIA of the TPA.
- (f) Where either party serves notice under **clause 8.4(a)**, that notice will include:
  - (i) the contact details for the parties to the dispute;
  - (ii) whether the parties have agreed or are likely to agree upon a private arbitrator if the ACCC does not arbitrate the dispute; and
  - (iii) an agreement by that party in the case of referral by the ACCC of the Dispute to a private arbitrator to:
    - (A) pay any amounts determined in accordance with **clause 8.9**; and
    - (B) indemnify the private arbitrator from any claims made against the private arbitrator arising in connection with the performance by the private arbitrator of its duties, such indemnity excluding circumstances where the conduct of the private arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

## 8.5 Arbitration procedure – private arbitrator

- (a) If a Dispute is referred to a private arbitrator, the parties shall attempt to agree upon a suitably qualified person to act as arbitrator.
- (b) If the parties fail to agree an arbitrator within ten Business Days of the ACCC giving a notice under **clause 8.4(c)(i)** referring the Dispute to a private arbitration, or the ACCC being deemed to give a notice under **clause 8.4(c)(ii)**, either party may request the President of the Western Australian Chapter of the IAMA to appoint an arbitrator, such appointment to be made within five Business Days of the request to IAMA.

- (c) Subject to the involvement of, and disclosures to, the ACCC, unless the Port Operator and the Applicant agree otherwise, the arbitration by a private arbitrator must be conducted in private.
- (d) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
- (e) The private arbitrator will, when conducting the arbitration:
  - (i) keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions;
  - (ii) observe the rules of natural justice but is not required to observe the rules of evidence;
  - (iii) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (iv) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the private arbitrator;
  - (v) call on any party the private arbitrator believes necessary to give evidence;
  - (vi) permit the ACCC, on its request, to make submissions to the private arbitrator on matters relevant to the Dispute;
  - (vii) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
  - (viii) present its determination in a draft form to the parties and hear argument from the parties before making a final determination;
  - (ix) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based; and
  - (x) provide a copy of the final determination to the ACCC at the time of handing down the final determination.
- (f) The private arbitrator may at any time terminate arbitration (without making an award) if it thinks 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.

## **8.6 Matters which private arbitrator must take into account**

- (a) In deciding a Dispute the private arbitrator will take into account:

- (i) the principles, methodologies and provisions set out in this Undertaking;
  - (ii) the provisions of Part IIIA of the TPA;
  - (iii) any relevant guidelines published by the ACCC;
  - (iv) any submissions provided by the ACCC; and
  - (v) any other matters that the private arbitrator thinks are appropriate to have regard to.
- (b) In making its determination, the arbitrator:
- (i) may deal with any matters referred to in section 44V of the TPA;
  - (ii) will not make a determination that would have any of the effects described in section 44W of the TPA; and
  - (iii) will take into account the matters referred to in section 44X of the TPA.

## 8.7 Confidentiality – private arbitration

- (a) The private arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.
- (b) The private arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
  - (i) requiring each party to give confidentiality undertakings to the other party and their external advisers; and
  - (ii) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (c) The private arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.
- (d) For the purpose of clarity, save for an arbitration conducted by the ACCC pursuant to **clause 8.4(d)** the entire dispute resolution process outlined in this **clause 8** is subject to **clause 9**.
- (e) Nothing in this **clause 8.7** shall prevent a private arbitrator from, or limit the extent to which a private arbitrator may, provide information to the ACCC.

## 8.8 Effect of private arbitrator's determination

- (a) The determination of the private arbitrator will be final and binding subject, to any rights of review by a court of law.
- (b) Except where the determination or direction is subject to a review by a court of law, if an Applicant does not comply with a determination or direction of the private arbitrator, then the Port Operator will no longer be

obliged to continue negotiations regarding the provision of access for that Applicant.

- (c) Except where the determination or direction is subject to a review by a court of law, the Port Operator will comply with the lawful directions or determinations of the private arbitrator.

## **8.9 Private Arbitrator's costs**

The private arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the private arbitrator determines. Each party may make submissions to the private arbitrator on the issue of costs at any time prior to that determination.

## **8.10 Backdating of arbitration determination**

The ACCC and a private arbitrator shall have the discretion to determine that an arbitration determination shall take effect from the:

- (a) date of the Determination; or
- (b) date on which the Dispute Notice was served; or
- (c) date on which the relevant Access Application was submitted.

# **9 Confidentiality**

- (a) Subject to **clause 9(b)**, if a party provides Confidential Information to the other party as part of the negotiation or dispute resolution or arbitration processes under this Undertaking, the receiver of the Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the provider of the Confidential Information and not use that Confidential Information for any purpose other than that which the provisions of this Undertaking allow.
- (b) A party is permitted to disclose Confidential Information to the extent necessary for the provision of information:
  - (i) to a mediator or arbitrator or to the ACCC as provided for under the provisions of this Undertaking; and
  - (ii) for the purposes of advice from legal advisors, financiers, accountants or other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party).
- (c) Nothing in this **clause 9** shall prevent a party or a private arbitrator from, or limit the extent to which a party or a private arbitrator may, provide information to the ACCC.

## 10 Capacity management

### 10.1 Compliance with Port Terminal Rules

- (a) The Port Operator must comply with the Port Terminal Rules when providing or accessing the Port Terminal Services under an Access Agreement.
- (b) The Port Operator may require that Applicants agree to comply with the Port Terminal Rules as a condition of acquiring Port Terminal Services.
- (c) The Port Operator must publish the Port Terminal Rules on its website.

### 10.2 Variation of Port Terminal Rules

The Port Terminal Rules may be varied by the Port Operator provided that:

- (a) the variation is consistent with this Undertaking and in particular **clauses 6.2 and 10.6**;
- (b) the Port Operator has followed the process in **clause 10.3 or 10.4** in relation to the variation; and
- (c) the Port Terminal Rules must include an expeditious dispute resolution mechanism for dealing with disputes over compliance with the Port Terminal Rules or the Auction Rules.

### 10.3 Variation following notice and consultation

In order to vary the Port Terminal Rules for any reason other than Exceptional Circumstances, the Port Operator must:

- (a) publish a notice (**PTR Variation Notice**) on the Port Operator's website containing or annexing the following:
  - (i) a copy of the relevant part of the Port Terminal Rules with the proposed variation shown in mark-up;
  - (ii) the Port Operator's reasons for the variation;
  - (iii) a request that interested parties provide written responses in relation to the proposed changes;
  - (iv) a contact name and address for written responses to be addressed to the Port Operator, with a response closing date of no less than five Business Days of the date of publication of the PTR Variation Notice;
  - (v) a timetable including dates, times and venues for consultation meetings to be held, including by way of telephone conference, within a period of not less than ten and not more than 15 Business Days of the date of publication of the PTR Variation Notice; and
  - (vi) the proposed date on which the variation is proposed to take effect (**Effective Date**), which must be no less than 25 Business Days after publication of the PTR Variation Notice;



- (b) send copies of the PTR Variation Notice to all Users and the ACCC within one Business Day of publication of the PTR Variation Notice;
- (c) publish copies of all non-confidential responses received on the Port Operator's website and provide copies to all Users and the ACCC within one Business Day of receipt of each response;
- (d) if requested to do so by any User or the ACCC, conduct a meeting to discuss the proposed variation with interested parties;
- (e) review and consider in good faith any written responses and discussions with Users and the ACCC in relation to the proposed changes;
- (f) no less than 20 Business Days after publication of the PTR Variation Notice, publish on its website a statement withdrawing or confirming the proposed PTR Variation Notice; and
- (g) if the Port Operator proposes to amend a PTR Variation Notice, it must re-commence the variation process in this clause.

#### 10.4 Variation in Exceptional Circumstances

In Exceptional Circumstances, the Port Operator may vary the Port Terminal Rules on two Business Days notice, provided that the Port Operator must:

- (a) publish a notice (**Exceptional Circumstances Variation Notice**) on the Port Operator's website containing or annexing the following:
  - (i) a copy of the relevant part of the Port Terminal Rules with the proposed variation shown in mark-up;
  - (ii) the Port Operator's reasons for the variation, including the facts and matters that establish the existence of Exceptional Circumstances;
  - (iii) a request that interested parties provide written responses in relation to the proposed changes;
  - (iv) a contact name and address for written responses to be addressed to the Port Operator;
  - (v) the proposed Effective Date, which must be no less than two Business Days of publication of the Exceptional Circumstances Variation Notice;
- (b) send copies of the Exceptional Circumstances Variation Notice to all Users and the ACCC within one Business Day of publication of the Exceptional Circumstances Variation Notice;
- (c) publish copies of all non-confidential responses received on the Port Operator's website within one Business Day of receipt of each response;
- (d) review and consider in good faith any responses received in relation to the proposed changes; and
- (e) if the Port Operator proposes to amend the Exceptional Circumstances Variation Notice, re-commence the variation process in this clause.

## 10.5 Transitional measures

- (a) All activities performed in accordance with the Port Terminal Rules prior to the Effective Date of any variation shall remain valid notwithstanding any subsequent variation of the Port Terminal Rules.
- (b) The nomination of vessels in accordance with the Port Terminal Rules shall be governed in accordance with the Port Terminal Rules published at the time of nomination notwithstanding any subsequent variation of the Port Terminal Rules unless the User and the Port Operator agree otherwise.
- (c) Vessels nominated after the Effective Date of any variation of the Port Terminal Rules will be required to be nominated under the Port Terminal Rules as varied.

## 10.6 No hindering

- (a) The Port Operator and its Related Bodies Corporate must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by an Applicant or User.
- (b) A person may be taken to have engaged in conduct for the purpose referred to in **clause 10.6 (a)** even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This clause does not limit the manner in which the purpose of a person may be established.

## 11 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:

Customer Account Manager  
Grain Operations  
Co-operative Bulk Handling Limited  
Gayfer House, 30 Delhi Street  
West Perth WA 6005

- (b) Applicants are also encouraged to review the Port Operator's web site at [www.cbh.com.au](http://www.cbh.com.au) which includes information relevant to the Port Terminal Services.
- (c) Persons wishing to contact the ACCC in relation to this Undertaking should contact the ACCC at the following address:

General Manager  
Transport and General Prices Oversight  
Australian Competition and Consumer Commission  
Level 35, 360 Elizabeth Street  
Melbourne VIC 3000  
Fax (03) 9663 3699

## 12 Publication of key information

- (a) Within the last three days of each month, the Port Operator will publish in a prominent place on its website a statement of the total amount of Bulk Wheat and the total amount of grain other than Bulk Wheat situated at each of the Port Terminal Facilities. The Port Operator must use reasonable endeavours to ensure that the statement is accurate within + / - 5%.
- (b) By the close of the Business Day following the Business Day on which the Port Operator receives a vessel nomination from a User (including its Trading Business), the Port Operator will publish the nomination on the shipping stem and in a prominent place on its website. Vessel nominations received after 4.00pm on a Business Day, or on a non-Business Day will be deemed to be received at 8.00am on the next Business Day.
- (c) Within the last three days of each of December, March, June and September, the Port Operator will publish in a prominent place on its website a statement of the key indicators of its performance of the Port Terminal Services at each Port Terminal Facility, including details of the:
  - (i) average number of days between the ETA (as defined in the Port Terminal Rules) on original vessel nomination and the date of the presentation of the Notice of Readiness (as defined in the Port Terminal Rules);
  - (ii) average number of days between presentation of a Notice of Readiness and Commencement of Loading (as defined in the Port Terminal Rules) for vessels that arrive within their contracted Shipping Window (as defined in the Port Terminal Rules);
  - (iii) average number of days between presentation of a Notice of Readiness and Commencement of Loading for vessels that arrive outside their contracted Shipping Window;
  - (iv) number of vessels rejected in the year to date;
  - (v) number of vessels presenting a Notice of Readiness outside of the contracted Shipping Window in the year and month to date;
  - (vi) Quantum of tonnes of wheat exported in the year and month to date; and
  - (vii) number of vessels loaded in the year and month to date.


DATED the 24<sup>th</sup> day of September 2009.

The common seal of Co-operative Bulk Handling Limited is affixed in the presence of:



  
.....  
Company Secretary/Director

LLOYD GUTHREY  
.....  
Name of Company Secretary/Director  
(print)

  
.....  
Director  
KENNETH GEORGE PALMER  
.....  
Name of Director (print)

# Schedule 1

## Access Application information

### 1 Request details

#### 1.1 Season

#### 1.2 Applicant's Application Type

### 2 Applicant details

#### 2.1 Company name

#### 2.2 ABN/ACN

#### 2.3 Website

#### 2.4 Address

#### 2.5 Contact details

#### 2.6 Details of authorised company representative (including authorisation)

#### 2.7 Duration of the Access Agreement sought

### 3 Indicative Export Tonnage

## Schedule 2

### Indicative Port Terminal Services Agreement



**CO-OPERATIVE BULK HANDLING LIMITED**  
(ABN 29 256 604 947)

**2009/10 Season  
PORT TERMINAL SERVICES AGREEMENT**

FOR

**Standard Port Terminal Services**

PROVIDED TO

**XXX**  
(ABN xxx)

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**THIS AGREEMENT** dated the .....

**BETWEEN:**

**CO-OPERATIVE BULK HANDLING LIMITED**  
(ABN 29 256 604 947)  
of Gayfer House, 30 Delhi Street, West Perth WA 6005  
("**CBH**")

**AND**

**XXX**  
(ABN xxx)  
of 'insert address'  
("**Customer**")

## **RECITALS**

- A. CBH operates Port Terminal Facilities in Western Australia.
- B. CBH provides its Customers with Port Terminal Services for the export of Bulk Wheat under the terms of its Undertaking.
- C. The Customer purchases Bulk Wheat and wishes to utilise the Services.
- D. CBH has agreed to provide the Customer with the Services pursuant to the terms and conditions of this Agreement.
- E. The Customer has agreed to the terms and conditions of this Agreement and will remunerate CBH for its provision of the Services in accordance with the terms of this Agreement.

## **THE PARTIES AGREE AS FOLLOWS:**

### **1 COMMENCEMENT AND TERMINATION**

#### **1.1 Commencement**

- (a) This Agreement will apply to Services provided by CBH after 1 October 2009 ("**Commencement Date**") unless otherwise agreed in writing between CBH and the Customer.
- (b) The terms and conditions set out in this Agreement shall be deemed to be accepted by the Customer if the Customer utilises any of the Services contained in this Agreement notwithstanding the fact that the Customer has not executed this Agreement.

#### **1.2 General Termination**

This Agreement will terminate on 31 October 2010 ("**End Date**") and the Customer must ensure that prior arrangements are made to Outturn all Bulk Wheat held by CBH prior to this date.

#### **1.3 Immediate Termination**

- (a) CBH may terminate this Agreement by notice to the Customer with immediate effect if:
  - (i) the Customer commits a Material Breach of this Agreement;
  - (ii) an Insolvency Event occurs; or
  - (iii) the Customer repudiates the Agreement.
- (b) If the Agreement is terminated under clause 1.3(a), CBH may require that all the Customer's Bulk Wheat be Outturned as soon as possible following termination, and the Customer's obligations under this Agreement will continue until all Bulk Wheat has been Outturned.

#### 1.4 Survival of Terms

Clauses 5.5, 9, 10, 13, 15, 18, 20, 21, 23, 24 and 25 shall survive the termination of this Agreement.

## 2 DEFINITIONS

In this Agreement:

**"ACCC"** means the Australian Competition and Consumer Commission.

**"Accumulation Plan"** means a plan for the delivery of grain to a Port Terminal Facility in order to accumulate a cargo for shipping .

**"Additional Storage Charges"** mean the charge with that description prescribed in Schedule 1.

**"Agreement"** means this agreement and all schedules, annexures and attachments.

**"Annual Shipping Period"** means the period 16 January to the next 31 October as modified from CBH from time to time prior to 31 August for the coming Year .

**"AQIS"** means the Australian Quarantine Inspection Services.

**"Arrived"** **"Arrives"** and **"Arrival"** means the time at which a vessel arrives at the waiting area designated from time to time by the relevant port authority for the Port Terminal Facility (whether or not it sets anchor), is ready to proceed to berthing and has presented a Notice of Readiness.

**"Auction"** means the sale by auction of Capacity during the Annual Shipping Period.

**"Auction Premium"** means any additional amount paid by the Customer for Capacity which is in excess of the start price for Capacity within a Lot in the Auction.

**"Auction Premium Rebate"** means the rebate calculated in accordance with Schedule 2.

**"Auction Rules"** means the rules of that name published by CBH from time to time attached as **Schedule 1** to the Port Terminal Rules. The current version of these rules can be found on CBH's website, [www.cbh.com.au](http://www.cbh.com.au).

**"Bulk Handling Act"** means the Bulk Handling Act 1967 (WA).

**"Bulk Handling Regulations"** means the Bulk Handling Act Regulations 1967 (WA).

**"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.

**"Bulk Wheat Entitlement"** means the Customer's entitlement under the Bulk Handling Act or this Agreement to the possession of Bulk Wheat in CBH's custody.

**"Bulk Wheat Receival Services"** means the Bulk Wheat receival services provided by CBH pursuant to clause 5.

**"Bulk Wheat Storage Services"** means the storage services provided by CBH pursuant to clause 6.

**"Business Day"** means a day that is not a Saturday, Sunday or gazetted public holiday in Western Australia.

**"Capacity"** means the capacity of a Port Terminal Facility, to put grain on board a vessel at a Port Terminal Facility during a Shipping Window, measured in tonnes.

**"Capacity Transfer Fee"** means the fee with that description prescribed in Schedule 1.

**"Charter Party"** means the agreement between the owner of a vessel and the party hiring the vessel for use of the vessel in transporting a cargo.

**"Commencement Date"** has the meaning set out in clause 1.1.

**"Contaminant"** means a Level 1 Contaminant, a Level 2 Contaminant or a Level 3 Contaminant as the case requires.

**"Corynetoxins Contamination"** means contamination by low molecular weight chemicals that cause annual ryegrass toxicity.

**"Credit Application Form"** means the form available from CBH on which all customers' credit application requests are to be made.

**"Customer's Manager"** means the Customer's representative who is responsible for the Customer's Bulk Wheat as notified in writing to CBH.

**"Demurrage"** means the defined level of damages paid to a vessel owner for the delays in loading or discharging the vessel after the Laytime has expired. It is customarily expressed in US dollars per day or portion thereof.

**"Direct to Port Delivery Declaration Form"** means the Port Delivery Form as published by CBH from time to time.

**"Dispatch"** means the money payable by the vessel owner to the charterer if the vessel completes loading within the agreed Laytime. It is customarily expressed in US dollars per day or portion thereof.

**"End Date"** has the meaning given in clause 1.2.

**"ETA"** means the estimated time of arrival of the Nominated Vessel.

**"Export Fee"** means the fee with that description prescribed in Schedule 1.

**"Export Outturn Request"** means an export outturn request in relation to Port Outturning Services.

**"Fair Market Price"** means the average value at the relevant time and place (of the requirement to determine the Fair Market Price) to be derived from the average of three independent broker valuations by broker appointed by Grain Trade Australia, with the valuations to take into account the Grade and variety and taking into account the cost of insurance, levies, taxes, charges, Freight and associated costs.

**"Force Majeure"** has the meaning given in clause 15.1.

**"Forfeiture Approval Authority"** means an authority issued by the Customer to CBH to forfeit Bulk Wheat in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS).

**"Freight"** means the independent Customer freight charges for delivery of Bulk Wheat to a Port Terminal Facility payable by a Customer.

**"Fumigation Statement"** means a statement declaring that a particular tonnage of Bulk Wheat has been fumigated, and shall be in the form adopted and prescribed by CBH from time to time.

**"Genetically Modified Organism"** has the meaning given to that term in the *Gene Technology Act 2000* (Cth).

**"Good Operating Practices"** means the practices, methods and acts engaged in or by a party who, in the conduct of its undertaking, exercises that degree of diligence, prudence and foresight reasonably and ordinarily exercised by skilled and experienced Australian operators engaged in the same type of undertaking under the same or similar circumstances and conditions.

**Government Agency** means any applicable Western Australian or Australian Federal Government department, authority, instrumentality or agency having jurisdiction in respect of any matter relating to this Agreement.

**"Grace Period"** means the period of 14 days commencing on the day following the last day of the Shipping Window.

**"Grade"** means, in relation to Bulk Wheat, the grade of the Bulk Wheat actually delivered to the Port Terminal Facility.

**"Gross Negligence"** means, if a duty of care is owed, an act or omission done with reckless disregard, whether consciously or not, for the consequences of the act or omission.

**"GST"** means any tax imposed by or through the GST Legislation on a supply (without regard to any input tax credit).

**"GST Legislation"** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any related tax imposition act (whether imposing tax as a duty of customs excise or otherwise) and includes any legislation which is enacted to validate recapture or recoup the tax imposed by any of such acts.

**"Harvest Shipping Period"** means 1 November to 15 January as modified from CBH from time to time prior to 31 August for the coming Year.

**"Heavy Metal Contamination"** means any heavy metal that if it comes into contact with or is contained in Bulk Wheat would present, in CBH's reasonable opinion, a health risk to the environment or humans, irrespective of whether that heavy metal is airborne, solid or contained in solution.

**"HMMS"** is CBH's Harvest Mass Management Scheme.

**"Indirect or Consequential Loss"** means indirect, consequential or remote loss and any loss in the nature of compensation for loss of production, loss of profit, loss of opportunity, loss of markets, loss of use of money, goods or other property or loss of goodwill or business reputation including any losses that the Customer may suffer in the event that the ability to resell the Bulk Wheat is adversely affected.

**"Insolvency Event"** means where the Customer:

- (i) does not pay its debts as and when they fall due;
- (ii) commits an act of bankruptcy;
- (iii) enters into a composition or arrangement with its creditors or calls a meeting of creditors with the view to entering into a composition or arrangement;
- (iv) has execution levied against it by creditors, debenture holders or trustees under a floating charge;
- (v) takes or has taken or instituted against it any actions or proceedings, whether voluntary or compulsory, which have the object of or which may result in the winding up or bankruptcy of the Customer (except, in the case of a corporation, for the purposes of a solvent reconstruction);
- (vi) has a winding up order made against it or (except for the purposes of a solvent reconstruction) passes a resolution for winding up; or
- (vii) is a party to the appointment of or has an administrator, official manager, receiver, receiver/manager, provisional liquidator or liquidator appointed to the whole or part of its property or undertaking.

**"Laycan"** means the earliest date on which Laytime can commence and the latest date, after which the charterer can opt to cancel the Charter Party.

**"Laytime"** means the amount of time that a charterer has to load a vessel before the vessel is deemed to be on Demurrage.

**"Level 1 Contaminant"** means a contaminant identified as Level 1 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion cannot be removed and constitute a significant food safety or quality risk.

**"Level 2 Contaminant"** means a contaminant identified as Level 2 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion pose a food safety or processing hazard and can have a significant impact on the integrity of the supply chain.

**"Level 3 Contaminant"** means a contaminant identified as Level 3 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion present a food safety or processing risk and can be managed on-farm.

**"LoadNet® for Marketers™"** means CBH's grain management interface for Acquirers which is available to registered users (including the Customer) at [www.cbh.com.au](http://www.cbh.com.au)

**"Loss or Damage"** means all losses, costs or damages (including legal costs on a solicitor client basis) arising in connection with any personal injury, death, damage to property or economic loss.

**"Lost Capacity"** has the meaning given in the Port Terminal Rules.

**"Lot"** means the Capacity within a Shipping Window at a Port that is offered to Customers at Auction.

**"Material Breach"** means a breach which:

- (a) in the reasonable opinion of CBH, is not capable of being remedied; or
- (b) the Customer has failed to remedy after being given at least 14 days written notice by CBH to do so.

