

# Port Terminal Services Access Undertaking

by

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

in favour of

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

31 July 2013

# Port Terminal Services Access Undertaking

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## 1. Interpretation

### 1.1 Definitions

In this Undertaking unless the context otherwise requires:

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

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

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

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

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

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

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

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

**Confidential Information** means information exchanged between the Port Operator and an Applicant or User in relation to the business of those persons that:

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

but excludes information that:

- (d) is comprised solely of the name, address and contact details of a person; or
- (e) was in the public domain at the time when it was supplied; or
- (f) subsequently becomes available other than through a breach of confidence or breach of this provision; or
- (g) was in lawful possession of the a party prior to being provided by the party; or
- (h) must be disclosed 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 9(4) of WEMA;

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

**Credit Support** means either:

(a) a Parent Guarantee; or

(b) Security;

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

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

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

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

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

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

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

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

**Port Operator** means ABA.

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

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

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

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

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

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

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

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

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

- (a) the Applicant has been able to pay all its debts as and when they become due and has not failed to comply with a statutory demand under section 459F(1) of the *Corporations Act 2001 (Cth)*;
- (b) a meeting has not been convened to place it in voluntary liquidation or to appoint an administrator;
- (c) an application has not been made to a court for the Applicant to be wound up without that application being dismissed within one month;

- (d) a controller (as defined in the *Corporations Act 2001 (Cth)*) of any of the Applicant's assets has not been appointed; and
- (e) the Applicant has not proposed to enter into or enters into any form of arrangement with its creditors or any of them, including a deed of company arrangement;

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

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

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

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

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

## 1.2 Interpretation

In this undertaking, unless the context otherwise requires:

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

## 2. Background

### 2.1 Introduction

- (a) ABA operates the Port Terminal Facility at the Port Terminal.
- (b) The Port Terminal Facility provides services relating to the export of Bulk Wheat and other commodities.
- (c) ABA has historically provided access to services provided by the Port Terminal to third parties under fair access policies.

- (d) The 'access test' under the WEMA requires:
- (i) the person to comply with the continuous disclosure rules in relation to a port terminal service; and
  - (ii) there is, either:
    - (A) an access undertaking in operation (under Division 6 Part IIIA of the CCA) relating to the provision of access to the port terminal service for purposes relating to export of Bulk Wheat; or
    - (B) a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the CCA) and under that regime wheat exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.
- (e) The ACCC approved on 28 September 2011 an undertaking from ABA under Part IIIA of the CCA which satisfied the 'access test' (Original Undertaking). The Original Undertaking will expire on 30 September 2013.
- (f) ABA has submitted this Undertaking to the ACCC for approval under Part IIIA of the CCA to replace the Original Undertaking for the purpose of continuing to satisfy the 'access test'.

## 2.2 Objectives

The Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminal in relation to the export of Bulk Wheat;
- (b) establishing a workable, transparent, non-discriminatory and efficient process for lodging and processing Access Applications;
- (c) providing a non-discriminatory approach to pricing and the provision of Port Terminal Services under which the Port Operator publishes reference prices annually and offers access to standard services on the terms and conditions contained in Schedule 1;
- (d) operating consistently with the objectives and principles in Part IIIA of the CCA and the Competition Principles Agreement between the Commonwealth and States and Territories of Australia dated 11 April 1995;
- (e) reaching an appropriate balance between:
  - (i) the legitimate business interests of the Port Operator, including:
    - (A) recovery of all efficient costs associated with the provision of access to the Port Terminal Services;
    - (B) a fair and reasonable return on the Port Operator's investment in the Port Terminal Facility commensurate with its commercial risk;
    - (C) the export of grain (other than Bulk Wheat) and non-grain commodities using the Port Terminal Facility; and
  - (ii) the public interest, including:
    - (A) the efficient use of resources; and

- (B) the promotion of economically efficient investment, use and operation of the Port Terminal; and
- (iii) the interest of Applicants wanting access to the Port Terminal Services, including providing access:
  - (A) on non-discriminatory price and non-price terms; and
  - (B) in a transparent, open, efficient and non-discriminatory manner;
- (f) providing an efficient, effective and binding dispute resolution process in the event that the Port Operator and an Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (g) in accordance with the objective in s44AA(b) of the CCA, providing for a consistent approach to access to the Port Terminal Services at the different port terminals to the extent practicable.