**"Microbial Contamination"** means contamination by pathogenic (disease-causing) micro-organisms including *E. coli*, *Cryptosporidium*, *Giardia*, and *Salmonella*.

**"NCV"** means no commercial value.

**"Natural Toxicant Contamination"** means contamination by toxins that are produced by, or naturally occur in, plants or micro-organisms (including, without limitation, mycotoxins produced by fungi, and poisonous low molecular weight substances of plant and bacterial origin).

**"Nominated Tonnage"** means the tonnage of Bulk Wheat to be shipped in a particular Nominated Vessel and notified to CBH in accordance with this agreement and the Port Terminal Rules.

**"Nominated Vessel"** means a vessel nominated by the Customer and notified to CBH in accordance with the terms of this agreement and the Port Terminal Rules.

**"Notice of Readiness"** means a valid notice of readiness served by the owner of the Nominated Vessel pursuant to the Vessel Charter party stating, amongst other things, that the Nominated Vessel is ready to load in all respects (including physically and legally).

**"Outturn"** means to cause Bulk Wheat to physically leave CBH's custody at a Port Terminal Facility and is deemed to occur when the Bulk Wheat exits the delivery spout into a Bulk Wheat shipping vessel at which point physical possession of the Bulk Wheat passes from CBH to the Customer or a third party authorised by the Customer

**"Pesticide Residue Contamination"** means contamination by any substance in Bulk Wheat resulting from the use of a pesticide. The concept of pesticide residue includes any derivatives of a pesticide, such as conversion products, metabolites, reaction products, and impurities considered to be of potential toxicological significance.

**"Port"** means the ports of:

- (a) Albany;
- (b) Esperance;
- (c) Geraldton; and
- (d) Kwinana.

**"Port Grain Holdings"** means the information about quantities of the Customer's grain held at a Port by CBH and as required to be published in accordance with the Undertaking or Port Terminal Rules.

**"Port Outturning Services"** means the services provided by CBH pursuant to clause 7.

**"Port Terminal Facility"** means a ship loader and associated infrastructure that is:

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

including:

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

that is:

- (h) at the port; and
- (i) associated with the ship loader; and
- (j) capable of dealing with wheat in bulk.

**"Port Terminal Rules"** means the port terminal rules published and amended by CBH from time to time in accordance with the Undertaking.

**"Port Terminal Service"** means the services provided by means of the Port Terminal Facilities which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facilities, including:

- (a) unloading and receival by CBH of a Customer's Bulk Wheat at the Port Terminal Facilities, for the purpose of loading onto a vessel scheduled to arrive at the Port Terminal Facility;
- (b) sampling by CBH of a Customer's Bulk Wheat received and out-turned, to check for visible evidence of the presence of chemical residue, insect activity and live insects or other contaminants, and providing the Customer with a composite shipping sample of the Customer's Bulk Wheat;
- (c) weighing by CBH of a Customer's Bulk Wheat received and out-turned, using CBH's weighing facilities, and providing the Customer with a weighbridge ticket or other statement certifying the weight and quantity of Bulk Wheat delivered;
- (d) storage by CBH of a Customer's Bulk Wheat at the Port Terminal Facility for the purpose of export accumulation in a restricted time period and loading onto vessels at the Port Terminal Facility; and
- (e) fumigation in response to evidence of insect infestation;
- (f) accumulating and assembling Bulk Wheat for the purpose of loading cargo onto a vessel scheduled to arrive at the Port Terminal Facility;
- (g) administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
- (h) access to inspectors from the Australian Quarantine and Inspection Service, for inspection of the Customer's Bulk Wheat received and held at the Port Terminal Facilities; and
- (i) out-turning by CBH of a Customer's Bulk Wheat received at the Port Terminal Facility, and loading onto the Customer's nominated vessel.

**"Pre-Delivery Sample Analysis Form"** means the form available from CBH from time to time.



**"Related Bodies Corporate"** has the meaning given to that term in the *Corporations Act 2001* (Cth).

**"Relevant Surveys"** means all relevant surveys required to be conducted on the Nominated Vessel before it can be loaded with the Bulk Wheat, including, but not limited to a structural survey of the Nominated Vessel and surveys conducted by AQIS.

**"Season"** means the period between 1 October of one year and the next 30 September.

**"Services"** means all of the services provided by CBH to the Customer pursuant to this Agreement.

**"Shipping Window"** means a half month period of between 14 and 16 days within which a Customer may nominate a vessel to arrive at a Port Terminal Facility for loading of a cargo for which the Customer has been allocated Capacity under the Port Terminal Rules.

**"Shrinkage"** means the allowance for loss in weight of Bulk Wheat that occurs during the storage and handling and transport process.

**"Stack"** means a stored quantity of Bulk Wheat delivered to the Port Terminal Facility for export accumulation and loading to a ship.

**"Storage"** means the silo, bin, Stack or other storage area at a Port Terminal Facility in which Bulk Wheat is accumulated for loading to an export Bulk Wheat shipping vessel.

**"Taxable Supply"** has the meaning given in the GST Legislation.

**"Tax Invoice"** has the meaning given in the GST Legislation.

**"Term"** means the term of this Agreement which commences on the Commencement Date and ends on the End Date, unless terminated earlier in accordance with the terms of this Agreement.

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

**"Undertaking"** means the undertaking provided by CBH to the ACCC under the provisions of the WEMA and Part IIIA of the TPA dated September 2009 and available on the ACCC website

**"Upfront Marketer Fee"** means the fee with that description prescribed in Schedule 1.

**"Varietal Purity"** refers to the consistency in the genetic make-up of seed Bulk Wheat, and is determined by measuring the percentage of seed in the sample of the declared variety.

**"Vessel Nomination"** means a nomination of a vessel to Outturn Bulk Wheat to the Nominated Tonnage onto a Nominated Vessel within a Shipping Window held by the Customer under this Agreement on the relevant Vessel Nomination Form or online via LoadNet® for Marketers™.

**"Vessel Nomination Form"** means the form available from CBH or online via LoadNet® for Marketers™ on which all Vessel Nominations must be made.

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

**"Wilful Misconduct"** means an intentional and conscious disregard of any material provision of this Agreement, but does not include any error of judgment or mistake made by the person alleged to be culpable or by any director, employee, agent or contractor of that person in the exercise, in good faith, of any function, power, authority or discretion conferred on that person under this Agreement or under any law.

**"Year"** means 1 November to 31 October.

### 3 INTERPRETATION

In this Agreement:

#### 3.1 Interpretation

- (a) headings, sub-headings, captions and service descriptions do not affect the construction or interpretation of this Agreement;

- (b) a word in the singular includes the plural of that word and vice versa;
- (c) a word of any gender includes the corresponding words of each other gender and a reference to one sex includes a reference to all sexes;
- (d) "including" means "including, but not limited to";
- (e) where any word or phrase is given a defined meaning in this Agreement, any part of speech or other grammatical form of that word or phrase has a corresponding meaning; and
- (f) a reference in this Agreement to a thing (including an amount) is a reference to the whole and each part of it (but nothing in this clause 3.1(f) implies that performance of part of an obligation is the performance of the whole) and a reference to a group of persons is a reference to all of them collectively, to any 2 or more of them collectively and to each of them individually;

### 3.2 Documents and Parts of Documents

- (a) a reference to any law, document, instrument or agreement, including this Agreement, includes a reference to that law, document, instrument or agreement as amended, novated, supplemented, varied or replaced from time to time; and
- (b) a reference to a clause or annexure or attachment is (unless the context requires otherwise) a reference to a clause or annexure or attachment to this Agreement;

### 3.3 Persons and Corporations

- (a) a reference to a person includes a body politic, corporation, partnership, limited partnership, association or joint venture (whether incorporated or not) whatsoever and wheresoever formed and howsoever described and also a government, governmental or semi-governmental agency or local authority; and
- (b) a reference to a person includes that person's successors and permitted assigns and, in the case of a natural person, that person's legal personal representatives;

### 3.4 Time, Money and Measurement

- (a) a reference to an amount of money is a reference to the amount in the lawful currency of Australia;
- (b) a reference to time is a reference to the local time in Perth, Western Australia (unless otherwise stated);
- (c) where any matter or thing is required to be attended to or done on a day which is not a Business Day, it will be attended to or done on the first day thereafter which is a Business Day; and
- (d) measurements of physical quantities are in Australian legal units of measurement within the meaning of the *National Measurement Act 1960* (Cth).

### 3.5 Discretions and Approvals

- (a) Whenever the Customer is required to form an opinion, give approval, exercise a discretion or perform any act under this Agreement, it must be done reasonably in the circumstances, and based on reasonable grounds, and not capriciously, or arbitrarily refused or unduly delayed.
- (b) In making any decision pursuant to this Agreement CBH shall have regard to the efficient running of the CBH Port Terminal Facility and balancing of the interests of all Customers of the Port Terminal Facility.
- (c) CBH's refusal to accept a request for Service will not be a breach of the Agreement for making a decision where the refusal is made in compliance with the provisions of the Port Terminal Rules.

## 4 PORT TERMINAL RULES

CBH and the Customer:

- (a) agree to comply with the Port Terminal Rules; and
- (b) acknowledge that in case of any inconsistency between the terms of this Agreement and the Port Terminal Rules, the Port Terminal Rules shall apply.

## 5 BULK WHEAT RECEIVAL SERVICES

**Service Description:** This service provides Bulk Wheat receipt, storage assessment, weight measurement and handling at the point of receipt into a Port Terminal Facility.

### 5.1 Service Availability

- (a) Bulk Wheat Receipt Services are provided by CBH under this Agreement for the purpose of export accumulation only and will not be available more than 21 days before the ETA.
- (b) CBH agrees to make Bulk Wheat Receipt Services available at the Port Terminal Facilities in accordance with the terms and conditions of this Agreement and the Port Terminal Rules.
- (c) Prior to requesting Bulk Wheat Receipt Services, the Customer must acquire Capacity.
- (d) If the Customer requires Bulk Wheat Receipt Services, the Customer must submit a Vessel Nomination Form to CBH no later than 30 days prior to the ETA.
- (e) At least 22 days prior to the ETA, the Customer must submit a valid Vessel Nomination in accordance with the Port Terminal Rules.

### 5.2 Before Delivery

- (a) CBH requires a representative sample of the Bulk Wheat intended for delivery to minimise the risk of insect or chemical residue contaminated Bulk Wheat being received into the Port Terminal Facility.
- (b) The Customer must complete and provide CBH with a Pre-Delivery Sample Analysis Form, paying particular attention to completing the section marked '*Treatment*'.
- (c) The Customer must provide a one kilogram representative sample from each source of Bulk Wheat that the Customer intends to deliver to the Port Terminal Facility for placement into Storage. If the grain is from more than one storage type, the Storage identification must be clearly marked on each sample.
- (d) The Pre-Delivery Sample Analysis Form with the sample/s for chemical and insect analysis must be couriered direct to: "Australian Grains Centre, 700 Abernethy Road, Forrestfield WA 6058"
- (e) CBH will use all reasonable endeavours to provide the Customer with the sample results within 2 Business Days of the sample being received.
- (f) Each acceptable sample analysis will permit the Customer to deliver the Bulk Wheat to the Port Terminal Facility for up to 28 days from the date when the results are reported to the Customer. If the Customer wishes to deliver Bulk Wheat to the Port Terminal Facility after that 28 day period has expired, then the Customer must comply with the procedures in this clause 5.2 again.
- (g) If the sample contains any manageable Contaminants, the Bulk Wheat must be treated before a new sample is presented for testing. The costs of assessing the new sample will be paid by the Customer ("**Sample Reassessment Fee**").
- (h) The Port Terminal Rules set out the circumstances in which the requirement to provide a pre-delivery sample and conduct chemical residue testing will be waived.

### 5.3 During Delivery

- (a) Upon arrival of each truck load containing the Customer's Bulk Wheat, CBH staff will assess the VRL of the truck delivering loads to the Port Terminal Facility. Each truck is to have a valid permit to meet the presented combination and the gross weight tendered. Unloading of non-compliant vehicles will be refused and those vehicles will be required to leave the Port Terminal Facility.
- (b) The grade, variety and other characteristics of the Bulk Wheat delivered are to be declared in writing by the Customer by no later than the time of delivery and CBH takes no responsibility for the accuracy, completeness or veracity of the information relating to the Bulk Wheat declared by the Customer. If the load is found to be contaminated with Level 1 or Level 2 Contaminants or showing signs of insect infestation or activity the load will be rejected. CBH shall advise the Customer or nominated representative of the rejection as soon as practicable and in any event before the end of the day following the day of delivery.
- (c) If a load is found to be contaminated with a Level 1 Contaminant, the Customer will not be permitted to deliver that load or any additional load to CBH Port Terminal Facilities until the Customer has provided CBH with evidence in the form of independent expert verification that there is no further risk of Contamination. Alternatively, the Customer may request CBH to arrange at the Customer's cost for independent expert verification that there is no further risk of Contamination.
- (d) Independent expert verification may involve identifying the source site of contamination and the taking of steps by the Customer to ensure that the source site of contamination is not the source site for any future deliveries or that the Customer takes remedial action to ensure that the contaminant has been effectively removed from the source site of contamination.
- (e) If a load is found to be contaminated with a Level 2 Contaminant the Customer will not be permitted to deliver that load or any additional load to CBH Port Terminal Facilities until the Customer has provided CBH with evidence that the Customer has taken remedial action to ensure that the contaminant has been effectively removed.
- (f) Following completion of the steps outlined in clauses 5.3 (c) and (d) above, the Customer must produce a new representative sample from the source site of the contamination and complete the processes specified under clause 5.2 confirming the absence of contamination, prior to recommencing delivery.
- (g) Remedial fumigation following delivery of contaminated grain shall be by means of cylinderised phosphine and the Customer shall pay the Remedial Fumigation charges prescribed in Schedule 1.

#### 5.4 Receival Procedures

Where CBH receives a load of Bulk Wheat at the Port Terminal Facility (whether or not delivered by the Customer), CBH will at the time CBH receives the Bulk Wheat:

- (a) record the running Grade of the Bulk Wheat delivered to the Port Terminal Facility declared by the Customer;
- (b) determine the Storage into which the Bulk Wheat will be placed;
- (c) weigh the Bulk Wheat delivered;
- (d) store the Bulk Wheat in accordance with the Bulk Wheat Storage Services and any specific additional storage and handling requirements as agreed to in writing between the Customer and CBH;
- (e) furnish to the Customer a weighbridge ticket or a statement that specifies Bulk Wheat type, running Grade, weight and any other relevant details or specifications; and
- (f) receive from the person tendering a load of Bulk Wheat to CBH at the Port Terminal Facility, and the Customer shall deliver to CBH, a written statement declaring:
  - (i) the date of delivery;

- (ii) the place of delivery;
- (iii) the approximate quantity tendered; and
- (iv) the type and variety of Bulk Wheat.

## 5.5 Warranties

The Customer represents and warrants that:

- (a) it owns any Bulk Wheat tendered for delivery by or on behalf of it;
- (b) the full particulars of the variety of the Bulk Wheat disclosed on any form are true and correct;
- (c) it has not manipulated or loaded any delivery in any way to prevent the making of an accurate assessment by CBH of the quality of the Bulk Wheat using CBH's standard sampling procedures;
- (d) Bulk Wheat being tendered for delivery will not:
  - (i) include any Contaminant; or
  - (ii) be in breach of the Bulk Handling Act or the Bulk Handling Regulations;
- (e) unless it has advised CBH in writing prior to delivery, all of the Bulk Wheat was grown between the May and September immediately prior to the current Season;
- (f) all of the Bulk Wheat in a delivery has been or is only contained in equipment, bags, farm implements, farm storages and Bulk Wheat motor bodies that have:
  - (i) not contained any Bulk Wheat product prior to the containing Bulk Wheat of this current Season and are free from insects and vermin; or
  - (ii) previously contained a Bulk Wheat product, but have been freed of all such Bulk Wheat product and is free from insects and vermin;
- (g) any vehicle that has previously transported non-Bulk Wheat or contaminated Bulk Wheat products:
  - (i) is clean, dry and free of any remaining materials and odours from previous loads;
  - (ii) has been washed under high pressure prior to delivering any Bulk Wheat; and
  - (iii) has the details of previous loads disclosed on the relevant form;
- (h) if any of the Bulk Wheat has been treated with substances for the control of insects, details of the substances and the application of those substances has been provided in writing to CBH on the relevant form and the use of any other chemical in the process of planting, growing and storage of Bulk Wheat has been in accordance with the levels prescribed in any relevant legislation and also in accordance with the usage instructions;
- (i) none of the Bulk Wheat in a delivery is a Genetically Modified Organism (unless declared in writing to, and approved in writing by, CBH before the delivery enters the Port Terminal Facility); and
- (j) any information it provides to CBH is true and correct and not misleading or deceptive or likely to mislead or deceive.

## 5.6 HMMS and road vehicle registration

- (a) Subclauses 5.6(b) to 5.6(e) inclusive apply in relation to any deliveries from a farm by the Customer or its agent to the Port Terminal Facility during the Harvest Shipping Period or such other period as may be published from time to time by Main Roads WA. All road vehicles delivering Bulk Wheat to a Port must be registered with CBH. Outside of the

Harvest Shipping Period (or such other period published by Main Roads WA) CBH is not obliged to receive Bulk Wheat from road vehicles in excess of their relevant mass limits.

- (b) The HMMS is incorporated as part of the terms of this Agreement in respect of any deliveries of Bulk Wheat to the Port Terminal Facility by road vehicles that may occur.
- (c) If, as part of CBH's HMMS, the Customer has an option to give CBH a Forfeiture Approval Authority to forfeit Bulk Wheat in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS), CBH is entitled to deduct, in accordance with the HMMS and the Forfeiture Approval Authority, the relevant tonnage from the delivered Bulk Wheat when calculating the Customer's Bulk Wheat Entitlement in accordance with clause 6.3. Title to any Bulk Wheat deducted under this clause vests in CBH and CBH may donate the Bulk Wheat or the proceeds from its sale to a charity or local government at CBH's discretion.
- (d) A Forfeiture Approval Authority:
  - (i) is valid and binding on the Customer until CBH acknowledges receipt of an instruction to vary it; and
  - (ii) may be varied on an individual delivery basis by signing a contrary instruction on the PDF.
- (e) Notwithstanding anything in the HMMS, the Customer agrees:
  - (i) that it is solely responsible for ensuring that it or its carrier/agent comply with all relevant mass limits prescribed by legislation or regulation for the vehicle used;
  - (ii) it will take all necessary steps (including unloading of any mass in excess of those prescribed limits) to ensure compliance; and
  - (iii) to indemnify and keep CBH indemnified against all expenses, Loss or Damage incurred by CBH and all actions, claims and demands which may be made against CBH, that arise in relation to the Customer's non-compliance with any maximum mass limits prescribed by legislation or regulation for the vehicles used by it or its carrier/agent to deliver Bulk Wheat to a CBH Port Terminal Facility.

## 6 BULK WHEAT STORAGE SERVICES

**Service Description:** This service involves storage of Bulk Wheat at Port Terminal Facilities.

### 6.1 Service Availability

- (a) Bulk Wheat Storage Services are provided by CBH under this Agreement for the purpose of export accumulation only.
- (b) The Bulk Wheat Storage Services are provided at a Port Terminal Facility if the relevant Storage is available.

### 6.2 Outturn Specifications

Subject to clauses 6.5 and 6.6, the loads of Bulk Wheat delivered to CBH will be Outturned by CBH upon request from the Customer, subject to the terms of this Agreement.

### 6.3 Bulk Wheat Entitlement

- (a) CBH will maintain a register of the Customer's entitlement to Bulk Wheat stored at Port Terminal Facilities (the "**Bulk Wheat Entitlement**"). A certificate by an officer of CBH as to the Bulk Wheat Entitlement shall be prima facie evidence of the loads of Bulk Wheat that have been delivered to CBH and which the Customer is entitled to have Outturned from the CBH Port Terminal Facility, subject always to the terms and conditions of this Agreement.
- (b) Upon request and subject always to clause 6.3(d), CBH will provide the Customer with information regarding the Bulk Wheat held at the Port Terminal Facility and delivered to the Port Terminal Facility by the Customer.

- (c) The Bulk Wheat Entitlement of the Customer is calculated at any particular point in time by aggregating the weight of the loads of Bulk Wheat received by CBH at the Port Terminal Facility on behalf of the Customer or transferred to the Customer:
  - (i) less the relevant Shrinkage factor specified in clause 6.5,
  - (ii) less the relevant Bulk Wheat Dust Deduction in clause 6.6 where the Bulk Wheat is Outturned via the Port Terminal Facility into the Nominated Vessel;
  - (iii) less the weight of any Bulk Wheat that is damaged or destroyed as a result of a riot, industrial dispute, civil commotion, war, act of God or any unforeseen cause not attributable to the negligence of CBH;
  - (iv) less the weight of any NCV Bulk Wheat or damaged Bulk Wheat in respect of which an insurance claim has been made and paid to the Customer in accordance with clauses 13.1 and 14.1;
  - (v) less the weight of any Outturned Bulk Wheat.
- (d) CBH does not warrant the correctness or completeness of data that has been supplied by the Customer provided in relation to loads of Bulk Wheat.

#### 6.4 Bulk Wheat Fumigation

- (a) CBH will not fumigate Bulk Wheat delivered to the Port Terminal Facility unless insect activity is detected by either or both CBH and AQIS.
- (b) Fumigation services as set out in **Schedule 1** will be carried out by CBH on all Bulk Wheat where required in its Port Terminal Facility to protect the Bulk Wheat. The application of remedial fumigation services as set out in clause 5.3(g) will limit availability of the Bulk Wheat in accordance with standard CBH Bulk Wheat protection practices. CBH will consult with the Customer as to the type of fumigant to be used. The Customer must nominate a representative who is available on a 24/7 basis to confirm available fumigation options. If CBH using reasonable endeavours is unable to obtain confirmation from the representative or agreement with the representative as to an alternative fumigant, CBH will determine the type of fumigant to be used. The Customer will be responsible for all charges for fumigation services incurred pursuant to this clause 6.4(b) at the rates prescribed in **Schedule 1** unless an alternative fumigant and rate is agreed.
- (c) Where the Bulk Wheat delivered by a Customer to a Port Terminal Facility has been fumigated prior to delivery, the Customer shall provide a Fumigation Statement detailing any Bulk Wheat treatment information following a written request from CBH.
- (d) Where Bulk Wheat has been fumigated at the Port Terminal Facility by CBH:
  - (i) CBH shall have no liability for any delays in loading the Customer's Vessel as a result of the unavailability of the Bulk Wheat under fumigation;
  - (ii) CBH shall provide a Fumigation Statement detailing any Bulk Wheat treatment information within 3 Business Days of receiving a written request from the Customer.

#### 6.5 Shrinkage

Notwithstanding any other clause in this Agreement, CBH will apply a Shrinkage factor to all Bulk Wheat delivered by the Customer to the Port Terminal Facility to determine the quantity of Bulk Wheat that CBH is obliged to Outturn on behalf of the Customer.

The Shrinkage factor for Bulk Wheat is 0.50%.

#### 6.6 Bulk Wheat Dust

Dust, chaff or fines removed at any stage of the handling process into a CBH dust extraction system is considered be NCV dust and CBH is entitled to dispose of NCV dust as it sees fit. CBH will apply a Bulk Wheat Dust Deduction of 0.25% from a Customer's Bulk Wheat Entitlement when the relevant Bulk Wheat type is Outturned from a Port Terminal Facility into a vessel.