### 3. **Structure**

#### 3.1 Components

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

#### 3.2 Priority

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

#### 3.3 Obligation to procure

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

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

#### 4.1 Commencement Date

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

#### 4.2 Expiry

This Undertaking expires on the earlier of:

- (a) 30 September 2014; or
- (b) the day the ACCC consents to the Port Operator withdrawing the Undertaking in accordance with Part IIIA of the CCA.

#### 4.3 Early withdrawal of the Undertaking

The Port Operator may seek the approval of the ACCC to the withdrawal of this Undertaking on the occurrence of any of the following events:

- (a) the Port Operator and any associated entity of the Port Operator ceases to be a person who exports wheat under the WEMA; or



- (b) the WEMA is amended such that a person who exports wheat is no longer required to have in place an access undertaking under Part IIIA of the CCA in relation to access to any of the Port Terminal Services for the purposes of exporting wheat under the WEMA.

#### 4.4 Variations to this Undertaking

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

#### 4.5 Other variations

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

### 5. **Scope**

#### 5.1 Application

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

#### 5.2 Meaning of Port Terminal Services

- (a) This Undertaking applies only to access to Port Terminal Services.
- (b) **Port Terminal Services** means the services provided by means of the Port Terminal Facility which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facility, including:
  - (i) unloading and receipt by the Port Operator of a User's Bulk Wheat at the Port Terminal Facility;

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

### 5.3 Meaning of Port Terminal Facility

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

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

and includes any of the following facilities:

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

that is

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

### 5.4 What this Undertaking does not cover

- (a) This Undertaking does not apply to:
  - (i) access to services in relation to Bulk Wheat provided by the Port Operator which are not Port Terminal Services;

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

## 6. Standard Terms and Reference Prices

### 6.1 Access to Standard Port Terminal Services

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

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

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

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

### 6.2 Reference Prices

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

### 6.3 Standard Terms

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

Operator but this Undertaking will only apply to the terms relating to the provision of access to Port Terminal Services.

#### 6.4 Non-discriminatory access

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

#### 6.5 Variation to Reference Prices and Standard Terms

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

### 7. Negotiating for access

#### 7.1 Good faith negotiation

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

#### 7.2 Framework

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

#### 7.3 Preliminary inquiry

(a) Provision of information

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

#### 7.4 Eligibility to apply

(a) The Port Operator's obligation to:

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

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

- (iii) the Applicant is Solvent;
- (iv) the Applicant and its Related Bodies Corporate are not currently in, and in the previous two years have not been in, Material Default;
- (v) the Applicant:
  - (A) has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including the ability to pay access charges and insurance premiums when they fall due; or
  - (B) provides Credit Support.
- (b) The Applicant must be entitled to export Bulk Wheat under the laws of Australia, and it is the Applicant's responsibility to ensure that it complies with the relevant legal requirements for that purpose.
- (c) The Port Operator reserves the right to negotiate only with an Applicant who complies with the Eligibility Requirements under clause 7.4(a). the Port Operator may give a written request to the Applicant to demonstrate that it satisfies the Eligibility Requirements:
  - (i) within five Business Days of the Port Operator receiving the Applicant's Access Application; and
  - (ii) after that time, within five Business Days of the Port Operator becoming aware of any credible grounds which give rise to a reasonable assumption that the Applicant may no longer satisfy the Eligibility Requirements.
- (d) If the Port Operator refuses or ceases to negotiate with an Applicant, for any reason, it will, on the day of the decision to refuse or cease to negotiate, provide to the Applicant written reasons for such refusal.
- (e) If the Applicant considers that the Port Operator has unreasonably refused to commence, unreasonably delayed or unreasonably ceased negotiation for any reason, then the Applicant may refer the matter to the arbitrator under clause 8. the Port Operator will comply with the arbitrator's determination.

#### 7.5 Application Process for Access Application

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

- (e) Upon receiving the required information or clarification from the Applicant, the Port Operator will provide written acknowledgement of the receipt of the completed Access Application within three Business Days.

## 7.6 Standard Access Agreements

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

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

- (a) If an Applicant lodges an Access Application and requests access to Port Terminal Services prior to finalising and executing an Access Agreement, the Port Operator will, subject to the Applicant satisfying the Eligibility Requirements set out in clause 7.4(a), within three Business Days of receiving the request, offer to provide access to the Standard Port Terminal Services on the Standard Terms and at the Reference Prices.
- (b) The Applicant may accept the Port Operator's offer to provide access to the Standard Port Terminal Services on the Standard Terms and at the Reference Prices by executing an **Interim Agreement** consisting of the Standard Terms and Reference Prices.
- (c) The Interim Agreement will terminate on the earlier of:
  - (i) the date on which an Access Agreement is entered into;
  - (ii) the date on which the parties agree otherwise;
  - (iii) a date determined by an arbitrator under clause 8; or
  - (iv) if, by the end of the Negotiation Period, neither party has lodged a Dispute Notice, the end of the Negotiation Period.
- (d) The Interim Agreement does not preclude the parties from entering into an Access Agreement.
- (e) If an Interim Agreement terminates under clause 7.7(c), and an Applicant lodges a new Access Application, an Applicant may again request access to Port Terminal Services and clauses 7.7(a) to 7.7(d) and clause 7.7(f) will apply.
- (f) An Access Agreement once executed will apply retrospectively from the later of:
  - (i) the date on which the Interim Agreement was executed; or
  - (ii) a date determined by an Arbitrator under clause 8,and will replace the Interim Agreement.

## 7.8 Negotiation of Access Agreement

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

## 7.9 Access Agreement

- (a) Once the Applicant has notified the Port Operator that it is satisfied with the terms and conditions of the Access Agreement as drafted, the Port Operator will within two Business Days provide a final Access Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.
- (b) If the Port Operator offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, the Port Operator will execute the Access Agreement within five Business Days of the Port Operator providing a final Access Agreement to the Applicant under clause 7.9(a), or such longer period as is agreed by the parties.

## 8. **Dispute resolution**

### 8.1 Disputes

- (a) This clause 8 applies to any Dispute arising in relation to:
  - (i) the negotiation of new Access Agreements;
  - (ii) the negotiation of access to Port Terminal Services in addition to Port Terminal Services already the subject of an executed Access Agreement.
- (b) An Applicant is not entitled to raise a Dispute in relation to the terms of the Loading Protocol applying at the time of the Access Application.
- (c) Any Dispute will, unless otherwise expressly agreed by both parties, be resolved in accordance with this clause and either party may give to the other party to the Dispute Notice in writing.



- (d) Other than as set out in clause 8.1(a)(ii), any Disputes in relation to an Access Agreement once executed (including the application of the Loading Protocol) will be dealt with in accordance with the provisions of that Access Agreement.
- (e) The Port Operator will by 31 July of each year provide a report to the ACCC on any material disputes in relation to an Access Agreement and any Disputes raised by Applicants or Users or the Port Operator in the last 12 months (except for the first year in which case the report will apply to the period from the commencement of this Undertaking) including the details of any resolution and the status of unresolved matters.

## 8.2 Negotiation

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

## 8.3 Mediation

- (a) If the Dispute is not resolved under clause 8.2 within five Business Days of the date the Dispute Notice is received by the recipient then the provisions specified in subparagraphs (b) to (f) inclusive, below, apply.
- (b) If the parties agree to resolve the Dispute by mediation, the Dispute will be referred to the chief executive officers of each party who will attempt to resolve the Dispute, including by informal mediation.
- (c) If the Dispute is not resolved within 5 Business Days after being referred to the chief executive officers under clause 8.3(b) (or such longer period as is agreed between the chief executive officers), the Dispute will be referred to formal mediation in Victoria.
- (d) A Dispute referred to mediation in accordance with clause 8.3(c) will be mediated by a single mediator appointed by agreement of the parties or, if they fail to agree within 3 Business Days, a mediator appointed by the President of the Victorian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) acting on the request of either party.
- (e) Unless the parties agree otherwise:
  - (i) the mediation will be conducted under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);
  - (ii) a party may appoint a person, including a legally qualified person, to represent it or assist it in the mediation;
  - (iii) each party will bear its own costs relating to the preparation for and attendance at the mediation;
  - (iv) the costs of the mediator will be borne equally by the parties; and
  - (v) the parties will use reasonable endeavours to ensure that the mediation is completed within 28 Business Days from the date the mediator is appointed, or such longer period as agreed between the parties.
- (f) If the parties do not wish to resolve the Dispute by mediation, either party may, by notice in writing to the other, refer the Dispute to be determined by arbitration under clause 8.4.