## 6.7 Additional Bulk Wheat Storage Charges

CBH will invoice the Customer for Additional Storage Charges at the rates specified in Schedule 1 if:

- (a) there is any residual Bulk Wheat Entitlement following the loading of the Customer's vessel; or
- (b) the relevant Shipping Window has passed and the Customer's Nominated Vessel has not commenced loading as a result of:
  - (i) the failure of the Customer to make a Vessel Nomination which has an ETA in the Shipping Window;
  - (ii) delays in the date and time of Arrival of the Customer's Nominated Vessel or delays in the passing of any Relevant Surveys;
  - (iii) the Customer failing to meet the Accumulation Plan agreed with CBH; or
  - (iv) quality issues with the Customer's Bulk Wheat Entitlement, namely:
    - A) the presence of insect activity and live insects in the Bulk Wheat;
    - B) Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination;
    - C) the presence, at any level or concentration, of Genetically Modified Organisms; or
    - D) any other quality issue that would result in the Bulk Wheat not meeting an export specification requested by the Customer which does not comply with the Customer's Bulk Wheat Entitlement.

## 6.8 Title to surplus Bulk Wheat

Title in any Bulk Wheat remaining in the CBH system which is surplus to the Customer's Bulk Wheat Entitlement shall transfer to CBH and CBH shall be entitled to sell or dispose of any surplus Bulk Wheat as it sees fit and retain any proceeds.

# 7 PORT OUTTURNING SERVICES

**Service Description:** This service provides bulk Outturning of Bulk Wheat at a Port Terminal Facility into a ship's hold.

## 7.1 Service Availability

- (a) Port Outturning Services are provided by CBH under this Agreement for the purpose of export accumulation only.
- (b) Port Outturning Services are offered at all Port Terminal Facilities in accordance with the terms and conditions contained in this Agreement.
- (c) Port Outturning Service charges do not include any rail or road transportation costs in moving Bulk Wheat to the relevant Port Terminal Facility.

## 7.2 Vessel Nominations

The Customer must request any Port Outturning Services required either online through LoadNet® for Marketers™, or on a Vessel Nomination Form.

## 7.3 Vessel Nomination Form

On receipt of a Vessel Nomination, CBH will determine its ability to meet the request and advise the



Customer in accordance with the Port Terminal Rules if CBH has:

- (a) accepted the Vessel Nomination; or
- (b) rejected the Vessel Nomination.

#### 7.4 Operational Decision Making

In making any decision to accept or reject the Vessel Nomination or any amendment to a Vessel Nomination, CBH shall make its determination in accordance with the terms of the Undertaking having regard to the following:

- (a) that in making decisions relating to the provision of access to the Port Terminal Services, CBH must balance conflicts of interests of Customers of the Port Terminal Facilities;
- (b) the application by CBH of objective commercial criteria and practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making;
- (c) giving priority to vessels based on the lead time given between nomination and vessel ETA, and the likely availability of sufficient Bulk Wheat Entitlement at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a Nominated Vessel's Nominated Tonnage;
- (d) the objectives of:
  - (i) minimising Demurrage at the Port over a given period; and
  - (ii) maximising throughput of Bulk Wheat at the Port over a given period; and
- (e) changes in relevant facts and circumstances including:
  - (i) insufficient Bulk Wheat Entitlement at the Port accumulated by the Customer necessary to make a Customer's Nominated Vessel's Nominated Tonnage;
  - (ii) variations in vessel arrival times;
  - (iii) failure of vessels to pass surveys;
  - (iv) stability and ship worthiness inspections;
  - (v) vessel congestion;
  - (vi) variation in cargo requirements;
  - (vii) lack of performance of freight providers;
  - (viii) equipment failure;
  - (ix) maintenance outages;
  - (x) contamination of accumulated cargoes or contamination of loads; or
  - (xi) a Material Breach;
  - (xii) a Customer not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another Customer is able to do so;
  - (xiii) the Bulk Wheat is unavailable as a result of fumigation activities pursuant to clause 6.4;
  - (xiv) the Vessel Nomination contains inadequate or inaccurate information; or
  - (xv) an event of Force Majeure prevents the scheduling of Port Outturning Services.

#### 7.5 Acceptance of Vessel Nomination

Upon acceptance of an Vessel Nomination, CBH shall Outturn the Bulk Wheat in accordance with the Vessel Nomination Form and all other provisions of this Agreement.

7.6 Outturn Standard

CBH is obliged to Outturn the Bulk Wheat delivered to the Port Terminal Facility by the Customer and held in Storage.

7.7 Weigh

CBH shall weigh all Bulk Wheat Outturned using its certified batch weighers. In the absence of manifest error or fraud the CBH weight measurement will be final.

7.8 AQIS Sampling

Bulk Wheat will be made available for inspection by AQIS inspectors at the Customer's cost prior to Outturning the Bulk Wheat onto the Nominated Vessel.

7.9 Auction Premium Rebate

Within 30 days of the end of the Term, CBH will pay the Auction Premium Rebate (if any) to the Customer.

7.10 Right to Invoice Prior to Outturning

If Bulk Wheat is scheduled to be Outturned into a ship's hold from a Port Terminal Facility, CBH reserves the right to invoice the Customer and receive payment for the Port Outturning Service charges prescribed in **Schedule 1** prior to the Bulk Wheat being Outturned onto a ship. Where there are variations in respect of the amount of Bulk Wheat actually Outturned and the costs incurred in Outturning, CBH and the Customer agree that:

- (a) within 30 days of the Bulk Wheat being Outturned onto a ship, CBH will refund any amounts paid by the Customer under this clause in respect of Port Outturning Service charges invoiced by CBH relating to Bulk Wheat that was not Outturned onto a ship; and
- (b) CBH is entitled to invoice the Customer for any additional charges prescribed in **Schedule 1** for Bulk Wheat Outturned by CBH as a direct result of the actions of the Customer or the Customer's agent.

7.11 Bulk Wheat Export Licence

The Customer warrants that the appropriate Bulk Wheat export licence or accreditation (if applicable) continues to be held prior to requesting Port Outturning Services and that the request is within the terms of the licence. CBH reserves the right to request details of the Bulk Wheat export licence or accreditation, at any time, and the Customer agrees to provide a copy of the licence to CBH within twenty-four (24) hours of any such request.

7.12 Misrepresentation

- (a) The Customer warrants that the Bulk Wheat and its Grade will not be misrepresented to third parties or incorrectly recorded on commercial or shipping documents.
- (b) The Customer indemnifies CBH against all Loss or Damage incurred in any dispute over Bulk Wheat quality arising from such misrepresentation or incorrect recording of the Grade on commercial or shipping documents.

7.13 Cleanliness

- (a) The Customer is responsible for ensuring that all vessels arrive at a Port Terminal Facility in a clean, empty and well maintained state free from any Contaminants or residue.
- (b) CBH is not obliged to inspect any vessel for cleanliness but if it does inspect then CBH, acting reasonably at all times, is entitled to reject the vessel as unfit for the transportation of Bulk Wheat and to refuse to load the vessel.
- (c) CBH is not liable for any Loss or Damage caused as a result of a rejection of the vessel.

- (d) The Customer agrees to pay CBH for any costs incurred by CBH as a result of the rejection of a vessel by CBH or AQIS.
- (e) Vessels are not permitted to be cleaned at any Port Terminal Facility without CBH's consent. If CBH consents to cleaning of the vessel, and if a vessel fails inspection, CBH can instruct a vessel to be removed from the berth if it is preventing another vessel from loading at the same berth.

#### 7.14 Stevedoring

If the Customer requests, CBH is willing to arrange stevedoring services for the Customer's vessels when they are loaded at Port Terminal Facilities. Upon request CBH will provide the Customer with the necessary terms and conditions (including charges) for CBH's provision of stevedoring services.

#### 7.15 Demurrage and Dispatch

The parties may enter into Demurrage and Dispatch arrangements by mutual agreement at the time CBH is notified of the Vessel Nomination in accordance with the Port Terminal Rules, subject to the Customer complying with the Port Terminal Rules.

#### 7.16 Non-Shipment of Bulk Wheat

If Bulk Wheat is not shipped from a Port Terminal Facility as detailed in a Vessel Nomination other than as a result of circumstances directly within the control of CBH, then:

- (a) CBH will consult with the Customer about the re-positioning within, or removal from the Port Terminal Facility of the Bulk Wheat; and
- (b) after 14 days have passed since the ETA contained in the Vessel Nomination, CBH may remove or reposition Bulk Wheat at its discretion and the Customer shall pay all reasonable costs incurred by CBH.

### 8 ADDITIONAL INFORMATION AND SERVICES

**Service Description:** CBH may also provide additional information or services over and above the standard information and services that CBH has agreed to provide under this Agreement.

- (a) CBH will provide the Customer with an estimate of its costs and any additional terms and conditions required in order to provide additional information or services. Costs may either be a lump sum or in accordance with normal hourly rates.
- (b) The Customer agrees to pay CBH's costs in providing any additional information or services requested by the Customer.
- (c) The decision of CBH whether to provide any additional information or services requested by the Customer will be at CBH's absolute discretion unless it is required to provide such additional information by any law.

### 9 PAYMENT

#### 9.1 Fees and Charges

- (a) In consideration for any Services provided by CBH to the Customer under this Agreement, the Customer agrees to pay CBH for all Services rendered in accordance with the charges set out in Schedule 1.
- (b) In particular, and without limiting the charges that may be levied under this Agreement the Customer agrees to pay:
  - (i) The Upfront Marketer Fee set out in Schedule 1 within 5 Business Days of the date of the CBH invoice for each tonne of Capacity that the Customer acquires in the:
    - (A) Harvest Shipping Period; and
    - (B) Annual Shipping Period;

- (ii) the relevant Auction Premium within 5 Business Days of the date of the CBH invoice for each tonne of Capacity acquired at an Auction;
- (iii) the Export Fee in accordance with the provisions of clauses 7.10, 9.3 and 9.6 for:
  - (A) each tonne loaded onto a Nominated Vessel; or
  - (B) each tonne of Lost Capacity;
- (iv) the Additional Storage Charges in accordance with the provisions of clause 6.7 for each tonne of Capacity to which the Additional Storage Charges relate; and
- (v) the Capacity Transfer Fee in relation to each 1000 tonnes of Capacity transferred in accordance with the Port Terminal Rules.
- (c) The charges set out in Schedule 1 are a realistic assessment of the loss and damage that CBH will suffer as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules.
- (d) CBH is entitled to retain the fees paid or to levy the charges payable as compensation by way of liquidated damages as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules.

## 9.2 Application for credit terms

- (a) If the Customer does not have an existing credit arrangement with CBH the Customer must provide CBH with a completed Credit Application Form at the same time as it executes this Agreement.
- (b) The Customer agrees that any credit provided by CBH is for business or investment purposes only and not for personal, domestic or household purposes.

## 9.3 Credit terms

- (a) If CBH agrees to provide credit terms to the Customer, then CBH reserves the right, in its absolute discretion, to:
  - (i) place or vary a limit on the amount allowed to be outstanding by the Customer at any time;
  - (ii) vary the credit terms by providing not less than 60 days' written notice of the new or varied credit terms;
  - (iii) refuse to extend further credit terms to the Customer; or
  - (iv) withdraw the Customer's credit terms.
- (b) It is the Customer's responsibility to request a credit limit increase if it is going to exceed the approved credit limit. Any refusal, withdrawal or exceeding of credit terms will result in the Services being provided on a prepaid basis.
- (c) If CBH has agreed to provide credit terms prior to the Commencement Date and has not withdrawn them prior to this Agreement then those credit terms will be deemed to continue on the terms and conditions set out in this clause 9.

## 9.4 Credit information

The Customer authorises CBH to provide information contained in the Credit Application Form and acquired as a result of the Customer's performance of this Agreement to any bank, credit reporting agency, debt collection agency, trade reference and any other person, business or company.

## 9.5 Invoicing

- (a) CBH will invoice the Customer for all charges payable in providing Services under this Agreement.

- (b) CBH will endeavour to issue invoices pertaining to bulk vessel shipments within 14 days of the vessel departure.
- (c) If GST is payable by CBH in respect of any Taxable Supply to the Customer under this Agreement, the Customer must pay any such GST (in addition to any other amounts payable under this Agreement).
- (d) CBH will provide the Customer with a tax invoice that complies with the GST Legislation.
- (e) All charges in this Agreement are expressed exclusive of GST.

#### 9.6 Payment terms

- (a) If credit terms are made available by CBH at its discretion, then the Customer must pay the amount set out in any invoice provided by CBH within 14 days of the date of the invoice.
- (b) If:
  - (i) credit terms are not made available to the Customer;
  - (ii) the Customer fails to make payment of an invoice in accordance with clause 9.6(a); or
  - (iii) CBH withdraws the provision of the credit terms to the Customer,
 then all existing invoices shall become immediately due and payable and the Customer must tender to CBH the charges for any Service prior to the performance of that Service.
- (c) CBH may, in its absolute discretion, suspend the provision of the Services (including credit) if the Customer fails to pay an invoice in accordance with clauses 7.10 and 9. The suspension of the Services is not a breach by CBH of its obligations under this Agreement and CBH may continue to suspend the Services until such time as the invoice has been paid.

#### 9.7 Certificates

A certificate signed by an authorised representative of CBH stating the amount owing to CBH by the Customer on any account whatsoever and all interest in respect thereof shall be a prima facie evidence of the amount owed to CBH by the Customer at the date of the certificate and shall be deemed correct unless the Customer proves otherwise.

#### 9.8 Interest on late payments

- (a) The Customer must pay interest on all amounts owing to CBH on any invoice that remains outstanding upon expiration of the due date expressed in the invoice at a rate 5% above the 90 day Bank bill rate offered by the Commonwealth Bank of Australia as at 31st October each year or as otherwise amended and notified to the Customer if there is a significant rise in this rate.
- (b) Interest will be calculated daily from the due date expressed in the invoice, until all amounts owing on the invoice, including interest, have been paid.
- (c) Payments by the Customer marked specifically for a particular invoice will be applied by CBH firstly in reduction of the interest outstanding and accruing on the invoice and then on any amount outstanding on the invoice.

#### 9.9 Cost recoverable

Any Loss or Damage incurred by CBH in recovering any outstanding monies shall be paid in full by the Customer prior to CBH resuming the provision of the Services.

#### 9.10 Set off

- (a) Any amounts owing by CBH or any of its Related Bodies Corporate to the Customer whether under this Agreement or otherwise, may, at the election of CBH, be set off (without prior notice) against any amounts owing by the Customer to CBH or any of its Related Bodies Corporate, whether under this Agreement or otherwise.

- (b) CBH holds the benefit of this clause and may exercise the rights under this clause on its own behalf and for and on behalf of each of its Related Bodies Corporate but nothing in this clause obliges such Related Bodies Corporate to perform any of the obligations of CBH under this Agreement.
- (c) CBH will give notice to the Customer of any set off performed under this clause.
- (d) The Customer is not entitled to set off amounts owing to CBH or any of its Related Bodies Corporate.

#### 9.11 Security

The Customer shall provide such security to CBH as CBH reasonably requires (including the execution of personal guarantees by the Customer's signatories to this Agreement, directors, shareholders or beneficiaries of the Customer).

### 10 LIEN AND RIGHT TO WITHHOLD BULK WHEAT

#### 10.1 Statutory Lien

CBH has, in priority to all other claims, liens or security, a lien over any Bulk Wheat received by it, in respect of any fees and charges payable to CBH in respect of that Bulk Wheat.

#### 10.2 Right to withhold Bulk Wheat

Notwithstanding any other term of this Agreement, CBH may, at its sole discretion, refuse to Outturn the Customer's Bulk Wheat if the Customer has not paid any amounts owing to CBH pursuant to clause 9.6.

### 11 DUE CARE AND DILIGENCE

- (a) CBH will comply with Good Operating Practices in the carrying out of its obligations under this Agreement.
- (b) The Customer will comply with Good Operating Practices in the carrying out of its obligations under this Agreement.

### 12 APPOINTMENT OF AN AGENT

#### 12.1 Notice and Obligations

The Customer may appoint an agent to undertake the day to day co-ordination of its operational Service requirements. The Customer must notify CBH immediately in writing upon the appointment of any such agent. Any such appointment will not in any way relieve the Customer of its obligations under this Agreement and accordingly any instruction from the appointed agent is, and will be deemed to be, an instruction of the Customer.

#### 12.2 Liability for Agent's Actions

The Customer agrees to accept full responsibility and to indemnify CBH for all actions, decisions and costs incurred or authorised by any agent appointed pursuant to clause 12.1 above when performing Services on behalf of the Customer under this Agreement.

### 13 CBH LIABILITY

#### 13.1 Liability for Shortfall at a Port Terminal Facility

- (a) Subject always to clauses 6.4(d), 13.1(b) and 13.8, CBH will be responsible and liable for any shortfall at a Port Terminal Facility if it cannot Outturn the Customer's Bulk Wheat Entitlement from the Port Terminal Facility to which the Customer's Bulk Wheat Entitlement relates.
- (b) CBH's liability for a shortfall in Bulk Wheat Entitlement pursuant to clause 13.1(a) will only extend (in the case of a shortfall in quantity), at the election of CBH, to either the:
  - (i) provision of sufficient grain of a similar type, variety and Grade from any Port Terminal

Facility to ensure the Customer's Bulk Wheat Entitlement is not diminished; or

- (ii) provision of financial compensation for the value of the Bulk Wheat shortfall to be determined at the Fair Market Price for such Bulk Wheat.

For the avoidance of doubt, there is no shortfall in the Customer's Bulk Wheat Entitlement if CBH is able to Outturn the Bulk Wheat Entitlement following any fumigation.

#### 13.2 Damage for Gross Negligence or Wilful Misconduct

Other than as set out in clause 13.7 and subject to clauses 13.3, 13.4 and 13.8, CBH will only be liable for loss and/or damage, which is caused by the Gross Negligence or Wilful Misconduct of CBH, its officers, employees or contractors.

#### 13.3 Liability Cap

Other than as set out in clauses 13.1 and 13.7, CBH's maximum liability to the Customer howsoever arising shall be limited to \$100,000 for any single event and limited to a maximum in aggregate of \$250,000 for the term of this agreement, however caused including Loss or Damage resulting from:

- (a) the negligence of CBH, its servants or agents; or
- (b) the breach of this Agreement by CBH, its servants or agents.

#### 13.4 Limitation of Bulk Wheat Loss and Damage

Except as provided for in clauses 13.1, 13.2 and 13.7, CBH will not be liable or responsible for any Loss or Damage (including Indirect or Consequential Loss) to the Bulk Wheat resulting from any variation in the quality of the Bulk Wheat resulting from:

- (a) the natural deterioration of Bulk Wheat over time;
- (b) the loss of germinative capacity of Bulk Wheat; or
- (c) the effects of the normal handling process on the Bulk Wheat held at, or transported within Port Terminal Facility.

#### 13.5 Limitation of Loss or Damage for delay

In the event of:

- (a) delays incurred in CBH Outturning the Bulk Wheat that are not caused by the Gross Negligence or Wilful Misconduct of CBH, its officers, employees or contractors;
- (b) delays due to the actions of third parties which are beyond the reasonable control of CBH;
- (c) delays in respect of the provision of information by CBH to the Customer pursuant to clause 6.3(b);
- (d) delays resulting from insect infestation of the Bulk Wheat,

and such delay causes any shortfall in Bulk Wheat Entitlement, then CBH's liability will only extend to the remedies provided in clause 13.1(b). CBH will not be liable for any other Loss or Damage caused by such delay.

#### 13.6 Contribution to loss

Where any express or implied term of this Agreement places on any Party (in this clause 13.6 "**Party A**") any duty of care the breach of which would, if the duty of care were imposed by the general law rather than by such express or implied term, constitute an actionable tort against any other Party (in this clause "**Party B**");

- (a) Party B has an obligation not to commit any negligent act or omission which contributes to any Loss or Damage it suffers or may suffer as a result by any breach by Party A of such express or implied terms; and

- (b) the liability of Party A for any such breach is limited to the direct and proximate Loss or Damage of Party B arising out of such breach, less the proportion of such Loss or Damage attributable to any breach by Party B of its obligations under clause 13.6(a).

The obligations imposed on a Party in this clause 13.6 in relation to any breach by Party A of the kind the subject to this clause are additional to, and not in derogation of, any obligation of Party B to mitigate its Loss or Damage in relation to such breach.

#### 13.7 Conditional exclusion of Statutory Liability

This Agreement excludes to the maximum extent permitted by law any warranty or condition implied by common law, practice or statute. However in the case of those warranties under statute which may not be excluded, including the *Trade Practices Act 1974 (Cth)*, CBH's liability for breach of such conditions or warranties shall, to the maximum extent permitted by law, be limited, in the sole discretion of CBH, to the lesser of:

- (a) in the case of Services:
  - (i) the re-supply of the relevant Service; or
  - (ii) the payment of the cost of re-supply of the relevant Service; and
- (b) in the case of goods (including Bulk Wheat provided under clause):
  - (i) the replacement of the goods or the supply of equivalent goods;
  - (ii) the repair of the goods;
  - (iii) the payment of the cost of replacing the goods or of acquiring replacement goods; or
  - (iv) the payment of the cost of having the goods repaired.

For the purposes of this clause 13.7, "relevant Service" shall mean the Service in relation to the quantity of affected Bulk Wheat only and does not mean the aggregate value of the relevant Service provided to the Customer.

#### 13.8 No Indirect or Consequential Loss

Notwithstanding anything else in this Agreement, CBH will not be liable to the Customer for any Indirect or Consequential Loss arising out of or in relation to the provision of Services by CBH pursuant to this Agreement.

#### 13.9 Indemnity and Release

The Customer hereby releases and indemnifies CBH in respect of all actions, claims and demands which may be instituted by the Customer against CBH in respect of the matters dealt with under clauses 13.4 and 13.8.

#### 13.10 Exclusion of warranties

CBH does not represent, warrant or guarantee that any Bulk Wheat received, acquired or Outturned for the Customer:

- (a) conforms to any specification as to Varietal Purity;
- (b) is free from the presence, at any level or concentration, of Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) is free from the presence, at any level or concentration, of Genetically Modified Organisms.

#### 13.11 Exclusion Clauses

Notwithstanding anything expressed in or implied by this Agreement, to the extent permitted by law CBH will not be liable to the Customer for any and all Loss or Damage caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of CBH, or



otherwise howsoever arising in connection with this Agreement from:

- (a) any variance in any specification as to Varietal Purity from the actual Varietal Purity of Bulk Wheat received or Outturned for the Customer;
- (b) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration, of any Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.

#### 13.12 Indemnity

Notwithstanding anything expressed in or implied by this Agreement, to the extent permitted by law the Customer shall indemnify, keep indemnified and hold harmless CBH from any and all Loss or Damage suffered by or claimed from CBH, whether caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of CBH, or otherwise howsoever arising in connection with this Agreement from:

- (a) any variance in any specification as to Varietal Purity from the actual Varietal Purity of Bulk Wheat received or Outturned for the Customer;
- (b) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration, of any Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.

### 14 INSURANCE AND RISK

#### 14.1 Insurance

- (a) CBH will, to the extent that it is reasonably practicable, take out and keep in force an insurance policy in respect to the risk of loss or damage to the Bulk Wheat whilst:
  - (i) it is held in the Port Terminal Facilities; and
  - (ii) during transit organised by CBH within the Port Terminal Facility.
- (b) CBH will advise the Customer if it cannot gain insurance coverage as detail above.

#### 14.2 Transfer of risk

Subject to clause 13, the risk of loss or damage to Bulk Wheat is transferred to the Customer at the point in time when the Bulk Wheat exits the Outturning spout of a Port Terminal Facility into a form of a Bulk Wheat transportation vessel.

### 15 FORCE MAJEURE EVENT

#### 15.1 Definition

An event of "**Force Majeure**" is any event or circumstance not within the reasonable control of the party affected by it (the "**Affected Party**"), including:

- (a) acts of God, including storms or cyclones, action of the elements, epidemics, landslides, earthquakes, floods, fire, road or rail closures due to washouts or impassability and natural disaster;
- (b) strikes, stoppages, restraints of labour, or other industrial disturbances;
- (c) acts of the public enemy, including wars which are declared or undeclared, blockades and insurrections;

- (d) riots, malicious damage, sabotage and civil disturbance;
- (e) accident (including accidental emissions of pollutants or hazardous substances), fire, explosion, radioactive contamination and toxic or dangerous chemical contamination;
- (f) the adverse application of any Australian laws or enforcement actions of any Commonwealth or State court or governmental agency not resulting from any wrongful act or omission of the Affected Party;
- (g) the refusal of or delay in obtaining any necessary consents from any government agency, provided that the Affected Party has acted in a timely manner in endeavouring to secure them;
- (h) the failure of, or the breakdown of or accident to, plant or machinery of any kind other than breakdowns or damage caused by the Gross Negligence of CBH;
- (i) the breach by any third party supplier of its obligations to supply goods or services to the Affected Party, provided that the Affected Party has acted in a timely manner in endeavouring to secure such supply, and provided that the Affected Party itself is not in breach of any relevant obligation; and
- (j) any production shutdown or interruption which is validly required or directed by the Commonwealth or State government or any governmental agency which is not due to the act or default of the Affected Party,

and which the Affected Party is not reasonably able to prevent or overcome, or the effects of which the Affected Party is not reasonably able to predict and take measures to avoid, by the exercise of reasonable technical and commercial diligence and prudence.

## 15.2 Exemption from Force Majeure

The lack of funds or inability to use any funds will not constitute Force Majeure.

## 15.3 Relief from performance and liability

Subject to clause 15.6, an Affected Party will be excused from performance of and will not be liable to the other party for any failure in carrying out any of its obligations under this Agreement if and only to the extent and for the time that it is prevented in whole or in part from doing so by Force Majeure.

## 15.4 Actions during Force Majeure Events

An Affected Party claiming the benefit or protection of Force Majeure will:

- (a) promptly give written notice to the other party of the occurrence and circumstances in respect of which the claim of Force Majeure arises;
- (b) take all reasonable steps to ameliorate and remedy the consequences of that occurrence without delay;
- (c) maintain regular communication with the other party to describe what is being done to remedy the Force Majeure; and
- (d) resume performance in full of its obligations under this Agreement as soon as reasonably practicable,

but the settlement of strikes, lockouts, or other industrial disputes or disturbances which constitute Force Majeure will be entirely within the discretion of the Affected Party and the Affected Party may refrain from settling the strike, lockout or dispute or may settle it at such time and on such terms as it considers to be in its best interests.

## 15.5 Termination

If the Affected Party is relieved from performance and liability in accordance with clause 15.3 due to Force Majeure for a period exceeding 60 days, either party may terminate this Agreement with immediate effect by written notice to the other party.

## 15.6 Payments by the Customer

Despite any other provision of this Agreement, the occurrence of Force Majeure affecting the Customer will not relieve the Customer of the obligation to pay any amounts owing under this Agreement in relation to Services performed by CBH prior to notice being given in accordance with clause 15.4(a), including but not limited to the payment of the charges set out in Schedule 1 as modified from time to time by CBH.

## 16 TITLE TO BULK WHEAT

- (a) Subject to the terms of this Agreement, CBH is a bailee for reward of any Bulk Wheat received from, on behalf of, or for the account of, the Customer, that is within CBH's power, possession, custody or control.
- (b) Subject to clause 10, the proprietary interest in Bulk Wheat is vested in the person who, for the time being, is entitled to obtain it from the stocks held by CBH or under CBH's control.

## 17 PORT TERMINAL FACILITY ACCESS

### 17.1 Access Procedure

In order to protect the safety of the Customer's employees, agents or contractors and that of CBH's employees, agents, contractors and invitees:

- (a) if the Customer wishes to visit a Port Terminal Facility, then the Customer must give a minimum of 2 Business Days notice to the CBH Customer Account Manager stating the date the Customer wishes to attend, the identity of the Customer's representative and the purpose of the visit;
- (b) CBH may, in its absolute discretion, refuse or reject any visitation request or propose alternative times and/or places for the visit; and
- (c) subject to clause 17.2, the Customer shall not attend at any CBH Port Terminal Facility without receiving the prior consent of the Customer Account Manager for each visit and shall not enter or stay on the Port Terminal Facility without appropriate CBH supervision.

### 17.2 Public Reception

If a CBH Port Terminal Facility has a public reception, then clause 17.1(c) is modified to the extent necessary to allow the Customer to proceed directly following the commonly accepted route to the public reception but does not allow the Customer to proceed to any other part of the Port Terminal Facility without appropriate supervision.

### 17.3 Port Terminal Facility Safety

Whilst on a Port Terminal Facility, the Customer agrees to:

- (a) follow all reasonably necessary directions of CBH personnel, including departure from the Port Terminal Facility;
- (b) not create any hazard, or cause any contamination, on the Port Terminal Facility; and
- (c) procure that its employees, agents or contractors comply with this clause 17.3.

## 18 CONFIDENTIALITY

### 18.1 General obligation

Subject to clauses 18.2 and 18.3, this Agreement and all information exchanged between the parties under this Agreement or during the negotiations preceding the signing of this Agreement is confidential to the party which provided it and may not be disclosed to any person except:

- (a) by a party to the legal and other professional advisers, auditors and other consultants ("**Consultants**") and employees of:
  - (i) that party; or

- (ii) that party's Related Bodies Corporate;
- (b) to another party with the consent of the party which first supplied the information;
- (c) if the information is at the time lawfully in the possession of the proposed recipient of the information through sources other than a party;
- (d) to the extent required by any law or by the lawful requirement of any governmental agency having jurisdiction over the party or its Related Bodies Corporate;
- (e) to the extent required by a lawful requirement of any stock exchange having jurisdiction over a party or its Related Bodies Corporate;
- (f) if necessary or commercially desirable to be disclosed in any prospectus or information memorandum to investors or proposed or prospective investors:
  - (i) for an issue or disposal of any shares in a party or its Related Bodies Corporate;
  - (ii) for an issue of debt instruments of a party or a party's Related Body Corporate; or
  - (iii) for the purposes of a party obtaining a listing on Australian Stock Exchange Limited of any shares;
- (g) if the information is at the time generally and publicly available other than as a result of breach of confidence by the party wishing to disclose the information or those to whom it proposes to disclose it;
- (h) if necessary or commercially desirable to be disclosed to an existing, or bona fide proposed or bona fide prospective:
  - (i) financier;
  - (ii) financier of a party or of any of its Related Bodies Corporate; or
  - (iii) rating agency in respect of a party or of any of its Related Bodies Corporate;
- (i) if necessary or commercially desirable to be disclosed to any bona fide proposed or prospective:
  - (i) transferee of an interest in any Bulk Wheat; or
  - (ii) financier of such transferee providing or proposing or considering whether to provide relevant financial accommodation;
- (j) if necessary or commercially desirable to be disclosed to consultants or employees of any of the persons referred to in clause 18.1(h) or 18.1(i); or
- (k) if CBH is required under the Undertaking or under the Port Terminal Rules to publish Port Grain Holdings.

## 18.2 Conditions

- (a) In the case of a disclosure under clause 18.1(a) or 18.1(b) and, where appropriate, under clause 18.1(d), 18.1(e) or 18.1(f), the party wishing to make the disclosure must inform the proposed recipient of the confidentiality of the information and the party must take customary precautions to ensure that the proposed recipient keeps the information confidential.
- (b) In the case of a disclosure under clause 18.1(h), 18.1(i) or 18.1(j) (in the case of consultants only), the party wishing to make the disclosure must not make any disclosure unless:
  - (i) in the case of a disclosure under clause 18.1(h) or 18.1(i), the proposed recipient has first entered into and delivered to the parties a confidentiality undertaking in a form acceptable to all parties; and

- (ii) in the case of a disclosure under clause 18.1(j), the principal or employer of the proposed recipient has first entered into and delivered to the parties a confidentiality undertaking in a form acceptable to all parties which shall incorporate a warranty by the principal or employer of the proposed recipient that the proposed recipient is under an obligation of confidentiality to the principal or employer and that the principal or employer will enforce that obligation to the fullest extent that the law allows upon being called upon to do so by any of the parties.

- (c) The Customer consents to CBH publishing Port Grain Holdings pursuant to clause 18.1(k). The Customer acknowledges that whilst CBH will only disclose Port Grain Holdings, such disclosure to the public in accordance with this clause 18 may enable third parties to identify the quantities of grain stored by a Customer at a Port using this information in conjunction with other publicly available information including the shipping stem published in accordance with the Port Terminal Rules and the WEMA.

### 18.3 Notice to other Parties

Each party must:

- (a) promptly inform all other parties of any request received by that party from any person described in clause 18.1(d) to disclose information under clause 18.1(d);
- (b) inform all other parties as soon as reasonably practicable after information is disclosed by the party under clause 18.1(d); and
- (c) not disclose any information under clause 18.1(e) unless all other parties have been informed of the proposed disclosure.

### 18.4 Indemnities

Subject to clause 13, each party indemnifies each other party against any costs, losses or damages suffered by that other party arising out of or in connection with any disclosure by the first-mentioned party of information in contravention of this clause 18.

### 18.5 Binding nature of confidentiality obligations

The obligations of confidentiality imposed by this clause 18 survive the termination of this Agreement and any person who ceases to be a party continues to be bound by those obligations.

## 19 DISPUTE RESOLUTION

### 19.1 Disputes

- (a) Save for any dispute arising under the Auction Rules which shall be dealt with in accordance with the provisions of the Auction Rules all disputes arising out of or in connection with this Agreement or the Port Terminal Rules shall be dealt with in accordance with the provisions of this clause 19.
- (b) A dispute shall be referred to the Customer's Manager and the CBH Operations Manager - Logistics for resolution. The CBH Operations Manager - Logistics and the Customer's Manager shall meet or confer at least once within 24 hours of the notification of the dispute to discuss the dispute and attempt to resolve the dispute.
- (c) Where the dispute relates to invoiced Services, the Customer is to inform the CBH Operations Manager - Logistics immediately, and before the due date of that invoice.
- (d) Any dispute relating to a breach of the terms and conditions of this Access Agreement shall not, of itself, amount to a dispute relating to a breach of the Undertaking or the rules forming part of the Undertaking,

### 19.2 Escalation of Dispute – Executive Panel

If no resolution of the dispute can be reached in accordance with clause 19.1, within seven (7) days of the dispute being notified to the other party, each party shall refer the dispute to the General Manager - Operations of CBH and the CEO of the Customer (or such person designated by the Customer as having authority equivalent to that of a CEO) (the "**Executive Panel**"). The Executive

Panel:

- (a) will meet at least once at a time mutually convenient no later than 2 Business Days after the dispute has been referred to it; and
- (b) may decide on the methods and procedure by which it will resolve the dispute, which may include the obtaining of expert advice.

19.3 Payment of invoices pending resolution of a dispute

Notwithstanding anything in this Agreement, the Customer is not entitled to withhold payment of the undisputed amount of any invoice. If the Customer cannot provide a reasonable estimate of the disputed amount the Customer will not be entitled to withhold any payment.

19.4 Arbitration

(a) Referral to arbitration

- (i) If the Dispute is not resolved within ten Business Days after being referred to the Executive Panel under clause 19.2, either of the parties may give notice to the other party to refer the Dispute to Arbitration in Western Australia by a single arbitrator appointed by agreement of the parties or if they fail to agree within ten Business Days, an arbitrator appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) acting on the request of either party.
- (ii) CBH must notify the ACCC of the details of any Dispute which has been referred to arbitration. CBH must provide the arbitrator's final determination to the ACCC.
- (iii) If the Customer serves notice under clause 19.4(a)(i), that notice will also include an agreement by that Customer to:
  - (A) pay any amounts determined in accordance with clause 19.4 (f); and
  - (B) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.
- (iv) CBH must pay any amounts determined in accordance with clause 19.4 (f) and will indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.
- (v) The arbitrator will not proceed with the arbitration unless and until the Customer has agreed to pay the arbitrator's costs as determined under clause 19.4(f).

(b) Arbitration procedure

- (i) Unless CBH and the Customer agree otherwise, the arbitration must be conducted in private.
- (ii) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
- (iii) The arbitrator will when conducting the arbitration:
  - (A) observe the rules of natural justice but is not required to observe the rules of evidence;
  - (B) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (C) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;
  - (D) call on any party the arbitrator believes necessary to give evidence;
  - (E) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;

- (F) present its determination in a draft form to the parties and hear argument from the parties before making a final determination; and
  - (G) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based.
- (iv) The arbitrator may at any time terminate arbitration (without making an award) if it thinks that:
  - (A) the notification of the Dispute is vexatious;
  - (B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (C) the party who notified the Dispute has not engaged in negotiations in good faith.
- (c) Matters which arbitrator must take into account

In deciding a Dispute the arbitrator will take into account the principles, methodologies and provisions set out in the Undertaking, in particular clauses 6.4 and 6.5;

- (d) Confidentiality
  - (i) The arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.
  - (ii) The arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
    - (A) requiring each party to give confidentiality undertakings to the other party and their external advisers; and
    - (B) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.
  - (iii) The arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.
  - (iv) For the purpose of clarity, the entire dispute resolution process outlined in this clause 19 remains subject to clause 18.
- (e) Effect of arbitrator's determination
  - (i) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.
  - (ii) Except where the determination or direction is subject to a review by a court of law, if a Customer does not comply with a determination or direction of the arbitrator, then CBH will no longer be obliged to provide services under this Agreement for that Customer.
  - (iii) Except where the determination or direction is subject to a review by a court of law, CBH will comply with the lawful directions or determinations of the arbitrator.
  - (iv) The arbitrator shall have the discretion to determine that an arbitration determination shall take effect from the date of the determination, the date upon which the dispute was notified or the date of this Agreement.
  - (v) During any dispute process the parties must continue to comply with their obligations and exercise their rights under this Agreement.
- (f) Arbitrator's costs

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 that determination.

## 20 ENTIRE AGREEMENT

- (a) This Agreement constitutes the entire Agreement between the parties. Each party warrants and covenants to the other that there are no written or oral statements, representations,

undertakings, covenants or agreements between the parties, express or implied, except as provided for in this Agreement.

- (b) This Agreement may only be amended or varied:
  - (i) by agreement in writing signed by both parties expressly amending this Agreement;
  - (ii) pursuant to the variation procedure prescribed in the Undertaking; or
  - (iii) by operation of law
- (c) Unless the context otherwise requires, a reference to this Agreement shall include a reference to this Agreement as amended or varied from time to time.
- (d) Notwithstanding that CBH from time to time produces operational guidelines to assist customers, nothing in those guidelines shall be deemed to impliedly or expressly amend anything in this Agreement and if there is any inconsistency between any guidelines and a term of this Agreement, the terms of this Agreement shall prevail.

## 21 NOTICES

### 21.1 Types of Notices

Except as provided in clause 21.2, all notices of any kind and all statements, forecasts, advices, policy statements, procedures manuals, guidelines and the like, and all invoices given or made under this Agreement (each a "**Communication**") shall be:

- (a) in writing in the English language;
- (b) marked for the attention of the appropriate person; and
- (c) delivered by hand to the address of the addressee, or sent by ordinary letter post (airmail if posted to or from a place outside Australia) or hand delivery by a reputable courier service to the address of the addressee, or sent by facsimile to the facsimile number of the addressee.

### 21.2 Operational and Urgent Notices

Where this Agreement expressly so provides, and in those cases or categories of cases where the parties agree in writing, notices of a day to day operational nature or notices given in an operational emergency may be given orally and confirmed in writing. The parties shall also agree upon protocols, contact points and contact telephone numbers for dealing with matters which require urgent action in the administration of this Agreement, and shall ensure that lists of up-to-date contact points and telephone numbers are exchanged as and when required to ensure the currency of those lists.

### 21.3 Notice Takes Effect

Subject to clause 21.4, a Communication takes effect from the later of:

- (a) the time it is actually received; and
- (b) any later time specified in the Communication.

### 21.4 Deemed Receipt

For the purposes of this Agreement:

- (a) a Communication delivered by hand to the address of a party shall be deemed to be received if it is handed (with or without acknowledgment of delivery) to any person at that address who, in the reasonable judgment of the person making the delivery (upon making appropriate enquiries), appears to be and represents himself as a manager or officer of the party to whom the Communication is addressed;
- (b) a Communication which is posted is deemed to be received by the party to whom the Communication is addressed on the second Business Day after the day of posting;
- (c) a Communication sent by facsimile transmission which is transmitted:



- (i) prior to 4 p.m. on a Business Day shall be deemed to have been received by the party to whom it is addressed on that Business Day; and
- (ii) after 4 p.m. on a Business Day shall be deemed to have been received by the party to whom it is addressed on the first Business Day following the date of transmission; and
- (iii) the production of the transmission report or a printout of a transmission log generated by the sender's facsimile machine (or other facsimile transmission device) showing successful uninterrupted facsimile transmission of all pages of the relevant Communication to the facsimile number of the party to whom it is addressed and proof of confirmation by physical delivery or mailing as provided above shall constitute evidence of receipt of that facsimile transmission; and
- (d) a Communication given orally under clause 21.221.2 shall be deemed to have been received when first given orally.

#### 21.5 Change of Address

A party may at any time, by notice given to the other parties to this Agreement, designate a different person, street address, postal address, electronic mail address or facsimile number for the purpose of Communications pursuant to this clause 21.

#### 21.6 Electronic Mail

- (a) The parties agree, that in the absence of evidence to the contrary, an electronic mail message sent by a party to the electronic mail addresses notified by the parties shall be deemed to be received on the day after the day that the electronic mail message is recorded as having been sent by the sender's computer server.
- (b) Messages relating to the following subjects will not be valid if sent by electronic mail:
  - (i) termination of this Agreement;
  - (ii) disputes;
  - (iii) change of address, phone number, fax number or electronic mail address.

### 22 ASSIGNMENT

#### 22.1 General Prohibition

Neither party may assign, transfer or otherwise dispose of all or any part of its rights or obligations under this Agreement without the prior written consent of the other party.

#### 22.2 Deed of Covenant

The assignee must enter into a deed of covenant with the party whose consent is sought, acknowledging that party's rights under this Agreement and undertaking by way of novation to observe and perform all the assignor's obligations under this Agreement. Such deed of covenant shall be prepared by the party whose consent is sought in such reasonable form as that party requires, but at the expense of the assignor. The deed shall be stamped by and at the expense of the assignor.

### 23 WAIVER

- (a) No right under this Agreement shall be deemed to be waived except by notice in writing signed by each party.
- (b) No default or delay on the part of any party exercising any of its rights or obligations under this Agreement shall operate as a waiver of any such right or obligation under this Agreement.

## 24 NO PARTNERSHIP

- (a) Nothing contained in this Agreement will be deemed or construed by the Customer or CBH or by any third party as creating the relationship of partnership, principal and agent, or joint venture.
- (b) No relationship between the Customer and CBH other than that of bailor and bailee upon the conditions and provisions in this Agreement will be created by the payment of any money under this Agreement, any other conditions or provision in this Agreement or any act of the Customer or CBH.

## 25 GOVERNING LAW AND JURISDICTION

### 25.1 Governing law

This Agreement shall be governed by and construed in accordance with the laws of the State of Western Australia.

### 25.2 Jurisdiction

Each Party irrevocably submits to and accepts generally and unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Western Australia.

## 26 ATTORNEYS

Each individual signing this Agreement on behalf of a party warrants that the individual has been duly authorised to execute this Agreement and to bind that party on whose behalf the individual is signing.

## 27 SUB-CONTRACTING

CBH may in its sole and absolute discretion:

- (a) sub-contract the whole or any part of the Services; or
- (b) otherwise engage any person to undertake any part of the Services on CBH's behalf, without notice to the Customer.

## 28 SEVERANCE

If any term or other part of this Agreement is or becomes for any reason invalid or unenforceable at law, the remainder of this Agreement shall continue to be valid and enforceable and such term or other part of this Agreement shall be severed or modified without affecting the remainder of this Agreement.

## 29 RE-NEGOTIATION OF TERMS

### 29.1 Change in Law

- (a) Subject to clauses 29.1(c) and 29.2, if at any time during the Term:
  - (i) the costs to CBH of operating and maintaining the Port Terminal Facility for the purposes of supply of the Port Terminal Services under this Agreement and otherwise complying with its obligations under this Agreement are increased to a material extent ("**Increased Costs**"); and
  - (ii) the Increased Costs are a result of the enactment or promulgation of any new Act of Parliament or regulation or the amendment of any existing Act or regulation by a Government Agency relating to the management or protection of the environment or the health and safety of workers, including any tax on the emission of carbon, sulphur or nitrogen compounds (a "**Change in Law**"),

then CBH shall be entitled to increase the price paid by the Customer under this Agreement for the provision of Port Terminal Services as may be necessary to offset those Increased Costs. In any such case, CBH shall provide the Customer with a statement

providing such information as is necessary to demonstrate:

- (iii) the causal relationship between the Change in Law and the Increased Costs referred to;
  - (iv) the reasonableness and necessity of the measures taken by CBH to comply with the Change in Law; and
  - (v) the nature and extent of any increase in the price paid by the Customer under this Agreement for Port Terminal Services necessary to offset the Increased Costs referred to.
- (b) A statement by CBH under clause 29.1(a)(ii) shall be deemed to constitute a request by CBH for a variation of this Agreement and shall be dealt with as a request for a variation under the terms of the Undertaking.
- (c) CBH shall not be entitled to seek any increase under clause 29.1(a) in the price paid by the Customer under this Agreement for Port Terminal Services to the extent that the Increased Costs are a consequence in whole or in part of a failure by CBH to operate and maintain any Port Terminal Facility in accordance with Good Operating Practices.

## 29.2 Income and payroll taxes

Each Party shall be liable for its own income tax and payroll tax levied now or at any time in the future by any Government Agency, whether or not they affect the cost to that Party of complying with its obligations under this Agreement.

**Signed** for and on behalf of **Co-operative Bulk Handling Limited** (ABN 29 256 604 947) in the presence of:

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Name of Witness in full

**Signed** for and on behalf of **xxx** (ABN xxx in the presence of:

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Name of Witness in full

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

\_\_\_\_\_  
Signature of authorised representative

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

## SCHEDULE 1

### Payment

All charges payable pursuant to this Agreement are to be paid in accordance with clause 9 of this Agreement. As set out in clause 10, CBH has the discretion not to Outturn Bulk Wheat until all outstanding fees and charges have been paid.

The Charges Schedule outlines the CBH Board of Directors approved Port Terminal Services Charges which will be altered only by the CBH Board.

The charges outlined apply from the 1<sup>st</sup> October 2009 to 31<sup>st</sup> October 2010.

All prices are quoted in AUD and are exclusive of GST.

### ***General Service Charges***

<b>1.</b>	<b>Annual Registration Fee</b>	<b>\$525.00 pa</b>
This charge applies for the initial and on-going access to all services offered by CBH that forms part of the charges listed in this schedule and in the relevant Grain Services and/or Port Terminal Services Agreements.		
The fee will apply once upon signing and return of the relevant Agreement/s.		

<b>2.</b>	<b>Overdue Payment Interest</b>	
Interest may be charged on overdue invoices, at the discretion of CBH.		
The rate will be set annually at 31 <sup>st</sup> October and amended more frequently where there is a significant increase in interest rates, at a rate of 5% above the current 90 day bank bill rate offered by the Commonwealth Bank of Australia or as specified in any other trading agreement signed by both the Customer and CBH.		