## 8.4 Referral to arbitration

- (a) Notwithstanding any other provision of this Undertaking, either party may, by notice in writing to the other (**Arbitration Notice**), refer a Dispute to arbitration in accordance with this clause at any time following the issue of a Dispute Notice. The Arbitration Notice must specify the nature of the Dispute, the matters in respect of which the party is seeking arbitration and the contact details of both parties and whether the

parties have agreed or are likely to agree upon a private arbitrator if the ACCC does not arbitrate the Dispute.

- (b) If the Dispute referred to in the Arbitration Notice is already the subject of mediation in accordance with clause 8.3, that mediation will cease immediately.
- (c) Any arbitration will be conducted in accordance with clauses 8.5 to 8.7.

#### 8.5 Appointment of arbitrator

- (a) If a Dispute is referred to arbitration in accordance with clause 8.4, the Port Operator must, within two Business Days, provide the ACCC with a copy of the relevant Dispute Notice and Arbitration Notice. All correspondence with the ACCC under this clause 8 must be addressed to:

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

- (b) If within five Business Days of receiving notice in accordance with clause 8.5(a), the ACCC advises the Port Operator and any other party to the Dispute in writing that it wishes to be the arbitrator in respect of the Dispute, then the ACCC will be appointed to arbitrate the dispute and the arbitration will be conducted in accordance with clause 8.6.
- (c) If, within five Business Days of receiving notice in accordance with clause 8.5(a), the ACCC:
  - (i) advises each party to the Dispute in writing that it does not wish to be the arbitrator in respect of the Dispute; or
  - (ii) does not advise each party to the Dispute in writing that it wishes to be the arbitrator in respect of the Dispute,

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

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

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

- (a) If the ACCC is the arbitrator, then except as set out in clause 8.6(b), the arbitration will be conducted in accordance with the procedures, and the ACCC will have the powers, set out in Subdivisions C-E and G of Division 3 of Part IIIA of the CCA and any references to a “final determination” or “interim determination” in those Subdivisions will be taken to mean a final or interim determination made by the ACCC under clause 8.6.
- (b) In any arbitration conducted by the ACCC in accordance with this Undertaking:
  - (i) the ACCC may not make a determination which would have any of the effects described in section 44W of the CCA;

- (ii) the ACCC may not make a determination which would have the effect of setting terms and conditions of access to a Port Terminal Service in respect of any period following the expiry of this Undertaking;
  - (iii) the ACCC must have regard to the provisions of this Undertaking;
  - (iv) sections 44Z0(1)-(4) of the CCA will not apply. A determination or direction of the ACCC will be final and binding, subject to any rights of review, and will have effect on and from the date specified by the ACCC. Any or all of the provisions of a final determination may be expressed to apply from a specified day that is earlier than the day on which the final determination is made. However, that specified day may not be earlier than the date of the Access Application.
- (c) Other than in circumstances where the determination or direction is the subject of review, if an Applicant or User does not comply with a determination or direction of the ACCC, the Port Operator will not be obliged to continue negotiations for the provision of access to Port Terminal Services for the Applicant.

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

- (a) If the arbitrator of a Dispute is not the ACCC, the arbitration will be conducted in accordance with the following procedures:
- (i) the arbitrator will not be required to proceed with the arbitration unless and until the party that issues the Arbitration Notice has agreed to pay the arbitrator's and other costs as determined in accordance with clause 8.7(h) and provided in any indemnity as required in accordance with clause 8.7(j);
  - (ii) the arbitrator may make an interim determination granting access but only to Standard Port Terminal Services on the Standard Terms and at the then current Reference Prices;
  - (iii) subject to the involvement of and disclosures to the ACCC, unless the Port Operator and the Applicant agree otherwise, the arbitration must be conducted in private;
  - (iv) a party may appoint any person, including a legally qualified person, to represent it or assist it in the arbitration;
  - (v) the arbitrator must observe the rules of natural justice but is not bound by the rules of evidence;
  - (vi) the arbitrator must act as speedily as a proper consideration of the Dispute allows, having regard to the need to carefully and quickly enquire into and investigate the Dispute and all matters affecting the merits, and fair settlement, of the Dispute;
  - (vii) the arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to a Dispute, and may require that the cases be presented within those periods;
  - (viii) the arbitrator may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument;
  - (ix) the arbitrator may call on any party the arbitrator believes necessary to give evidence;
  - (x) the arbitrator will present their determination in a draft form to the parties and give the parties opportunity to comment before making a final determination;
  - (xi) the arbitrator will hand down a final determination in writing which includes their reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based;