### ***Bulk Export Capacity & Port Outloading Service Charges***

<b>3.</b>	<b>Upfront Marketer Fee</b>	<b>\$3.00 p/t</b>
This is a non-refundable fee applied to each tonne of grain where a Customer obtains Capacity through the Harvest Period EOI, Annual Period Port Capacity Auctions or through the Spare Capacity Bookings.		
<b>4.</b>	<b>Export Fee</b>	<b>\$14.10 p/t</b>
The Export Fee covers the provision of Port Terminal Services as described in the Port Terminal Services Agreement and applied to each tonne of grain that is loaded onto a vessel or considered Lost Capacity.		

<b>5.</b>	<b>Capacity Transfer Fee</b>	<b>\$0.05 p/t</b>
<p>This fee is applied where a Customer who has acquired export Capacity through the EOI, Auction or Spare Capacity processes, wishes to transfer some or all of that Capacity to another CBH Customer.</p> <p>Transfers can be requested using the Shipping Capacity Transfer Form available on LoadNet® for Marketers™.</p>		

<b>6.</b>	<b>Additional Port Storage Fee</b>	<b>As below</b>
<p>Additional Port Storage Fees will apply in instances of late ship arrivals and/or any residual grain left in port after shipment.</p>		
<b>Late Shipment</b>		
<p>Where a vessel has not commenced loading within the nominated Shipping Window due to reasons detailed in Section 6.7 (b) of the Port Terminal Services Agreement and grain is held in the Port Terminal Facility until the vessel is loaded or cancelled, the following charges will apply</p>	7th day after the end of the Shipping Window	\$3.00 p/t
	14th day after the end of the Shipping Window	\$3.00 p/t
<b>Residual Grain</b>		
<p>Where there is any residual grain following loading of the Customer's vessel and this grain is left on the Port Terminal Facility until it is outturned by the Customer.</p>	1-3 days	free
	4-7 days	\$0.50 p/t
	8 days +	\$0.95 p/t

<b>7.</b>	<b>Shipping Relocation Fee</b>	<b>Kwinana Terminal</b>	<b>\$2.30 p/t</b>
		<b>Geraldton, Albany, Esperance Terminals</b>	<b>\$4.00 p/t</b>
<p>This charge may apply if a cargo for a nominated vessel is held at the Port Terminal Facility due to a cancellation or delay and needs to be relocated to allow the Port Terminal to continue to operate.</p>			

<b>8.</b>	<b>Outloading Fee</b>		<b>\$2.00 p/t</b>
		<b>Mobilisation</b>	<b>\$1000</b>
<p>This charge applies to each tonne of residual or contaminated Bulk Wheat that is outturned from the Port Terminal Facility into road or rail transport. It is charged per tonne with a minimum mobilisation charge of \$1000.</p>			

<b>9.</b>	<b>Wharfage fees</b>	<b>\$1.20 p/t</b>
<p>Wharfage charges are applied to Port services at Kwinana only to cover the costs associated with maintaining the Kwinana Jetty owned by CBH.</p> <p>For shipments at other ports, the relevant Port Authority will charge the Customer/shipper directly and should be contacted for relevant charges.</p>		

<b>10.</b>	<b>Shipping Agency fees</b>	<b>\$750.00</b>
<p>This fee applies where the Customer requests CBH to attend to the shipping documentation for their nominated vessel/s.</p> <p>The charge will apply per shipment per port.</p>		

<b>11.</b>	<b>3<sup>rd</sup> Party Port Access</b>	<b>\$2450 per vessel</b>
<p>This charge will apply to the Customer if they request a representative to have access to the berth or terminal and it is deemed necessary by CBH to have terminal staff in attendance. This fee will be waived if the representative stays onboard the vessel during loading. This charge does not cover representatives collection samples during loading.</p>		

<b>12.</b>	<b>3<sup>rd</sup> Party Quality Inspection</b>	<b>\$2450 per vessel</b>
<p>Charge will apply if the Customer requests an independent representative be allowed to take samples for the duration of the vessel during loading.</p>		

### ***Fumigation Charges***

<b>13.</b>	<b>Remedial Fumigation Services</b>	<b>\$1.00 p/t</b>
<p>CBH offers standard Remedial Fumigation Services in the form of cylinderised phosphine for application to the grain where insects have been detected in grain delivered to the Port Terminal Facility.</p> <p>Any other fumigation requirements should be discussed with CBH in line with Section 6.4 (b) of the Port Terminal Services Agreement and a quotation for application will be provided upon request.</p>		

<b>14.</b>	<b>Fumigation Statements</b>	<b>Per Port</b>	<b>\$82.50</b>
<p>Where a Customer requests a statement of fumigation for grain fumigated whilst in CBH store.</p>			

## **Sample Charges**

<b>14.</b>	<b>Ship Sample Fees</b>	<b>Per grade ≤3kg</b>	<b>\$115.50</b>
		<b>Per kg &gt; 3kg</b>	<b>\$11.55</b>

Upon request by the Customer, CBH will collect samples whilst the ship is loading.

At no charge CBH will collect a 2kg per hatch and/or 5kg per batch sample, and anything additional to this will be charged to the Customer.

Ship Sample collection should be requested on the Customers Cargo Outturn Request or Vessel Nomination Form available on LoadNet® for Marketers™.

Charges do not include freight or courier costs. The Customer must organise a courier or other means to pick up the sample/s from the Port Terminal Facility.

<b>15.</b>	<b>Cargo Sample Fee</b>	<b>Per sample ≤100kg</b>	<b>\$346.50</b>
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Cargo samples are samples of grain from the terminal designated for a particular cargo which is collected before the vessel commences loading.

Cargo Samples should be requested on the Customers Cargo Outturn Request or Vessel Nomination Form available on LoadNet® for Marketers™.

Charges do not include freight or courier costs.

<b>16.</b>	<b>Sample Reassessment Fee</b>	<b>Per sample</b>	<b>\$400.00</b>
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If a pre-delivery sample has been submitted for assessment as per Section 5.2 of the Port Terminal Services Agreement and subsequently rejected due to residual presence of chemicals and/or other contaminants, the Customer must re-submit a representative pre-delivery sample from

- a) grain from the same storage source that has been cleaned or otherwise treated to remove the contaminant for further re-assessment in order to continue deliveries from that grain source; or
- b) a substitute storage source in order to commence deliveries from that substitute source

The sample will then be assessed and the Customer will be required to pay the charges.



## SCHEDULE 2

### Auction Premium Rebate

The Auction Premium Rebate shall be calculated based on the following formula:

$$APR = \left( \frac{TAPR - TAC}{TTSAC} \right) \times TTSC$$

Where:

APR is amount of the Auction Premium Rebate paid to the Customer

TAPR is the total Auction Premiums received by CBH during the Term including any interest earned by CBH on those Auction Premiums

TAC is the Total Auction Costs

TTSAC is the total tonnes of grain shipped from all four Port Terminal Facilities by all CBH Customers using Capacity acquired in the Auctions during the Term.

TTSC is the total tonnes of Bulk Wheat shipped by CBH on behalf of the Customer using Capacity acquired in the Auctions during the Term under this Agreement.

# Schedule 3

## Port Terminal Rules



# Port Terminal Rules

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# Port Terminal Rules

## 1 Interpretation

### 1.1 Definitions

In these Port Terminal Rules unless the context otherwise requires:

**Access Agreement** means an agreement entered into between a Customer and the Port Operator containing provisions relating to the supply of Port Terminal Services to a Customer by the Port Operator.

**Accumulation Plan** means a plan for the delivery of Grain to a Port Terminal Facility in order to accumulate a cargo for shipping.

**Advised Harvest Capacity** means the total Harvest Capacity estimated by the Port Operator to be available pursuant to **rule 4.3(a)**.

**Annual Shipping Period** means the period 16 January to the next 31 October as modified from the Port Operator from time to time prior to 31 August for the coming Year.

**Annual Shipping Period Capacity** means Capacity during the Annual Shipping Period.

**AQIS** means the Australian Quarantine Inspection Services.

**Assembly Window** has the meaning given in **rule 16(a)**.

**Arrived** means the time at which a vessel arrives at the waiting area designated from time to time by the relevant port authority for the Port Terminal Facility (whether or not it sets anchor), is ready to proceed to berthing and has presented a Notice of Readiness. **Arrives** and **Arrival** have a corresponding meaning.

**Auction** means the sale by auction of Capacity for the Annual Shipping Period.

**Auction Premium** means any additional amount paid by the Customer for Capacity which is in excess of the start price for Capacity within a Lot in the Auction.

**Auction Rules** means the rules of that name published by the Port Operator from time to time attached as **Schedule 1** to the Port Terminal Rules .

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

**Business Day** means a day that is not a Saturday, Sunday or gazetted public holiday in Western Australia.

**Capacity** means the capacity of a Port Terminal Facility, to put grain on board a vessel at a Port Terminal Facility during a Shipping Window, measured in tonnes.

**Capacity Transfer Fee** means the fee of that name prescribed in an Access Agreement or GSA.

**Charter Party** means the agreement between the owner of a vessel and the party hiring the vessel for use of the vessel in transporting a cargo.

**Core Capacity** means the Capacity of each Port Terminal Facility calculated in accordance with the process set out in **rule 4.2(a)**

**Core Lots** means Lots that are available at Auction to all Customers, but excluding Surge Lots.

**Customer** means a customer of the Port Terminal Operator that has entered into an Access Agreement or GSA with the Port Operator and includes a User.

**Demurrage** means the defined level of damages paid to a vessel owner for the delays in loading or discharging the vessel after the Laytime has expired. It is customarily expressed in US dollars per day or portion thereof.

**Direct to Port Delivery Declaration Form** means the form substantially in the form attached at **Schedule 2**.

**Direct to Port Sample Declaration Form** means the form substantially in the form attached at **Schedule 3**

**ETA** means the estimated time of Arrival.

**ETC** means estimated time of commencement of loading.

**Export Fee** means the fee of that name prescribed in an Access Agreement or GSA.

**Forecast Submission Period** means 1 September to 10 September within each Year.

**Grace Period** means a period of 14 days that commences on the day following the last day of the Shipping Window.

**Grade** means, in relation to Grain, the grade of the Grain actually delivered to the Port Terminal Facility

**Grain** means all grains (including Bulk Wheat), pulses and oil seeds.

**Grain Entitlement** means the Customer's entitlement under the Bulk Handling Act or an Access Agreement or GSA to the possession of Grain in the Port Operator's custody .

**Grain Services Agreement (GSA)** means an agreement between an exporter, trader or marketer of Grain and the Port Operator that includes provisions for the supply of storage & handling services in relation to any Grain but does not include Port Terminal Services in relation to Bulk Wheat.

**Grower** means a grower of grain who as part of their farming business delivers Grain to a Port.

**GSA Capacity** means Capacity acquired or sought to be acquired by a GSA Customer under a GSA.

**Harvest Capacity** means Capacity during the Harvest Shipping Period.



**Harvest Shipping Period EOI** means an expression of interest containing all the information specified in **rule 5.2(b)**.

**Harvest Shipping Period** means 1 November to 15 January as modified from the Port Operator from time to time prior to 31 August for the coming Year.

**Laycan** means the earliest date on which Laytime can commence and the latest date, after which the charterer can opt to cancel the Charter Party.

**Laytime** means the amount of time that a charterer has to load a vessel before the vessel is deemed to be on Demurrage

**Lost Capacity** has the meaning given to it in **rule 12**.

**Lot** means the Capacity within a Shipping Window at a Port that is offered to Customers at Auction.

**Nominated Tonnage** means the tonnage of Grain to be shipped in a particular Nominated Vessel and notified to the Port Operator in accordance with these Port Terminal Rules.

**Nominated Vessel** means a vessel nominated by the Customer and notified to the Port Operator in accordance with these Port Terminal Rules.

**Notice of Readiness** or **NOR** means a valid notice of readiness served by the owner of the Nominated Vessel pursuant to the Nominated Vessel Charter Party stating, amongst other things, that the Nominated Vessel is ready to load in all respects (including physically and legally).

**Outload** means to remove Grain from a Port Facility to another location by means other than Outturning to a vessel.

**Outturning** means to cause Grain to physically leave the Port Operator's custody at a Port Terminal Facility and is deemed to occur when the Grain exits the delivery spout into a Grain shipping vessel at which point physical possession of the Grain passes from the Port Operator to the Customer or a third party authorised by the Customer.

**Phase 1 Auction** means the first Auctions of Capacity for the Annual Shipping Period in each year.

**Phase 2 Auction** means the Auctions of Capacity remaining after allocation of Capacity in the Phase 1 Auction for the Annual Shipping Period in each year.

**Port** means the ports of:

- (a) Albany;
- (b) Esperance;
- (c) Geraldton; and
- (d) Kwinana.

**Port Terminal Facility** means a ship loader and associated infrastructure that is:

- (i) at a Port;

- (ii) capable of handling Bulk Wheat; and
- (iii) owned, operated or controlled by the Port Operator,  
including:
  - (iv) an intake/receival facility;
  - (v) a grain storage facility;
  - (vi) a weighing facility; and
  - (vii) a shipping belt;
- that is:
  - (viii) at the port; and
  - (ix) associated with the ship loader; and
  - (x) capable of dealing with wheat in bulk.

**Port Terminal Services** means the services provided by means of the Port Terminal Facilities which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facilities, including:

- (a) unloading and receival by the Port Operator of a User's Bulk Wheat at the Port Terminal Facilities, for the purpose of loading onto a vessel scheduled to arrive at the Port Terminal Facility;
- (b) sampling by the Port Operator of a User's Bulk Wheat received and Outturned, to check for visible evidence of the presence of chemical residue, insect activity and live insects or other contaminants, and providing the User with a composite shipping sample of the User's Bulk Wheat;
- (c) weighing by the Port Operator of a User's Bulk Wheat received and Outturned, using the Port Operator's weighing facilities, and providing the User with a weighbridge ticket or other statement certifying the weight and quantity of Bulk Wheat delivered;
- (d) storage by the Port Operator of a User's Bulk Wheat at the Port Terminal Facility for the purpose of export accumulation in a restricted time period and loading onto vessels at the Port Terminal Facility; and
- (e) fumigation in response to evidence of insect infestation;
- (f) accumulating and assembling Bulk Wheat for the purpose of loading cargo onto a vessel scheduled to arrive at the Port Terminal Facility;
- (g) administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
- (h) access to inspectors from the AQIS, for inspection of the User's Bulk Wheat received and held at the Port Terminal Facilities; and
- (i) Outturning by the Port Operator of a User's Bulk Wheat received at the Port Terminal Facility, and loading onto the User's nominated vessel.

**Port Terminal Service Charges** means the charges payable for Port Terminal Services provided by the Port Operator under an Access Agreement.

**Product** means all Grain or other commodities or materials handled by the Port Operator through the Port Terminal Facilities.

**Relevant Surveys** means all relevant surveys required to be conducted on the Nominated Vessel before it can be loaded with Grain, including, but not limited to a structural survey of the Nominated Vessel and surveys conducted by AQIS.

**Season** means the period between 1 October of one year and the next 30 September.

**Services Forecast** has the meaning given in **rule 3**.

**Shipping Capacity Register** means the register maintained and held by the Port Operator in order to record allocations of and entitlement to Capacity.

**Shipping Stem Policy** means the policy prescribed in **rule 13**.

**Shipping Slot** means the nominal dates for loading of vessels during a Shipping Window.

**Shipping Window** means a half month period of between 14 and 16 days within which a Customer may nominate a vessel to arrive at a Port Terminal Facility for loading of a cargo for which the Customer has been allocated Capacity under these Port Terminal Rules.

**Spare Capacity** means:

- (i) for the Harvest Shipping Period, the additional Capacity remaining unallocated following submission by Customers of Harvest Shipping Period EOIs for the relevant Shipping Window at the Allocation Date;
- (ii) for the Annual Shipping Period, the Capacity remaining where Capacity awarded at Auction does not exceed the Capacity for the relevant Shipping Window forecast by the Port Operator in accordance with **rule 4.2**; and

any Capacity that may otherwise become available..

**Spare Capacity Allocation** means the allocation of Spare Capacity remaining after allocation of Capacity:

- (iii) following submission of Harvest Shipping Period EOIs in the Harvest Shipping Period under **rule 5**; and
- (iv) following completion of the Phase 1 Auctions and Phase 2 Auctions in the Annual Shipping Period under **rule 6**.

**Spare Capacity Booking Form** means the form of that name published by the Port Operator from time to time.

**Surge Capacity** means the Capacity of each Port Terminal Facility calculated in accordance with the process set out in **rule 4.2(b)**

**Surge Lots** means Lots:

- (i) available at Auction to all Customers; and
- (ii) which utilise the Port Operator's receipt, storage and handling resources other than and in addition to the Port Terminal Services.

**TBA** means to be advised.

**Transfer of Shipping Capacity Form** means the form of that name published by the Port Operator from time to time.

**Undertaking** means the Undertaking offered by CBH in favour of the Australian Consumer and Competition Commission in accordance with the provisions of the *Wheat Export Marketing Act 2008 (Cth)*.

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

**Vessel Nomination** means a nomination of a vessel to ship the Nominated Tonnage on a Nominated Vessel within a Shipping Window held by the Customer under the Access Agreement or GSA.

**Vessel Nomination Form** means the form available from the Port Operator or on the Port Operator's LoadNet® for Marketers website on which all bulk export requests are to be made.

**Website** means the website operated by the Port Operator from time to time and at the commencement of these rules means [www.cbh.com.au](http://www.cbh.com.au).

**Year** means 1 November to 31 October.

## 1.2 Interpretation

- (a) Other defined terms have the meanings given to them in the Undertaking, unless the context otherwise requires.
- (b) Reference to a **rule** is a reference to a rule contained within these Port Terminal Rules.

## 2 Accuracy and completeness of information

- (a) Information provided by a Customer under these Port Terminal Rules must be accurate and complete in all material regards.

## 3 Services Forecast

- (a) Prior to the commencement of each Year, within the Forecast Submission Period each Customer must submit to the Port Operator a forecast of the Customer's exporting requirements for the following Year, including the following details:
  - (i) expected gross tonnage of Bulk Wheat;
  - (ii) expected gross tonnage of Grain other than Bulk Wheat;

- (iii) expected tonnage of Grain to be delivered to the Port by the Customer pursuant to a GSA;
- (iv) expected tonnage of Bulk Wheat to be delivered to the Port by the Customer pursuant to storage & handling or supply chain arrangements other than those supplied by the Port Operator pursuant to a GSA; and
- (v) expected shipping programme

for each Access Agreement or GSA, as the case may be (**Services Forecast**).

## 4 Capacity

### 4.1 Capacity Lots

The Port Operator shall allocate Capacity in Lots of a specified number of tonnes in a particular Shipping Window.

### 4.2 Criteria and process for estimating available Capacity

- (a) In calculating the Capacity and Core Capacity to be allocated under these rules, the Port Operator shall:
  - (i) estimate the size and characteristics (including geographic distribution) of the upcoming harvest;
  - (ii) review the past performance of the Port Terminal Facilities in loading vessels in high demand periods;
  - (iii) consider the efficient deployment of labour and other resources in Port Terminal Facilities over the Year;
  - (iv) take into account the Services Forecast in order to estimate:
    - (A) the likely shipping requirements of Customers;
    - (B) the supply chain arrangements likely to be used to get Grain to the Port Operator's Port Terminal Facilities;
  - (v) estimate the likely distribution of the transport task between road and rail in each port zone; and
  - (vi) take into account the risk of unforeseen events such as transport shortages, breakdowns or accidents reducing the speed with which Grain is delivered to the Port Terminal Facilities.
- (b) In calculating the Surge Capacity to be allocated under these rules, the Port Operator shall:
  - (i) estimate the extent to which Capacity in excess of Core Capacity may be made available if supply chains deliver Grain at a more accelerated pace than would be expected in normal operating conditions; and

- (ii) assess the likelihood that supply chains will deploy additional resources to deliver Grain at a more accelerated pace than would be expected in normal operating conditions.

#### **4.3 Publication of available Capacity**

The Port Operator shall publish on its website:

- (a) On or before 15 September each year, the proposed amount of Harvest Capacity it intends to offer for each of its Port Terminal Facilities for the following Harvest Shipping Period (**Advised Harvest Capacity**);
- (b) On or before 15 October each year, the proposed amount of Core Capacity it intends to offer for each of its Port Terminal Facilities for the following Annual Shipping Period; and
- (c) No later than 5 Business Days before each monthly Phase 2 Auction, the proposed amount of Surge Capacity it intends to offer for each of its Port Terminal Facilities on a rolling monthly basis during the Annual Shipping Period.

### **5 Capacity allocation for the Harvest Shipping Period**

#### **5.1 Invitation to submit Harvest Shipping Period EOIs**

On or before 15 September each year, the Port Operator shall publish on its website an invitation to Customers to submit Harvest Shipping Period EOIs.

#### **5.2 Applying for Harvest Capacity**

- (a) A Customer wishing to secure Harvest Capacity may submit a Harvest Shipping Period EOI on or before 23 September.
- (b) A Harvest Shipping Period EOI must include the following information:
  - (i) the Port Terminal Facility/s at which Capacity is required;
  - (ii) the amount of Capacity required;
  - (iii) the maximum lift-by window;
  - (iv) the type and grade of Grain;
  - (v) any multi-port requirements;
  - (vi) the supply chain arrangements to be used to deliver the relevant Grain to the Port Terminal Facility (ie, whether serviced under a GSA or another supply chain solution not provided under a GSA).
- (c) Customers shall not be required to obtain Grain Entitlement prior to making an application.
- (d) the Port Operator shall, on 1 October or the next Business day after 1 October (**Allocation Date**) allocate Harvest Capacity to Customers during the Harvest Shipping Period by the following process:

- (i) if the Harvest Capacity available in a Shipping Window is equal to or greater than the total Harvest Capacity requested in Harvest Shipping Period EOIs submitted by the Allocation Date, the Port Operator will allocate the requested Harvest Capacity to the relevant Customers;
- (ii) if the Harvest Capacity available in a Shipping Window is less than the Harvest Capacity requested in Harvest Shipping Period EOIs submitted by the Allocation Date, the Port Operator shall allocate the available Harvest Capacity to each relevant Customer by reducing the relevant Harvest Shipping Period EOIs in proportion to the total Harvest Capacity requested for that Shipping Window by all Customers who have submitted a Harvest Shipping Period EOI by the Allocation Date in accordance with the following formula:

$$RHCA_{(Cust)} = \frac{HSPEOI_{(Cust)} \times AHC}{\sum HSPEOI_{(AllCust)}}$$

Where:

$RHCA_{(Cust)}$  = the Revised Harvest Capacity Allocated to a Customer for a Shipping Window.

$HSP\ EOI_{(Cust)}$  = the Harvest Capacity for which the Customer has submitted a Harvest Shipping Period EOI for a Shipping Window.

$AHC$  = Advised Harvest Capacity for a Shipping Window.

$HSP\ EOI_{(All\ Cust)}$  = the sum of all Harvest Shipping Period EOIs by Customers for a Shipping Window.

- (e) The Port Operator shall inform Customers of the Harvest Capacity they have been allocated by serving a notice (**Harvest Allocation Notice**) within 5 Business Days of the Allocation Date;
- (f) A Harvest Allocation Notice shall include details of:
  - (i) the summary and particulars of the Harvest Capacity allocated to the Customer for each Shipping Window; and
  - (ii) the sum payable by the Customer to the Port Operator in accordance with the Access Agreement or GSA in respect of which the Customer will receive the Capacity.
- (g) Following the allocation of Harvest Capacity on completion of the Harvest Shipping Period EOI process in 2009/10 the Port Operator will consider whether to extend the Annual Shipping Period Capacity allocation process to cover the Harvest Shipping Period in subsequent years.