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- (xii) unless the parties to the Dispute agree otherwise, any information received by the parties during the course of an arbitration, the content of the arbitration and any determination by the arbitrator will be confidential;
  - (xiii) the arbitrator may make any determination or direction in relation to the Dispute that they consider appropriate. For the avoidance of doubt, such determination or direction may include making a binding determination in relation to the Dispute, or requiring the parties to continue or re-commence negotiations.
- (b) The arbitrator may at any time terminate the arbitration (without making an award) if they think that:
- (i) the notification of the Dispute is vexatious;
  - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (iii) the party who notified the Dispute has not engaged in negotiations in good faith.
- (c) In deciding a Dispute, the arbitrator must have regard to:
- (i) the provisions of this Undertaking (including clause 6.4);
  - (ii) the matters set out in section 44X(1) of the CCA;
  - (iii) any guidance published by the ACCC;
  - (iv) any submissions provided by the ACCC; and
  - (v) the objectives and principles in Part IIIA of the CCA.
- (d) In deciding a Dispute, the arbitrator may have regard to any other matters that they think are relevant.
- (e) In deciding a Dispute, the arbitrator must not:
- (i) without the consent of all parties, make a determination which relates to matters which were not specified in the Arbitration Notice;
  - (ii) make a determination which would have the effect of setting terms and conditions of access to a Port Terminal Service in respect of any period following the expiry of this Undertaking;
  - (iii) make a determination which would have any of the effects described in sections 44V(2)(d) or (da) of the CCA; or
  - (iv) make a determination which would have any of the effects described in section 44W of the CCA.
- (f) A determination or direction of the arbitrator will be final and binding, subject to any rights of review by a court of law, and will have effect on and from the date specified by the arbitrator. Any or all of the provisions of a final determination may be expressed to apply from a specified day that is earlier than the day on which the final determination is made. However, that specified day may not be earlier than the date of the Access Application.
- (g) Other than in circumstances where the determination or direction is the subject of review by a court of law, if an Applicant or User does not comply with a determination or direction of the arbitrator, the Port Operator will not be obliged to continue negotiations for the provision of access to Port Terminal Services for that Applicant.

- (h) The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to the arbitrator's costs determination.
- (i) The parties' appointment of the arbitrator must provide that:
  - (i) the arbitrator must keep the ACCC advised, not less frequently than fortnightly, about the process of the arbitration, including timelines and processes;
  - (ii) the arbitrator must provide a copy of any correspondence between the arbitrator and the ACCC relating to procedural or other matters to the parties within three Business Days; and
  - (iii) the ACCC will have the right to make submissions to the arbitrator in respect of the Dispute (subject only to complying with the procedures and timeframes for submissions determined by the arbitrator).
- (j) The arbitrator may require the parties to indemnify them from any claims made against the arbitrator arising in connection with the performance by the arbitrator of their duties under this clause 8, such indemnity excluding circumstances where the conduct of the arbitrator constitutes negligence or dishonest or unlawful conduct.
- (k) The Port Operator must send a copy of any determination made by the arbitrator to the ACCC within two Business Days of the determination being made.
- (l) The *Commercial Arbitration Act* 1984 (VIC) will apply to any arbitration undertaken in accordance with this clause 8.7. To the extent of any inconsistency, the provisions of the Undertaking will have priority over the provisions of the *Commercial Arbitration Act* 1984 (VIC).

## 9. Confidentiality

### 9.1 Treatment of Confidential Information

- (a) Subject to clause 9.1(b), if a party provides Confidential Information to another party as part of the negotiation or dispute resolution or arbitration processes under this Undertaking, the recipient of that Confidential Information will treat it as confidential, the property of the provider of that information, and will use that information solely for the purpose of negotiating access to the Port Terminal Services or resolving any Dispute in accordance with this Undertaking.
- (b) A party is permitted to disclose Confidential Information:
  - (i) to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants or professional advisers, provided they are under a legal obligation not to disclose the Confidential Information to any third party;
  - (ii) to any mediator or arbitrator appointed under clause 8 for the purposes of that mediation or arbitration (and, if the ACCC is the arbitrator, subject to the ACCC's standard confidentiality protocols and procedures);
  - (iii) to the ACCC to the extent necessary for a party to comply with any written request by the ACCC, (subject to the ACCC's standard confidentiality protocols and procedures);
  - (iv) if and to the extent required by law, provided that it first consults with the party that provided the Confidential Information in relation to the manner and timing of that disclosure: or
  - (v) to a Related Body Corporate of the party.