- (h) The Port Operator will in considering whether to extend the Annual Shipping Period Capacity allocation process take into account the benefits and costs of extending the Annual Shipping Period Capacity allocation process for the allocation of Harvest Capacity and the likelihood of demand exceeding supply in a significant number of Shipping Windows during the Harvest Period.
- (i) If the Port Operator determines that it is appropriate to extend to extend the Annual Shipping Period Capacity allocation process to cover the Harvest Shipping Period the Port Operator will comply with the procedure for Variation of the Port Terminal Rules set out in clause 10 of the Undertaking.
- (j) Harvest Shipping Period Spare Capacity shall be made available under the following process:
  - (i) the Port Operator shall publish on its website a statement of the total Spare Capacity available;
  - (ii) Customers may submit a Spare Capacity Booking Form to the Port Operator up to 30 days before the end of the Harvest Shipping Period or, if earlier, no later than 30 days before the first day of the relevant Shipping Window ; and
  - (iii) Spare Capacity shall be allocated on a first come-first served basis.
- (k) The notification to the Customer of Spare Capacity shall include details of:
  - (i) the summary and particulars of the Spare Capacity allocated to the Customer for each Shipping Window; and
  - (ii) the sum payable by the Customer to the Port Operator in accordance with the Access Agreement or GSA in respect of which the Customer will receive the Capacity.

## 6 Annual Shipping Period Port Terminal Services

### 6.1 Acquiring Capacity in Annual Shipping Period

- (a) Annual Shipping Period Capacity allocation shall be conducted in 3 stages:
  - (i) a Phase 1 Auction;
  - (ii) a Phase 2 Auction; and
  - (iii) a Spare Capacity Allocation.
- (b) The date and time each Auction is scheduled to be held and a schedule of the Capacity on offer at each Auction shall be published by the Port Operator on the auction system website [www.portcapacity.com](http://www.portcapacity.com) not less than 5 Business Days prior to the date of commencement of the Auction.



- (c) Each Auction will be held in accordance with the Auction Rules and according to the Auction Timeline, which must be published by the Port Operator on or before 15 September (with the 2009/2010 Auction Timeline being annexed to these rules as **Schedule 4**).
- (d) By no later than 5 Business Days after completion of each Phase 1 Auction and each Phase 2 Auction, a Customer must nominate the supply chain arrangements to be used to deliver the relevant Grain to the Port Terminal Facility (ie, whether serviced under a GSA or another supply chain solution not provided under a GSA).

## **6.2 Phase 1**

- (a) Phase 1 consists of two Auctions:
  - (i) one for Core Capacity during the period 16 January to 30 June;
  - (ii) one for Core Capacity during the period 1 July to 31 October.
- (b) Phase 1 Auctions must be held on or before 1 November.
- (c) Any Capacity comprised in Lots that are passed in at the Phase 1 Auction will be included in the Core Capacity in the Phase 2 Auctions.

## **6.3 Phase 2**

- (a) Phase 2 consists of monthly Auctions held in each month during the period 1 November to 30 July.
- (b) Any Capacity comprised in Lots that are passed in at the Phase 2 Auction will become available as Spare Capacity.

## **6.4 Spare Capacity Allocation:**

- (i) If:
  - (A) a period of not less than 5 Business Days has passed from the end of the last Phase 2 Auction prior to the commencement of the relevant Shipping Window; and
  - (B) there is Spare Capacity for the relevant Shipping Window, the Port Operator shall publish on its website a statement of the total Spare Capacity available in the relevant Shipping Windows.
- (ii) Customers may submit a Spare Capacity Booking Form to the Port Operator at any time up to 30 days before the first day of the relevant Shipping Window that Spare Capacity is available for.
- (iii) A Customer must nominate at the time of making any application for Spare Capacity during the Annual Shipping Period the supply chain arrangements to be used to deliver the relevant Grain to the Port Terminal Facility (ie, whether serviced under a GSA or another supply chain solution not provided under a GSA) in order to use the Spare Capacity applied for.
- (iv) Subject to the availability of Spare Capacity, the Port Operator shall by no later than 30 days before the first day of the relevant

Shipping Window (**Spare Capacity Allocation Date**) allocate Spare Capacity to Customers on a first-come first-served basis within 2 Business Days of receiving the Spare Capacity Booking Form.

- (v) The notification to the Customer of Spare Capacity shall include details of:
  - (A) the summary and particulars of the Capacity allocated to each Customer for each Shipping Window;
  - (B) in each case whether the Capacity is Core Capacity or Surge Capacity; and
  - (C) the sum payable by the Customer to the Port Operator in accordance with the Access Agreement or GSA in respect of which the Customer will receive the Capacity.

## 7 Trading Capacity

- (a) Customers may trade or transfer Capacity that they have acquired provided that:
  - (i) Customers that have nominated to service their acquired Capacity with a supply chain solution not provided under a GSA may trade that Capacity with each other; and
  - (ii) customers who have nominated to service their acquired Capacity under a GSA may trade that Capacity with each other;but
  - (iii) Customers that have nominated to use a supply chain solution not provided under a GSA to service their acquired Capacity may not trade that Capacity for Capacity that another Customer has nominated to be serviced under a GSA; and
  - (iv) Customers that have nominated to service their acquired Capacity under a GSA may not trade that Capacity for Capacity that another Customer has nominated to be serviced with a supply chain solution not provided under a GSA.
- (b) For the avoidance of doubt, any purported trade or transfer of Capacity that does not comply with **rule 7 (a)** shall be of no effect.
- (c) All transfers must be:
  - (i) proposed using the Transfer of Shipping Capacity Form; and
  - (ii) signed by the transferor and transferee,prior to submission to the Port Operator.
- (d) All transfers of Harvest Shipping Period Capacity must be completed no later than 8 days prior to the first day of the relevant Shipping Window.

- (e) All transfers of Annual Shipping Period Capacity must be completed no later than 30 days prior to the first day of the relevant Shipping Window.
- (f) Subject to the transferor complying with their obligations under this rule, the Port Operator shall immediately sign a copy of the Transfer of Shipping Capacity Form and provide a copy to the transferor and transferee and amend the Shipping Capacity Register to record the details of the transfer.
- (g) The Customer transferring Capacity must pay the Port Operator the Capacity Transfer Fee payable by the Customer to the Port Operator in accordance with the Access Agreement or GSA under which the Capacity is to be transferred.
- (h) For the avoidance of doubt, no transfer shall be effective until approved by the Port Operator.

## 8 Port Operator's Obligations following acquisition of Capacity

- (a) The Port Operator is not obliged to load Grain onto a vessel if:
  - (i) the Customer has not obtained or delivered the relevant Grain Entitlement;
  - (ii) the Customer has not complied with the requirements under **rules 9 and 10**; and
  - (iii) the Customer's Nominated Vessel:
    - (A) has not arrived within the Shipping Window for the relevant Port Terminal Facility; or
    - (B) has not passed the Relevant Surveys.
- (b) Upon the later of the allocation of Spare Capacity or the allocation of a Shipping Window, Customers will be required to nominate vessels into those Shipping Windows in accordance with these Port Terminal Rules.

## 9 Nominating Vessels for Shipping Windows during the Harvest Shipping Period

### 9.1 Nominating Vessels for Shipping Windows

- (a) The provisions of this **rule 9** apply in relation to nomination of vessels for Shipping Windows during the Harvest Shipping Period in addition to the provisions of **rule 10**.
- (b) In the case of inconsistency between the provisions of this **rule 9** and the provisions of **rule 10**, the provisions of this **rule 9** shall apply.

## 9.2 Nomination prior to ETA

- (a) Vessel Nominations must be made no later than 22 days prior to the Nominated Vessel's ETA which must be no later than the last day of the Shipping Window.
- (b) The Port Operator may waive compliance with **rules 10.1(b) and 10.1(f)** during the Harvest Shipping Period provided that the Customer makes a declaration contained in the Direct to Port Delivery Declaration Form in respect of each load of Grain delivered to the Port Terminal Facility.

## 9.3 Readiness of cargo

No later than 48 hours prior to the ETA, the Customer must have physically accumulated or obtained Grain Entitlement equivalent to or greater than the Nominated Tonnage for each Grade to be loaded onto the Customer's Nominated Vessel.

# 10 Nominating Vessels for Shipping Windows

## 10.1 Non-GSA Cargo

### (a) Cargo Accumulation

- (i) Following receipt of a notice from a Customer of an intended shipment (a **Vessel Nomination Form**) within a Shipping Window that is nominated to be serviced by a supply chain other than under a GSA (**Non-GSA Cargo**), the Port Operator must:
  - (A) request an Accumulation Plan from the Customer;
  - and
  - (B) allocate the Customer a shipping date in accordance with the Shipping Stem Policy.
- (ii) A Vessel Nomination Form in relation to a Shipping Window must be provided no later than 30 days prior to the ETA of the vessel actually nominated to be loaded in the Vessel Nomination.
- (iii) The Customer must at the time of submitting the Vessel Nomination Form for a Non-GSA Cargo provide to the Port Operator:
  - (A) a pre-delivery sample of grain from each source of grain to be delivered to the Port Terminal Facility ; and
  - (B) a declaration that the pre-delivery sample is a representative sample of both the Grain to be delivered and the treatment of the Grain and is not misleading.
- (iv) The Customer must propose an Accumulation Plan in relation to a Non-GSA Cargo detailing:

- (A) whether deliveries of Grain to a Port Terminal Facility for export are to be made by road or rail, subject to the operational capabilities of the Port Terminal Facility to receive such deliveries; and
    - (B) the timetable for deliveries to the Port Terminal Facility; fitting in with pre-planned deliveries.
  - (v) The Port Operator and the Customer shall negotiate in good faith toward an agreed Accumulation Plan.
  - (vi) If an Accumulation Plan cannot be agreed within 3 Business Days, the Customer may lodge a Compliance Complaint under **rule 17**.
  - (vii) If deliveries are made by road from a farm during the Harvest Shipping Period (or such other period as published by Main Roads WA), all loads must comply with the requirements of the Harvest Mass Management Scheme published by the Port Operator on its Website and in force for the 2009/10 Year.
  - (viii) All road vehicles delivering Grain to a Port must be registered with the Port Operator and the Port Operator is not obliged to receive Grain from a road vehicle in excess of its relevant mass limits prescribed by the Harvest Mass Management Scheme.
- (b) Pre-delivery testing**
- (i) The Customer must collect and deliver to the Port Operator pre-delivery samples of any Non-GSA Cargo;
  - (ii) The Port Operator must receive pre-delivery sample test results for Non-GSA Cargo prior to the delivery of Grain to the Port Terminal Facilities, so as to:
    - (A) confirm the Grain type and other characteristics of the Grain to be delivered;
    - (B) check for the presence of chemicals and other contaminants; and
    - (C) check for the presence of insect activity and live insects,
 to minimise the risk of cross contamination whilst the Grain is held by the Port Operator at the Port Terminal Facilities.
- (c) Sampling**
- (i) The Port Operator will sample Grain delivered at the Port Terminal Facility, using Port Operator sampling facilities operated by personnel of the Port Operator who will:
    - (A) visually inspect the Grain for obvious signs of contaminants as it exits the vehicles; and
    - (B) sample the Grain unloaded into the grid as it is elevated on the way to storage,

and in all cases, the Port Operator will provide the Customer with a record of the results of the sampling.

- (ii) The Port Operator will not sample Grain for Grade or quality or on any other basis except as set out in **rule 10.1(c)(i)** above.

**(d) Unloading**

- (i) The Port Operator will provide access to the Port Terminal Facilities to road vehicles and rail vehicles (where such facilities exist at the Port Terminal Facilities) for the purpose of Customers unloading deliveries of Grain from the vehicles, for Grain export accumulation.
- (ii) Access to the Port Terminal Facilities for unloading Grain will be provided by way of:
  - (A) road or rail vehicle access (where such facilities exist at the Port Terminal Facilities) including access to roadways, rail track, passing loops and sidings located within the Port Terminal Facilities; and
  - (B) unloading through a grid capable of accepting deliveries by road or rail (where such facilities exist at the Port Terminal Facilities).
- (iii) Where vehicles containing the Customer's Grain arrive at the Port Terminal Facilities as scheduled (or within a reasonable time before or after the scheduled time, so that it can be unloaded to comply with the scheduled time) the Port Operator must use all reasonable endeavours to ensure that the vehicles are unloaded at a rate (commensurate with the type, condition and volumes of the Grain) that enables the Customer's Nominated Vessel to be loaded at its ETA, but not greater than the maximum receival rating of the relevant grid.

**(e) Weighing**

All Grain delivered to the Port Terminal Facilities for unloading must be weighed using the Port Operator's weighing facilities operated by personnel of the Port Operator who must:

- (i) record the gross and tare weights of the road vehicles containing the loads of Grain; or
- (ii) at the Port Operator's discretion where the Port Terminal Facilities have such facilities, batch weigh the Grain unloaded from rail vehicles into the grid,

and in all cases, the Port Operator must provide the Customer with a weighbridge ticket or other statement certifying the weight and quantity of Grain delivered, and confirming the name of the person in whose name the Grain is delivered based on the information contained in the Customer's Direct to Port Delivery Declaration Form and Direct to Port

Sample Declaration Form provided to the Port Operator at or prior to the delivery of each load of Grain at the Port Terminal Facility.

**(f) Fumigation**

The Customer must provide the Port Terminal Operator with a Fumigation Statement detailing all chemicals applied to the Grain for a Non-GSA Cargo prior to delivery at the Port Terminal Facility, in relation to:

- (i) all Grain delivered after 1 February in a Season; and
- (ii) all Grain that is not of the current Season.

**(g) Grain handling**

All delivery and unloading points, including any discharge grids, storage locations, and the movement of Grain following discharge will be nominated and determined by the Port Operator in its sole discretion, acting in accordance with the Port Terminal Rules.

**10.2 GSA Cargo**

- (a) In accumulating a cargo of Grain except Bulk Wheat serviced under a GSA (**GSA Cargo**):
  - (i) Customers must provide a Vessel Nomination to the Port Operator no later than 22 days prior to the last day of the Shipping Window.
  - (ii) The ETA of the Nominated Vessel must be no later than the last day of the Shipping Window.
  - (iii) All Vessel Nominations will be input into the Port Operator's shipping interface contained on LoadNet® for Marketers™ system.
  - (iv) At the time the Vessel Nomination is provided to the Port Operator, the Customer must have full Grain Entitlement for the cargo outlined in the Vessel Nomination.

**11 Vessel Nominations**

**11.1 Details**

- (a) When making a Vessel Nomination, Customers must provide the following vessel nomination and handling instruction details to the Port Operator by entry into the Port Operator's shipping interface in LoadNet® for Marketers™:
  - (i) maximum nominated tonnage (including Master's discretion);
  - (ii) destination details;
  - (iii) product description (commodity type and other characteristics);
  - (iv) ETA;
  - (v) discharge port;

- (vi) shipping agency;
  - (vii) vessel part loading;
  - (viii) de-ballasting requirements;
  - (ix) ship loading sequence plan (subject to **rule 11.1(c)(ii)**);
  - (x) vessel details (including beam, Arrival and departure drafts, dry-weight, vessel type/class, hold and hatch details, net and gross capacities);
  - (xi) cargo details (including batch reference, load tolerance range, total load tonnage);
  - (xii) stevedore details (subject to **rule 11.1(c)(iii)**);
  - (xiii) vessel name (subject to **rule 11.1(c)(i)**);
  - (xiv) Capacity Contract Reference number; and
  - (xv) any other details necessary for the Port Operator to process the Vessel Nomination.
- (b) All Vessel Nominations must:
- (i) provide a vessel ETA that is within the relevant Shipping Window for which the Customer has Capacity of the relevant type; and
  - (ii) provide Laycans less or equal to 14 days, have ownership of cargo and provide port, grades, quality and tonnage details.
- (c) The Port Operator recognises it may not be possible to provide:
- (i) a named vessel with over 22 days lead time, so a TBA nomination will be acceptable as long as the above criteria have been met and a vessel name is provided by no later than 15 days before the ETA;
  - (ii) a shiploading sequence plan with over 22 days lead time, so a TBA response for this category will be acceptable until no later than 48 hours before the ETA; and
  - (iii) stevedore details with over 22 days lead time, so a TBA response for this category will be acceptable until no later than 48 hours before the ETA.

## **11.2 Acceptance of Vessel Nominations**

- (a) The Port Operator will, within 2 Business Days of receiving a Vessel Nomination, notify the Customer whether it accepts or rejects a Vessel Nomination that contains all the information required in rule 11.1 provided that:
- (i) the ETA of the Nominated Vessel is within a Shipping Window for which the Customer has Capacity of the relevant type;
  - (ii) in the case of GSA Cargo, the Customer has full Grain Entitlement for the cargo outlined in the Vessel Nomination; and



- (iii) the Customer is not in Material Breach of its Access Agreement.
- (b) A Material Breach by a Customer of its Access Agreement is a breach which:
  - (i) in the reasonable opinion of the Port Operator, is not capable of being remedied; or
  - (ii) the Customer has failed to remedy after being given at least 14 days written notice by the Port Operator to do so if the Customer:
    - (A) does not pay its debts as and when they fall due;
    - (B) commits an act of bankruptcy;
    - (C) enters into a composition or arrangement with its creditors or calls a meeting of creditors with the view to entering into a composition or arrangement;
    - (D) has execution levied against it by creditors, debenture holders or trustees under a floating charge;
    - (E) takes or has taken or instituted against it any actions or proceedings, whether voluntary or compulsory, which have the object of or which may result in the winding up or bankruptcy of the Customer (except, in the case of a corporation, for the purposes of a solvent reconstruction);
    - (F) has a winding up order made against it or (except for the purposes of a solvent reconstruction) passes a resolution for winding up;
    - (G) is a party to the appointment of or has an administrator, official manager, receiver, receiver/manager, provisional liquidator or liquidator appointed to the whole or part of its property or undertaking; or
  - (iii) repudiates the Access Agreement.
- (c) If the Port Operator rejects a Vessel Nomination it will provide details of the reasons behind the rejection of the Vessel Nomination at the time it notifies the Customer of the rejection.

### **11.3 Amendment of Vessel Nominations**

- (a) The Port Operator may permit the amendment of a Vessel Nomination by a Customer if the Customer:
  - (i) provides written details including reasons justifying the requested amendment; and
  - (ii) those reasons relate solely to matters beyond the reasonable control of the Customer and were not contributed to by the Customer;

and:

- (iii) would not be inconsistent with the Non-discrimination and No Hindering Access provisions of the Undertaking;
- (iv) is to assist achievement of:
  - (A) minimising demurrage at the Port over a given period; or
  - (B) maximising throughput at the Port over a given period;
- (v) does not prejudicially alter the outcome or adversely affect other Customers participating in the Harvest Shipping Period EOI or Annual Shipping Period Auctions;
- (vi) would not result in other Customers incurring materially greater demurrage than would be the case if the amendment had not been accepted.

#### **11.4 Additional Charges**

Additional charges may be payable to the Port Operator to cover the Port Operator's reasonable costs incurred where a Customer requests amendments to the Vessel Nomination.

## **12 Lost Capacity**

### **12.1 Harvest Shipping Period**

- (a) Where, following acceptance by the Port Operator of a Vessel Nomination in respect of Harvest Capacity:
  - (i) a Customer's vessel Arrives outside of the Shipping Window but within the Grace Period; or
  - (ii) the Customer acquires or accumulates Grain Entitlement sufficient to load the vessel within the Grace Period and the Customer's Vessel has Arrived,

the Port Operator will use its reasonable endeavours to load the vessel.

- (b) Where following acceptance by the Port Operator of a Vessel Nomination in respect of Harvest Capacity:
  - (i) a Customer's vessel has not Arrived within the Grace Period; or
  - (ii) the Customer does not have full Grain Entitlement within 48 hours of the ETA of the Nominated Vessel,

the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.

- (c) Where:
  - (i) the Customer does not submit and have accepted by the Port Operator a Vessel Nomination for Harvest Capacity more than 22 days before the last day of the Grace Period; or

- (ii) the Customer does not ship all acquired Harvest Capacity within the Harvest Shipping Period, then:

the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window and the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.

## **12.2 Annual Shipping Period**

- (a) Where, following acceptance by the Port Operator of a Vessel Nomination in respect of Annual Shipping Period Capacity:

- (i) a Customer's vessel Arrives outside of the Shipping Window but within the Grace Period; or
- (ii) the Customer acquires or accumulates Grain Entitlement sufficient to load the vessel within the Grace Period and the Customer's Vessel has Arrived,

the Port Operator will use its reasonable endeavours to load the vessel.

- (b) Where:

- (i) the Customer does not submit and have accepted by the Port Operator a Vessel Nomination more than 22 days before the last day of the Grace Period; or
- (ii) the Customer's Nominated Vessel does not Arrive within the Grace Period; or
- (iii) in the case of a GSA Cargo, the GSA Customer does not obtain the full Grain Entitlement for the cargo at the time of Vessel Nomination; or
- (iv) in the case of a Non-GSA Cargo, the PTSA Customer does not obtain the full Grain Entitlement for the cargo at the time of Arrival of the Nominated Vessel,

the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window and the Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.

## **13 Shipping Stem Policy**

### **13.1 Prioritising Loading of Vessels**

The Shipping Stem is ordered by the Estimated Time of Commencement of Loading (**ETC**). In allocating or adjusting an ETC to a Customer the Port Operator shall have regard to (in order of decreasing importance):

- (a) the ETA of a vessel if the ETA is within the Shipping Window for which Capacity is being utilised and the Vessel actually Arrived within its Shipping Window;

- (b) the Nomination Date of the Vessel Nomination;
- (c) the Nomination Time of the Vessel Nomination;
- (d) changes in the ETA of a vessel (including those that would take it outside of the Shipping Window for which Capacity is being utilised);
- (e) changes in the expected Accumulation Plan of a vessel for a GSA Cargo or departures from an agreed Accumulation Plan for a Non-GSA Cargo; and
- (f) loading a vessel whose cargo remains at Port but which failed to Arrive prior to the last day of the Shipping Window.

### 13.2 Adjustments to the Stem

- (a) The Port Operator may amend the Shipping Stem at the request of a Customer only if accepting the request:
  - (i) would not be inconsistent with the Non-discrimination and No Hindering Access provisions of the Undertaking;
  - (ii) is for the purpose of:
    - (A) minimising demurrage at the Port over a given period; or
    - (B) maximising throughput at the Port over a given period;
  - (iii) does not prejudicially alter the outcome or adversely affect other Customers participating in the Shipping Stem;
  - (iv) would not result in other Customers incurring materially greater demurrage than would be the case if the request had not been accepted.

### 13.3 Discretion to Accept Vessel Nominations

The Port Operator may accept a Vessel Nomination that does not comply fully with the requirements of **rule 11** provided that such an action:

- (i) would not be inconsistent with the Non-discrimination and No Hindering Access provisions of the Undertaking;
  - (ii) is for the purpose of:
    - (A) minimising demurrage at the Port over a given period; or
    - (B) maximising throughput at the Port over a given period;
  - (iii) does not prejudicially alter the outcome or adversely affect other Customers participating in the Shipping Stem;
  - (iv) would not result in other Customers incurring materially greater demurrage than would be the case if the request had not been accepted.
- (b) a Vessel Nomination accepted under this **rule 13.3** shall in all cases have a lower priority than a Vessel Nomination that does comply fully with the requirements of **rule 11**.

#### **13.4 Other Information**

The Shipping Stem shall provide information about the total Capacity in relation to a Shipping Window and the amount of Capacity currently allocated.

### **14 Storage Priority Policy**

The Port Operator shall allocate the use of storage capacity in a Port Terminal to meet the order of vessels contained in the Shipping Stem from time to time having regard to the Shipping Stem Policy.

### **15 Port Queue Policy**

#### **15.1 Allocating Priority**

- (a) The port queue is the berthing priority for each vessel that has Arrived at a Port Terminal Facility and is waiting to be loaded.
- (b) Berth priority for vessels is determined by:
  - (i) cargo accumulation status; and
  - (ii) the time of Arrival of a vessel and its relationship to the Shipping Window of the Vessel Nomination;
- (c) The Port Operator will not call a vessel in to berth until the full cargo is ready for loading at the Port Terminal Facility and the Customer has full Grain Entitlement for the cargo unless it is necessary in the reasonable opinion of the Port Operator for the efficient operation of the Port Terminal Facility.

#### **15.2 Non compliant vessels**

- (a) Customers' vessels must pass all Relevant Surveys within 24 hours of berthing.
- (b) The Port Operator may require Customers to move their vessel from the berth if it fails survey in accordance with **rule 15.2(a)** and the non-compliant vessel is holding up the berth from another vessel.
- (c) where a vessel fails any Relevant Surveys it returns to its original priority once it has passed the Relevant Surveys .

#### **15.3 Multi porting**

The Port Operator recognises vessels which have received part Grain cargo from a previous call (multi port) at another Western Australian port. If this is applicable, then the actual Arrival date at the first port of call is used to establish its priority in the port berthing queue.

### **16 Delivery Queue Policy**

- (a) Each Customer will be allocated an Assembly Window for Non-GSA Cargo once they have a confirmed Vessel Nomination and ETA, during

which time the Customer will be permitted to deliver loads of Grain to the Port Terminal Facility for the purposes of Export Accumulation (**Assembly Window**).

- (b) The Port Operator allocates Assembly Windows in order to meet the facilitated order of vessels contained in the Shipping Stem from time to time having regard to the Shipping Stem Policy.
- (c) Assembly Windows will be allocated at Kwinana all Year round and at Geraldton, Albany and Esperance outside of the Harvest Shipping Period. During the Harvest Shipping Period at Geraldton, Albany and Esperance, Customer's Grain delivery vehicles will be required to queue for services along with other vehicles seeking access.
- (d) Customers delivering Bulk Wheat for a non-GSA Cargo may not access a delivery queue at a Port Terminal Facility until it has been provided with an Assembly Window by the Port Operator.
- (e) Provided that a Customer arrives at the relevant Port Terminal Facility within their Assembly Window, the Customer's priority in the delivery queue will be determined by the time that they arrived at and joined the delivery queue.
- (f) The Port Operator may require Customers to move a vehicle of theirs from a delivery queue if the vehicle breaks down or is rejected in accordance with the terms and conditions of the Access Agreement or these Port Terminal Rules and the non-compliant vehicle is holding up the delivery queue for other vehicles.

## 17 Complaints and Dispute Resolution

### 17.1 Complaints Resolution process

- (a) If a Customer considers that the Port Operator has not complied with any provisions of the Port Terminal Rules, they may lodge a complaint with the Risk and Compliance Coordinator of the Port Operator (**Compliance Complaint**).
- (b) The Compliance Complaint must:
  - (i) be in writing, including by email to [compliance@cbh.com.au](mailto:compliance@cbh.com.au) or by facsimile to (08) 9322 3942 addressed to the Risk and Compliance Coordinator;
  - (ii) be notified promptly and in any event by no later than 4.00 pm Western Australian Standard Time on the next business day following the day on which the circumstances giving rise to the complaint occurred;
  - (iii) contain details of:
    - (A) the facts and reasons relied upon by the Customer as the basis of the complaint, including the anticipated or actual loss, cost or expense and time or operational impacts of the

- non-compliance and the names of any representatives, agents or employees of the Customer and Port Operator involved;
- (B) the provisions of the Port Terminal Rules relevant to the alleged non-compliance; and
  - (C) the proposed terms of the decision that the Customer seeks
- (c) A Compliance Complaint must be referred to:
- (i) the Port Operator's General Manager of Operations;
  - (ii) the Port Operator's General Counsel; and/or
  - (iii) the Port Operator's Group CEO.
- (d) The Port Operator must use its best endeavours to respond to the Customer within one business day following receipt of the Dispute Notice (**Complaint Response**). The Complaint Response must notify the Customer whether the Port Operator will change its decision and, if not, it must provide written reasons for the Port Operator's decision.
- (e) If the Customer is not satisfied by the Complaint Response, or if the Port Operator fails to respond to the Compliance Complaint within one Business Day of its receipt, the Customer may serve written notice on the Port Operator within one business day of receipt of the Complaint Response, or within one business day of when the Complaint Response was due (**Escalation Notice**).
- (f) Upon receipt of the Escalation Notice, the Port Operator must use all reasonable endeavours to arrange a meeting between the Port Operator's General Manager of Operations and the Customer within two Business Days of receipt of the Escalation Notice. Where the Port Operator's General Manager of Operations is unavailable for such a meeting within the timeframe specified, the Port Operator will make available a suitable alternative authorised representative (**Alternate**) to meet with the Customer within two Business Days of receipt of the Escalation Notice. The meeting may take place either face to face or by telephone to assist in expediting the determination of the complaint.
- (g) At the meeting, the Port Operator's General Manager of Operations (or Alternate) and the Customer will discuss the subject of the Compliance Complaint and Complaint Response and use all reasonable endeavours to reach an agreed outcome. Where an agreed outcome cannot be reached, the Port Operator's General Manager of Operations (or Alternate) will make a final written decision including reasons for the decision in relation to the Complaint Notice and notify the decision to the Customer within one Business Day of the meeting (**Decision Notice**).
- (h) In considering the Compliance Complaint and providing the Complaint Response and any Decision Notice, the Port Operator must take into

account the circumstances of the complaint and the details set out in the Complaint Notice and, acting reasonably and in good faith, reach a decision that is consistent with the Port Terminal Rules and the Undertaking.



## Schedule 1



tradeslot

# SHIPPING CAPACITY ACCESS ALLOCATIONS

## AUCTION RULES

Version 2.0

7<sup>th</sup> August 2009

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## 1 Preamble

The following auction rules govern the obligations of parties in the conduct of an online auction. The auction rules for a specific auction are those rules located on the auction system website at the time of the auction. It is the responsibility of the individual bidder to ensure they understand and/or seek appropriate legal advice on the auction rules.

## 2 Tradeslot registered bidder agreement

Upon completion and submission of the Registered Bidder Agreement (and for all bidding conducted by the bidder while certified/authorised under those details), bidders are deemed to have accepted, and are bound by, the auction rules, as amended and varied in accordance with the Undertaking.

## 3 Bidder qualification

All entities wishing to participate in the auction (potential bidders) are required to apply for and be assessed as qualified bidders. To qualify as a bidder, entities are required to have signed an Access Agreement.

## 4 Bidder registration

Qualified bidders will be set up by Tradeslot as users of the auction system. Application to become a registered bidder requires acceptance of the terms and conditions of the Tradeslot Registered Bidder Agreement and participation in the training sessions provided by Tradeslot.

## 5 Training and system testing

To enable qualified bidders to participate in the auction process, Tradeslot and CBH shall provide training, including the running of "mock" auctions for qualified bidders to familiarise themselves with the auction system. Tradeslot shall also assist with system testing for qualified bidders prior to commencement of the Auctions.

## 6 Shipping capacity access auction system

In order to participate in an auction, registered bidders must log on to the dedicated auction system website, [www.portcapacity.com](http://www.portcapacity.com)

Registered bidders are issued a single system account user name and password via email, with which to access the system for purposes of the Auction. Registered bidders provide their account log on details to others entirely at their own risk. Bids entered by parties or advisors who have been granted access by a registered bidder are deemed to be bids of that bidder and are binding on that bidder.

The auction system website server is hosted within a secure third party hosting facility. Tradeslot independently manages the auction.

Tradeslot provides a telephone based help desk service during the auction. The Tradeslot help desk number is +61 3 8624 0000.

## 7 Auction format

### 7.1 Online auction

All bids in the auction are submitted electronically via the internet during the lot bidding period. The auction is conducted in a simultaneous, multi-round, ascending clock auction format.

### 7.2 Simultaneous auction format

All lots in the auction catalogue for the auction are contested simultaneously. Bidding on all lots commences at the date and time of the auction start (lot bidding period start) and ends when bidding on all lots ends (all lots are at or below capacity). Bidders have the opportunity to submit bids on all lots. All lots stay open until the end of the auction event. When the auction closes, all lots close simultaneously.

### 7.3 Multi round auction format

Lots are offered for bidding over a series of separate, pre-scheduled activity rounds. The auction can span multiple days with scheduled breaks between days.

Activity processing periods are scheduled after each activity round end and prior to the start of the activity pause period. These periods serve to aggregate bids from all bidders and determine whether the auction continues into another round. During activity processing periods all bidding activity is suspended.

Activity pause periods (or auction breaks) can be scheduled between activity rounds. Unlike activity processing periods, however, auction data will be viewable and proxy bids for future rounds can be set.

### 7.4 Ascending clock auction format

In the ascending clock auction format capacity in one lot is being offered at a per tonne uniform price across all bidders. Bidders indicate how much capacity they would purchase in that lot at that uniform price per tonne.

The first round uniform price begins at a start price defined as the upfront marketers fee plus auction premium (the auction premium typically starts at

\$0.00). As long as total demand for one lot is higher than total supply, the uniform price increases by one increment each round. With every new round bidders are asked to submit a new volume bid at the new price per tonne.

Bidders may change their bid at any time during the round. The submitted bid current at the time the round finishes is the bid processed for that round.

## **7.5 Auction schedule**

The auction schedule, including the date and time of all auction phases is determined by CBH who will publish the auction schedule prior to the auction start on the auction system website, accessed at [www.portcapacity.com](http://www.portcapacity.com)

CBH will also publish the auction catalogue of lots to be included in the scheduled auction prior to the auction start.

CBH may alter the auction schedule by notifying qualified bidders of the revised auction schedule, and publishing the revised auction schedule prior to the previously published auction start.

## **8 Event and round timing**

The server time on the auction system website is the official time clock for all activities associated with the auction. Australian Western Standard time (WST) will be displayed.

The time remaining in each round, known as the round time, will be displayed during bidding periods. In each round, the round timer counts backwards towards zero. When zero is reached, bidding is stopped and the system processes all bids of the closed round activity processing period and may start an activity pause period. During an activity pause period the system displays the time remaining till the live bidding process resumes.

Round length can be flat (all rounds have the same duration) or can be set round by round. CBH will advise bidders prior to the auction event of the round timing.

The auction does not have a scheduled end time but CBH anticipates the auction to run no longer than five business days. If necessary, the auction schedule will include breaks without bidding activity (activity pause period).

## **9 Auction pricing**

All auction pricing is in Australian Dollars for each lot delivered to the specified delivery point for each bidder.

All auction and bid pricing is exclusive of Goods and Services Tax (GST), per tonne of capacity. The system will display total committed dollars and total confirmed capacity.

Goods and Services Tax (GST) will be included upon invoicing of the capacity won for that bidder.

## 9.1 Clock price

The clock price for each lot will be displayed as an exact price per tonne. As long as total demand exceeds total supply the clock price will increase by one bid increment (as defined prior to the auction) at the beginning of each new round. Bidders will express bids in terms of capacity (minimum increment 1,000 mt) requested at that price per tonne. Round-by-round price increments can be flat (same increments for all rounds) or can differ between rounds. CBH will inform bidders about bid increments prior to the auction event.

If at the end of a round, total demand matches total supply or falls below total supply, the clock price stays constant in the next round. Other lots with total demand exceeding total supply increase in price by one increment. The auction rounds continue until demand in all lots is equal or less than supply.

The payable amount per tonne is a uniform price – when capacity of one lot is awarded, all successful bidders will pay the same (uniform) price per tonne of capacity (mt). The uniform price is determined as follows:

Upfront Marketers fee + Auction bid price + Surge fee (if applicable)

The clock price will be displayed lot by lot to allow direct comparison between per tonne lot pricing.

## 9.2 Start prices

The opening clock price per lot is based on the Upfront Marketers Fee plus any Surge Fees (if applicable) set by CBH prior to the auction.

## 10 Registration period

The registration period is the period before the first activity round where bidders are able to log in to the system and update contact details and email addresses online on the bidder profile page. They are also able to view the auction catalogue (lot information) and submit proxy bids (see next section).

## 11 Auction bidding activity

### 11.1 Bids

Bids on lots can only be submitted

- during an activity round; or
- as a proxy bid during an activity round or during the registration period.

Bidders can submit multiple bids during each activity round.

Valid bids submitted in previous activity rounds during the auction cannot be withdrawn by the bidder under any circumstances. The last valid bid placed in the previous activity round is binding on the bidder.

## **11.2 Starting the lot bidding period**

The lot bidding period for all lots commences at the date and time of the auction start. The lot bidding period continues subject to the scheduling of activity rounds.

The lot bidding period for a given lot ends at the end of the overall auction and lot award.

## **11.3 Valid bid**

Bidders can bid for up to 100% of the total capacity in a given lot. The system will reject bids for more than 100% of the lot volume.

The minimum increment for a bid is 1,000 mt. The system will not allow fractions of the minimum increment.

Total capacity requested across all lots in a round cannot exceed the total capacity requested in the previous round (total capacity rule). The system does not accept a bid that would bring the total capacity to exceed last round's total capacity. This means that the aggregate capacity bid represents the maximum aggregate capacity that may be bid in following rounds. As the auction progresses Bidders may change the way that they allocate their maximum aggregate capacity between lots but may not exceed the aggregate capacity bid for in the first round.

## **11.4 Activity round length**

Activity rounds last for a given duration of time, which is set by CBH before the auction begins. Activity round time can be flat (uniform across all rounds) or can be set round-by-round.

The time remaining to adjust bids in each current activity round is indicated on the screen by the round timer. Activity rounds are advanced when the round timer reaches zero.

## **11.5 Advancing activity rounds**

At the end of each activity round there will be a round processing period. During this period the system will calculate the aggregate demand for each lot by adding together the capacity demanded by all valid bids and proxy bids.

The aggregate demand of the previous round will be displayed in the system. Past round data can also be viewed and downloaded from the Bid History section of the system.

### **(a) Aggregate demand exceeds supply**

If the aggregate capacity demanded is greater than the capacity supplied in a lot, the round will advance with the clock price

- remaining at \$0.00 (from round 1 to round 2)
- increased by one price increment (from round 2 to 3 and following).

### **(b) Aggregate supply exceeds demand**

If the aggregate demand for a lot is less than or equal to the aggregate supply for that lot and the auction event is not closing, the lot

progresses into the next round without increasing the price per tonne.

Activity rounds continue to advance until all lots have aggregate demand less than or equal to aggregate supply. At this point, the overall auction event closes.

### **11.6 Lot Award**

A given capacity volume within each lot is awarded to one or more winning bidders at the close of the auction event.

The clock price per lot at the end of the auction determines the payable price per tonne.

The award of a lot may be subject to grievance proceedings.

### **11.7 Overshoot**

When, at the end of the auction event aggregate demand in one lot is less than supply it creates left over capacity, or overshoot. In the case of overshoot

- the volume that has been bid for will be allocated at the uniform price reached for the given lot
- the excess supply (the volume that has not been assigned) may be offered at a subsequent auction.

### **11.8 Passing in capacity**

If a lot is not awarded as there have been no bids for the lot at the end of the entire auction event, the capacity within that lot will be passed in and may be offered at a subsequent auction or through booking spare capacity after the relevant phase 2 auction.

### **11.9 Disruption to an auction**

If the auction system fails at the server, or there is any unexpected disruption to services prior to auction start, the auction will be re-scheduled. All qualified bidders will be notified of the rescheduling of the auction.

If the system fails, or there is any unexpected disruption to services after the auction start and during the lot bidding period, the status of competition for all lots, reverts to that existing at the end of the activity round immediately prior to the disruption. The auction recommences as soon as the problem is rectified, and as scheduled by CBH.

If a given bidder is disconnected from the system during the lot bidding period due to individual system or connection failure, the bidder can continue to participate in the auction indirectly if proxy bids have been submitted. The Tradeslot help desk is not authorized or technically able to submit bids on behalf of bidders.

## **12 Placement of Proxy Bids**

Proxy bids are bids placed before the beginning of an activity round or before the beginning of the auction during the registration period. Bidders can but are not



obliged to, set volume bids in anticipation of round clock prices. Proxy bids can be deleted or over-written during the registration period and at any time during activity rounds.

Proxy bidding is highly recommended as a safety net to ensure bidders stay in the bidding process even if they are temporarily disconnected from the system. This is particularly important as the auction rules prohibit the Tradeslot help desk from placing bids or proxy bids on behalf of bidders even in the case of internet connection issues.

## **12.1 Proxy bids and activity rules**

Proxy bids are subject to activity rules. Proxy bids will not be accepted by the system if a volume bid is higher than the bid of the previous round.

## **12.2 Over-writing proxy bids during the auction**

During the auction round, a bidder may elect to replace a pre-determined proxy bid with a lower volume (or higher provided that the total aggregate capacity limit is not exceeded) live bid.

The bidder will be asked to confirm or cancel this decision. Should they confirm to overwrite their pre-determined proxy bid, all existing proxy bids for that given lot that are greater than the overwriting live bid will be reduced to the volume of the overwriting live bid. Existing proxy bids for the given lot that are less than the overwriting live bid will remain unchanged.

If the live bid that overwrites an existing proxy bid is higher than the proxy, the bid will be accepted for that round without affecting the proxy setting for future rounds.

## **12.3 Auction Member Queries**

A Query is where an Auction Member seeks clarification of a rule or process in connection with the Auction.

All queries from a Bidder are to be directed to the Tradeslot helpdesk.

## **12.4 Auction Member Grievance**

A Grievance is where an Auction Member wishes to lodge a formal complaint with respect of the Auction.

A Bidder must indicate the intent to lodge a grievance with the Tradeslot helpdesk during the execution of the Auction.

Grievances lodged after the auction has ended will not be considered.

# **13 Post auction**

## **13.1 Invoicing**

Following the auction end, confirmation to winning bidders, of lot award and corresponding charges are included into the Invoice and issued electronically.

Bidders are normally notified of the lot award via email within two (2) business days after the end of the auction.

### **13.2 Publication of results**

CBH will publish the end price and % capacity sold within each lot at the end of the auction. The results of the auction will not disclose winning bidders or information allowing the identification of individual bidders.

If a grievance is submitted, winning bidders will be notified that their lot award is provisional until the grievance is determined by the Auction Review Committee. Confirmation of lot award to winning bidders will be made after determination of the grievance by the Auction Review Committee.

### **13.3 Grievance procedure**

The grievance procedure aims to provide a framework for raising and dealing with grievances which arise from the relevant online auction. It aims to provide an efficient, clear, fair and accessible mechanism for dealing with problems which arise and for ensuring that the determination of any grievances, and the online auction itself, has been conducted properly.

The grievance shall be determined having regard to the following factors only:

- the application of the auction rules;
- the bidder agreement between the aggrieved bidder and Tradeslot;
- the aggrieved bidder's participation in the online auction;
- the operation of the technical auction system;
- any oral submissions made by the aggrieved bidder related to the above factors;
- any recommendations made by the Auction Review Committee; and
- any other factor that the Auction Review Committee considers appropriate in its absolute discretion, provided that notice of such consideration is given to the relevant aggrieved bidder(s).

If a bidder indicated their intent to lodge a grievance during the auction with the Tradeslot helpdesk, the grievance and any supporting documentation must be lodged by 5.00 pm on the first business day following the auction end. Bidders are to submit grievances to the Tradeslot auction manager either electronically or by facsimile as follows:

- Electronically at: [auctionmanager@tradeslot.com](mailto:auctionmanager@tradeslot.com)
- By facsimile at: (03) 9621 1811

Grievances will be determined the Auction Review Committee.

CBH, Tradeslot and each aggrieved bidder have the right to maintain as confidential the grievance, application of the grievance procedure and the determination of the grievance.

Each bidder authorises and consents to the use of any personal information provided in connection with these auction rules for the purposes set out

herein, subject only to the Privacy Act 1988 (Cth) and any other applicable legislation. Without limiting the forgoing, such information may be used by the Auction Review Committee as reasonably necessary to determine any grievance.

## **14 Auction Review Committee**

### **14.1 Responsibility**

The Auction Review Committee is responsible for the oversight of the Auction process. Its primary goal is to ensure the Auction proceeds in an orderly and fair manner. As a result of this goal the Auction Review Committee is charged with investigating any outcomes that it believes may contravene the operations of a fair and equitable market.

### **14.2 Structure**

The voting members of the Auction Review Committee will comprise a mix of risk oversight skills, auction knowledge and independence as follows:

- CBH Group Chief Risk Officer (or representative) – Chairman
- Representative of Tradeslot
- One representative chosen by the trade from an accounting firm

A quorum is established when all voting members (or their representatives) are present.

A representative of CBH Operations may be invited to attend but does not carry a vote.

Auction Review Committee Meetings shall be held at the end of each auction and as required during each auction. Minutes shall be recorded and where necessary reports presented to the meeting.

### **14.3 Responsibility**

The Auction Review Committee is responsible for the oversight of the Auction process. Its primary goal is to ensure the Auction proceeds in an orderly and fair manner. As a result of this goal the Auction Review Committee is charged with investigating any outcomes that it believes may contravene the operations of a fair and equitable market.

### **14.4 Powers**

The powers of the Auction Review Committee will include but are not limited to:

- Enforcing a trading halt to the Auction process
- Querying Bidders regarding trading activity and outcomes
- Cancelling auction trades during the auction and prior to validation
- Suspend/cancel Bidder registration
- Validating the Auction

- Recommending improvements to the Auction process

## 15 Communication of Decisions

The Auction Review Committee will make available its decisions and the background to its decisions to the party that lodged the grievance. The decisions of the Auction Review Committee will be made publicly available where that information is not market sensitive, confidential or in breach of relevant regulations. Where necessary the decisions will also be communicated to the ACCC with supporting rationale and information.

## 16 Limitation of liability and indemnity

### 16.1 Limitation of liability

CBH and Tradeslot hereby exclude, to the fullest extent permitted by law, all liability to bidders arising out of or otherwise in connection with the participation by bidders in the auction including, without limiting the foregoing, any liability:

- for failure of the system prior to the auction start;
- for failure of the system during the lot bidding period;
- for failure by the system to accept a valid bid;
- for errors in the submission of proxy bids;
- for errors in the reserve price for a lot;
- for any capacity limit of a bidder, whether such limits are nominated by a bidder or otherwise;
- for interruption of any other kind to access to the online auction website;
- for loss or delay in the receipt by a bidder of any electronic notification from CBH;
- for loss or delay in the receipt by CBH of any electronic notification from a bidder;
- for indirect, incidental, special or consequential damages whether or not the bidder knows of the possibility of such damage or such damage was otherwise foreseeable;
- for loss of profits or savings (actual or anticipated) and loss of goodwill, whether or not the bidder knows of the possibility of such damage or such damage was otherwise foreseeable; and
- contributed to directly or indirectly by the bidder's acts or omissions;

except to the extent that such liability arises from acts or omissions of CBH that are negligent or unlawful or which amount to wilful misconduct.

## **16.2 Indemnity**

Each bidder indemnifies CBH and Tradeslot, its officers, employees and agents, from and against any claim, action, liability, loss, damage, cost, charge, expense, outgoing, payment, diminution in value or deficiency of any kind or character arising directly or indirectly from any:

- Breach by the bidder of these auction rules; or
- Acts or omissions (including any negligence, unlawful conduct or wilful misconduct) by the bidder arising out of or otherwise in connection with the bidder's participation in the online auction.

## Schedule 2

### Direct to Port Delivery Declaration Form

- (a) The Customer warrants and represents that:
  - (i) grain being tendered at the Port will not:
    - (A) include any Contaminant
    - (B) be in breach of the Bulk Handling Act 1967 (WA) or Bulk Handling Act Regulations 1967 (WA);
  - (ii) it owns any grain tendered for delivery by it or on its behalf;
  - (iii) all of the grain in a Delivery has been or is only contained in equipment, bags, farm implements, farm storages and bulk grain motor bodies that have:
    - (A) not contained any grain product prior to containing grain of this current Season and are free from insects and vermin; or
    - (B) previously contained a grain product, but have been freed of all such grain product and is free from insects and vermin;
  - (iv) any vehicle that has previously transported non-grain or contaminated grain products:
    - (A) is clean, dry and free of remaining materials and odours from previous loads;
    - (B) has been washed under high pressure prior to delivering any grain; and
    - (C) has the details of previous loads disclosed on the relevant form;
  - (v) if any of the grain has been treated with substances for the control of insects, details of the substances and application of those substances has been provided in writing to CBH and the use of any other chemical in the process of planting, growing and storage of the grain has been in accordance with the levels prescribed in any relevant legislation and also in accordance with the usage instructions;
  - (vi) none of the grain in a delivery is a Genetically Modified Organism (unless declared in writing to, and approved in writing by, CBH before the Delivery enters the Port Terminal Facility);

- (vii) any information provided to CBH in a delivery form is true and correct and not misleading or deceptive or likely to mislead or deceive; and
- (viii) in the case of grain delivered during the Harvest Shipping Period and without a pre-delivery sample being tendered by the Customer, all of the grain in a delivery was grown between the May and September immediately prior to the Current Season.

## Schedule 3

### Direct to Port Sample Declaration form

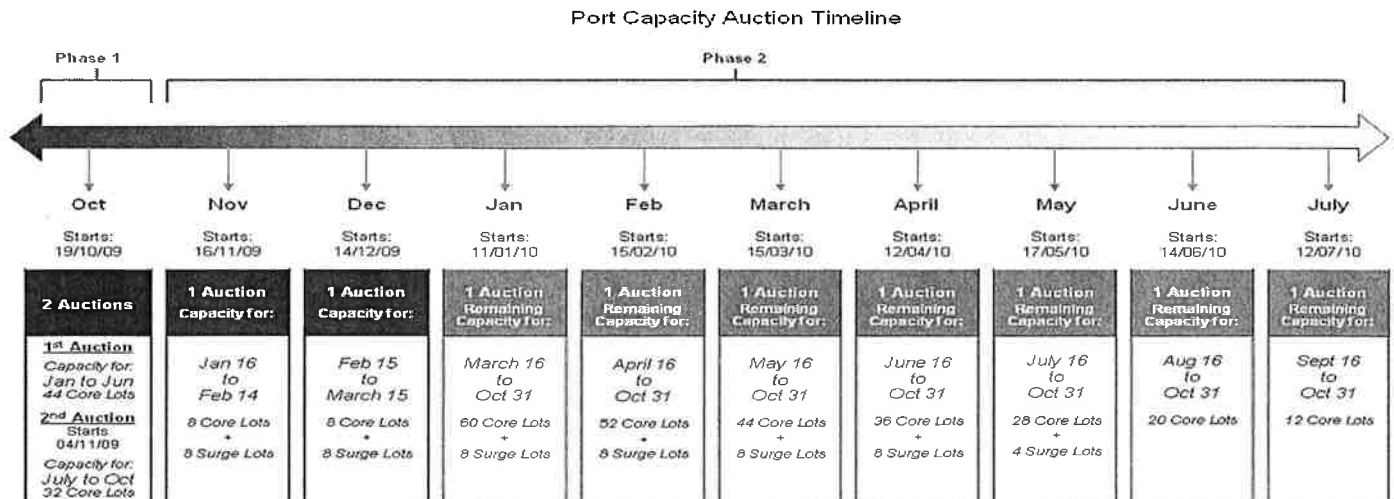
The Customer warrants and represents that:

- (a) grain being provided as a pre-delivery sample is a true and correct representative sample that has not been manipulated or created in order to produce an misleading or deceptive assessment of the quality of the grain to be delivered to the Port Operator; and
- (b) the grain is representative of all storages from which grain to be delivered to the Port Terminal Facility will be drawn.



# Schedule 4

## Auction Timeline



Note: Capacity remaining within lots will be re-auctioned in subsequent auctions.

Lot = ½ month capacity by Port.

## Schedule 4

### Port Terminal Facility - Geraldton

#### 1 Location

The Geraldton port terminal is located in the Western Australian city of Geraldton, which is approximately 428km north of Perth. The port terminal address is Corner Marine Terrace and Crowther Street, Geraldton WA 6530.

#### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below.



- (b) Grain receipt

- (i) 1 x 200 tonne weighbridge and 2 x 120 tonne weighbridges (located at west end depot).
- (ii) 1 x 1,000 tonne per hour road receipt bin and 4 x 500 tonne per hour road receipt bins across the port facility.
- (iii) 1 x 1,000 tonne per hour rail receipt station with associated rail line.

- (iv) 17 dust control systems.
  - (v) 55 grain conveyors with 7 associated grain elevators.
- (c) Grain storage
  - (i) The total grain storage capacity is 295,000 tonnes.
  - (ii) 24 x 2,200 tonne reinforced concrete vertical cells (current capacity is 1400 tonnes, until cell restoration is complete in 2011).
  - (iii) 14 x 500 tonne star cells with associated working house.
  - (iv) 14 x 10,000 tonne steel silos with self-discharging base and associated working house.
  - (v) 1 x 95,200 tonne capacity reinforced concrete horizontal storage cell.
- (d) Inload capacity
  - (i) Rail
    - (A) The port terminal has one rail receival station, which can also be used for road receivals when it is not being used by rail. The rail receival station is rated to receive grain at 1,000 tonnes per hour by rail or by road.
    - (B) The grid into which the grain is received can discharge at a minimum of 400 tonnes per hour, up to 1,000 tonnes per hour. The rate of discharge is dependent upon the silo to which the grain is to be discharged.
    - (C) Various factors reduce the ability of the rail receival station to receive grain at its rated capacity. These include:
      - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
      - (2) the physical configuration of rail wagons moving into the port terminal;
      - (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
      - (4) the Port Operator having to weigh grain on receipt using its batch weighers.
  - (ii) Road
    - (A) The port terminal has 5 road receival stations. One is rated to receive grain at 1,000 tonnes per hour. The other 4 receival stations are rated to receive grain at 500 tonnes per hour. In total, the Geraldton port terminal can receive grain by road at a maximum of 3,000 tonnes per hour.
    - (B) The 1,000 tonne per hour grid can discharge grain at a minimum of 400 tonnes per hour, up to 1,000 tonnes per

hour. The other 4 receival stations operate on a grid valve system, and can discharge grain at between 400 and 450 tonnes per hour.

(e) Ship loading capacity

The Geraldton port terminal has 2 luffing ship loaders, each rated to a loading capacity of 1,000 tonnes per hour. The operational capacity of the ship loaders averages between 950 and 1,400 tonnes per hour, depending on the following factors:

- (i) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
- (ii) trimming hatches – loading rates are reduced to ‘half feed’ when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
- (iii) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
- (iv) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
- (v) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship’s captain to check the ship’s draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
- (vi) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
- (vii) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship’s hatches; and
- (viii) weather – grain cannot be loaded on ships in rain or high winds.

(f) Associated system control and communication networks, Site office, ablution and workshop facilities.

- (g) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

# Schedule 5

## Port Terminal Facility - Kwinana

### 1 Location

The Kwinana port terminal is located in the Kwinana industrial area of Western Australia, approximately 40km south Perth. The port terminal address is Rockingham Beach Road, Kwinana Beach WA 6167.

### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below. The rail loop is also included, but not the land surrounding the loop.



- (b) (b) Grain receiptal
- (i) 1 x 4,000 tonne per hour rail receiptal station with associated rail loop.
  - (ii) 76 grain conveyors with 14 associated grain elevators.
  - (iii) 34 x dust control systems.

- (iv) 1 x 160 tonne certified weighbridge.
- (c) Grain storage
  - (i) The total grain storage capacity is 1,013,900 tonnes.
  - (ii) 144 x 2,350 tonne reinforced concrete vertical cells with associated working house (due to high level sensors and purge capacity, the operational capacity of these cells is 2,200 tonnes each).
  - (iii) 104 x 500 tonne star cells with associated working house (due to high level sensors and purge capacity, the operational capacity of these cells is 450 tonnes each).
  - (iv) 1 x 285,800 tonne and 1 x 238,100 tonne capacity reinforced concrete horizontal storage cells with associated working house (the capacity of these cells is based on one grain type – when segregated, storage capacity in these cells is reduced).
  - (v) 4 x corrugated galvanised steel open bulkheads with a total capacity of 120,100 tonnes, comprised of:
    - (A) O1: 30,100 tonnes
    - (B) O2: 40,000 tonnes;
    - (C) O3: 23,000 tonnes;
    - (D) O4: 27,000 tonnes.
- (d) Inload capacity
  - (i) Rail
    - (A) The port terminal has 1 rail receival station, which is comprised of 2 receival grids. The rail receival grids can also be used for road receivals. When shipping demand requires, rail accumulation tonnage is supplemented with road receivals. The receival grids are rated to receive grain at 4,000 tonnes per hour by rail, and 700 tonnes per hour by road.
    - (B) Operational constraints and the need to handle multiple grain segregations severely impact the port terminal's ability to achieve the rated rail receival capacity of 4,000 tonnes per hour. For example, changing the receival facilities to swap between receiving two grades of wheat takes 15-30 minutes. The process involves emptying the receival grid, purging the receival lines and moving trippers in the seventh floor workhouse. Changing the receival facilities to swap from receiving wheat to lupins can take 20-40 minutes, as this process additionally requires the grid to be blown down and the receival elevators to be air blasted.
    - (C) The physical configuration of rail wagons for discharge can also affect the ability of the receival station to operate at maximum capacity. This is because the grain discharges

from the wagons into the grid at a slower pace than the conveyors are able to remove it. The trains move slowly for set ups and the train must be stationary to allow the Port Operator to open wagons with the rail gun.

- (D) Various other factors reduce the ability of the rail receipt station to receive grain at its rated capacity. These include:
  - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
  - (2) the physical configuration of rail wagons moving into the port terminal;
  - (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
  - (4) the Port Operator having to weigh grain on receipt using its batch weighers.

(ii) Road

The port terminal does not have permanent dedicated road inloading facilities but may employ temporary drive-over grids in dry weather. Road receipts made through the rail receipt station reduce rail discharge rates by 25% to 50%. As a result of reducing the available discharge conveyors for the discharge of rail, they are discharged using the same conveyor belts and cannot be run together.

(e) Ship loading capacity

- (i) Ship loading occurs between 0730 and 2230, because :
  - (A) ships need time to empty their ballast. Due to the fast loading rate at Kwinana, some ships cannot empty their ballast tanks fast enough, so they are allocated time from 2230 and 0730 to catch up; and
  - (B) as part of the Port Operator's environmental commitments to keep dust and noise to a minimum for residents, the Port Operator does not load ships at the port terminal 24 hours per day.
- (ii) 4 x 2,500 tonne per hour travelling and luffing ship loaders (only 2 can be used simultaneously) with associated batch weighing and sampling systems. The ship loaders are fed by 4 conveyor belts, each with a loading capacity of 1,250 tonnes per hour. Because the ship loaders are dual fed (that is, 2 conveyors feed 1 loader), ships can be loaded at full capacity through less infrastructure.
- (iii) 291 metre long ship loading berth with associated access jetty.



- (iv) A number of factors influence the port terminal's ability to achieve its maximum shipping capacity of 5,000 tonnes per hour. These include:
  - (A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
  - (B) trimming hatches – loading rates are reduced to 'half feed' when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
  - (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship's captain to check the ship's draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship's hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (f) Associated system control and communication networks, Site office, ablution and workshop facilities.
- (g) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

# Schedule 6

## Port Terminal Facility - Albany

### 1 Location

The Albany port terminal is located in the Western Australian city of Albany, which is approximately 420km south east of Perth. The port terminal address is Princess Royal Drive, Albany WA 6330.

### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below. The sample sheds related to harvest activity are within the shaded area, but are not included in the Port Terminal Facilities.



- (b) Grain receipt
- (i) 2 x 140 tonne weighbridges with associated hut.
  - (ii) 2 x 700 tonne per hour and 3 x 400 tonne per hour road receipt grids.
  - (iii) 1 x 700 tonne per hour road receipt grid (which only services one particular 113,000 tonne capacity storage cell).

- (iv) 1 x 2000 tonne per hour rail receival station with associated rail line.
- (v) 12 x dust control systems.
- (vi) 59 grain conveyors with 16 associated grain elevators (some are task specific, such as for discharging by rail or shipping).
- (c) Grain storage
  - (i) The port terminal's total storage capacity is 474,000 tonnes.
  - (ii) 2 x 2,200 tonne and 5 x 1300 reinforced concrete vertical cells and 6 x 500 tonne star cells with associated working house.
  - (iii) 24 x 2,300 tonne reinforced concrete vertical cells.
  - (iv) 12 x 500 tonne star cells.
  - (v) 10 x 10,000 tonne reinforced concrete silos with bottom rake discharge.
  - (vi) 10 x 6,000 tonne steel silos with self discharge base.
  - (vii) 1 x 120,000 tonne and 1 x 113,000 tonne capacity reinforced concrete horizontal storage cells.
- (d) Inload capacity
  - (i) Rail
    - (A) The port terminal has 1 rail receival station, which can also be used for road receivals (when not in use for rail receivals). The rail receival station is rated to receive grain at 2,000 tonnes per hour by rail, and 1,000 tonnes per hour by road.
    - (B) To receive grain by rail at 2,000 tonnes per hour, the rail receival station must have two lines and two storage cells available for use. Additional staff are also required to discharge at this maximum rate. The rate of discharge is also dependent upon the silo to which the grain is to be discharged. For example, if the grain is to be discharged to either the 500 or 2,000 tonne cells, the discharge rate from the rail receival station is only 400 tonnes per hour. On average, wheat is discharged from the rail receival station at around 1,300 tonnes per hour
    - (C) Various factors reduce the ability of the rail receival station to receive grain at its rated capacity. These include:
      - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
      - (2) the physical configuration of rail wagons moving into the port terminal;

- (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
- (4) the Port Operator having to weigh grain on receipt using its batch weighers.

(ii) Road

- (A) The port terminal has 6 road receipt stations. There are 2 stations rated to receive grain at 700 tonnes per hour, 3 stations rated to receive grain at 400 tonnes per hour and 1 station rated to receive grain at 700 tonnes per hour (this station is at Annexe 2, which is a different area of the port).
- (B) The number of grids that can be used simultaneously largely depends on the rail, shipping and transferring activities being carried out at the same time. The control system only allows a set number of grain flows to be set up at once. For example, if shipping a 4-way blend of grain, 8 flows are required (4 flowing into the weigher, 4 flowing out) leaving only 4 flows for other activities.
- (C) Once storage space begins to reach its capacity, both storage options and flow path options reduce. The number of road pits available for use may also reduce. Segregating grain will increase the likelihood of this.
- (D) The rail grid is rated at 1000 tonnes per hour for road discharge. The 3 road grids are rated at 700 tonnes per hour. However, the actual discharge rate achieved is around 500 tonnes per hour, which is the maximum rate at which a truck can discharge 3 trailers.

(e) Ship loading capacity

- (i) The Albany port terminal has 3 luff and swing ship loaders with associated batch weighing and sampling systems, each with a rated loading capacity of 1,000 tonnes per hour. While any 2 ship loaders can be used simultaneously, the actual load rate achieved is on average 1,500 tonnes per hour.
- (ii) A number of factors influence the port terminal's ability to achieve its maximum shipping capacity of 2,000 tonnes per hour. These include:
  - (A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
  - (B) trimming hatches – loading rates are reduced to 'half feed' when the grain comes close to filling a hatch. This is to

prevent over-filling and allow instead for hatches to be level filled;

- (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship's captain to check the ship's draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship's hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (f) Associated system control and communication networks, Site office, ablution and workshop facilities.
  - (g) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

# Schedule 7

## Port Terminal Facility - Esperance

### 1 Location

The Esperance port terminal is located in the Western Australian city of Esperance, which is approximately 721km south-east of Perth. The port terminal address is Corner Harbour Road and Esplanade, Esperance WA 6450.

### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded area in figure 1 below.
- (b) The weighbridge and access roads at Chadwick, approximately 3km from the Esperance port terminal, also form part of the Port Terminal Facilities, and are contained in the shaded area in figure 2 below.

Figure 1



Figure 2



- (c) Grain receipt
  - (i) 5 road receipt bins:
    - (A) 2 x 800 tonne per hour;
    - (B) 2 x 200 tonne per hour; and
    - (C) 1 x 500 tonne per hour.
  - (ii) 1 x 800 tonne per hour rail receipt station with associated rail line.
  - (iii) 15 dust control systems.
  - (iv) 47 grain conveyors with 12 associated grain elevators,
  - (v) 1 x 180 tonne weighbridge located at the Chadwick depot.
- (d) Grain storage
  - (i) The port terminal's total storage capacity is 249,400 tonnes.
  - (ii) 8 x 5,000 tonne steel silos.
  - (iii) 8 x 2,100 tonne concrete silos.
  - (iv) 10 x 6,000 tonne steel silos with self discharging base and associated working house.
  - (v) 101,600 tonne capacity reinforced concrete horizontal storage cell.
  - (vi) 31,000 tonne capacity corrugated galvanized steel circular storage cell.
- (e) Inload capacity
  - (i) Rail
    - (A) The port terminal has 1 rail receipt grid, which can also be used for road receipts. The rail receipt grid is rated to receive grain at 800 tonnes per hour by rail and by road.
    - (B) The operational capacity of the rail receipt grid, and the rate at which it is able to receive grain, depends upon the type of grain being received and the destination silo of that grain. The following rates are based on wheat receipts:
      - (1) 800 tonnes per hour when grain moving to 10 x 6,000 tonne cells;
      - (2) 400 tonnes per hour when grain moving to 8 x 5,000 tonne cells;
      - (3) 250 tonnes per hour when grain moving to 8 x 2,100 tonne cells;
      - (4) 500 tonnes per hour when grain moving to horizontal storage; and
      - (5) 500 tonnes per hour when grain moving to circular storage.

(C) Various factors reduce the ability of the rail receival station to receive grain at its rated capacity. These include:

- (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
- (2) the physical configuration of rail wagons moving into the port terminal;
- (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
- (4) the Port Operator having to weigh grain on receipt using its batch weighers.

(ii) Road

(A) The port terminal has 5 road receival stations:

- (1) Grids 1 & 2 can receive grain at 800 tonnes per hour;
- (2) Grids 3 & 4 can receive grain at 200 tonnes per hour; and
- (3) Grid 5 can receive grain at 500 tonnes per hour.

(B) The road receival grids are limited to servicing specific storages within the port terminal:

- (1) Grids 1 & 2 fill can fill anywhere within the terminal and are used as the main discharge grids;
- (2) Grids 3 & 4 are used to fill the small concrete cells and annexe; and
- (3) Grid 5 fills part of the annexe and circular storage.

(f) Ship loading capacity

(i) The Esperance port terminal has 7 fixed shipping spouts, with a combined total rated loading capacity of 2,500 tonnes per hour, with associated batch weighing and sampling systems. The port terminal has the ability to load ships using 2 spouts loading into 2 hatches simultaneously, with each being able to load 1,250 tonnes per hour (depending on grain type and cargo position in the terminal). The Port Operator endeavours to position cargo so that ships can be loaded at the maximum rate. However, vessel requirements and weather delays must be taken into account. Given these restrictions, the port terminal aims to achieve an overall 1,800 tonnes per hour loading rate.

(ii) Ship loading rates at the port terminal are affected by the following factors:

(A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch



changes are necessary to keep the vessel stable during loading;

- (B) trimming hatches – loading rates are reduced to ‘half feed’ when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
  - (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship’s captain to check the ship’s draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship’s hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (g) Associated system control and communication networks, Site office, ablution and workshop facilities.
  - (h) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

## Schedule 8– Auditor

### 1 Appointment of Auditor

- (a) If, at any time during the term of this Undertaking, the ACCC issues a notice under **clause 6.3(a)** of the Undertaking, the Port Operator must, within 5 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.
- (b) 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:
  - (i) is a current employee or officer of the Port Operator or a Related Body Corporate of the Port Operator;
  - (ii) has been an employee or officer of the Port Operator or a Related Body Corporate of the Port Operator in the past 36 months;
  - (iii) in the opinion of the ACCC, holds an interest in the Port Operator or a Related Body Corporate of the Port Operator;
  - (iv) has within the past 36 months been a professional adviser to the Port Operator or a Related Body Corporate of the Port Operator;
  - (v) 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;
  - (vi) 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
  - (vii) 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

save that an Auditor that has been appointed by the Port Operator for the purposes of preparing an audit report to WEA (to comply with a requirement by WEA) or for the purposes of preparing an audit report to the ACCC (to comply with the audit requirements in respect of the exclusive dealing notification N93439 lodged by the Port Operator) shall not be considered as being not independent by reason of having been so appointed or having prepared such audit reports.

- (c) If, within 5 Business Days of receipt by the ACCC of the information or documents from the Port Operator referred to in **paragraph 1(a)** of this

**Schedule 8**, or such further period as required by the ACCC and notified to the Port Operator:

- (i) 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 5 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
- (ii) the ACCC does object to a Proposed Auditor, the Port Operator must as soon as practicable (but in any event within 5 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 functions under this Undertaking.

## 2 Scope of the audit

- (a) The Port Operator must, within 30 Business Days of the date on which the Auditor is appointed in accordance with **paragraph 1(c)** of this **Schedule 8**, provide to the ACCC a written report from the Auditor in relation to the Port Operator's compliance with its obligations under **clause 6.2(a)** of the Undertaking.
- (b) 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 6.2** of the Undertaking or for reporting to or otherwise advising the ACCC.
- (c) 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.
- (d) In complying with the obligations in **paragraph 2** of this **Schedule 8**, 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(a)** of this **Schedule 8** 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 this **paragraph 2** of this **Schedule 8** and ensure such personnel are aware of the Auditor and its role; and
  - (iii) provide access, information and/or documents required by the Auditor.

- (e) 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

- (a) 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 6.2** of the Undertaking more than twice in each 12 month period during the term of the Undertaking.
- (b) If:
  - (i) within the period of 3 months prior to the date on which the ACCC issues any notice under **clause 6.3** of the Undertaking, the Port Operator has submitted an audit report to WEA (to comply with a requirement by WEA) ("WEA Audit Report") or to the ACCC (to comply with the compliance audit requirements in respect of the exclusive dealing notification N93439 lodged by the Port Operator) ("**Compliance Audit Report**");
  - (ii) the Compliance Audit Report was prepared by a person that satisfies the criteria for independence set out in **paragraph 1(b)** of this **Schedule 8**; and
  - (iii) the Compliance Audit Report addresses the Port Operator's compliance with its obligations under **clause 6.2** of the Undertaking,

the Port Operator may provide the Compliance Audit Report to the ACCC, and the ACCC will may accept a Compliance Audit Report in satisfaction of the requirement for the Port Operator to provide an audit report to the ACCC in accordance with **paragraph 2(a)** of this **Schedule 8**.

- (c) For the avoidance of doubt, the ACCC will not be required to accept the Compliance Audit Report in satisfaction of the requirement for the Port Operator to provide an audit report to the ACCC in accordance with **paragraph 2(a)** of this **Schedule 8** if the ACCC (acting reasonably) considers that the matters set out in **paragraphs 3(b)(i)-(iii)** of this **Schedule 8** are not satisfied in respect of the Compliance Audit Report.