- (c) Nothing in clause 9 prevents a party or an arbitrator from, or limits the extent to which a party or arbitrator may, provide information to the ACCC.

## 10. Capacity management

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

### 10.2 Loading Protocol

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

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

- (a) The Port Operator may vary the Loading Protocol from time to time subject to clause 10.3(b) and subject to the following conditions:
  - (i) any variations to the Loading Protocol must be consistent with:
    - (A) the objectives of this Undertaking set out in clause 2.2;
    - (B) the Port Operator's obligations to provide non-discriminatory access under clause 6.4;
  - (ii) the Loading Protocol must include an expeditious dispute resolution mechanism for dealing with disputes relating to decisions made by the Port Operator under the Loading Protocol (but need not include independent binding dispute resolution);
  - (iii) before the Port Operator can vary the Loading Protocol, it must conduct a consultation process which involves:
    - (A) preparing and circulating proposed changes to interested parties, and to the ACCC, along with an explanation for the amendment;
    - (B) publishing a copy of the proposed changes and explanation for the amendment on its Web Site (with the proposed variation shown in mark-up) together with a contact name and address for written responses to be addressed to the Port Operator;
    - (C) allowing Users, Applicants and interested parties at least 10 Business Days to review and provide written responses to the proposed changes;
    - (D) collating, reviewing and actively considering in good faith the responses from interested parties;
    - (E) publishing on the Port Operator's website any written response received from an interested party under clause 10.3(a)(iii)(D) within five Business Days of receiving that response, provided that the Port Operator is not required to publish any response which it reasonably considers to contain material which is offensive, confidential or otherwise inappropriate for publication;

- (iv) any variation must be published on the Port Operator's website at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Loading Protocol.
- (b) At any time during the consultation process under clause 10.3(a)(iii), the Port Operator may prepare and circulate a further variation to the proposed changes to take into account feedback from interested parties or from the ACCC. To avoid doubt, this clause does not require the Port Operator to recommence the consultation process under clause 10.3(a)(iii).
- (c) This clause does not prevent the Port Operator unilaterally amending the Loading Protocol on a temporary basis during the period of Force Majeure, as defined in the Standard Terms.
- (d) The Port Operator must provide the ACCC with copies of variations to the Loading Protocol promptly following publication.
- (e) The Loading Protocol (as varied from time to time) is available at the Web Site or such other domain as notified from time to time.

#### 10.4 Objection notice

- (a) If the Port Operator seeks to vary the Loading Protocol in accordance with clause 10.3, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to the Port Operator stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 10.4(a) on the ACCC website.
- (b) Any notice issued under clause 10.4(a) must be issued at least ten Business Days prior to the date on which the variation is proposed to become effective.
- (c) At least five Business Days before issuing a notice under clause 10.4(a), the ACCC must provide the Port Operator with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.
- (d) In issuing a draft notice under clause 10.4(c) or a final notice under clause 10.4(a), the ACCC must have regard to whether the proposed variation:
  - (i) is material; and/or
  - (ii) amounts to a breach of the anti-discrimination provision in clause 6.4 and/or the no hindering access provision in clause 10.5.
- (e) The ACCC may withdraw a draft notice issued under clause 10.4(c) or a notice issued under clause 10.4(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 10.4(c) or the notice issued under clause 10.4(a) no longer exist.
- (f) If the ACCC issues a notice under clause 10.4(a), the Port Operator will, within three Business Days:
  - (i) withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the the Port Operator website and notifying the ACCC in writing; or
  - (ii) withdraw the proposed variation and confirm the status of the existing Loading Protocol by publishing a notice in a prominent place on the the Port Operator website and notifying the ACCC in writing.

#### 10.5 No hindering access

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

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

### 11.1 Information on stock at the port

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

### 11.2 Publication of vessel booking applications

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

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

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

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

- (iii) total capacity;
- (iv) Bookings received (tonnage);
- (v) spare available capacity;
- (vi) monthly tonnes shipped;



- (vii) capacity utilisation (percentage);
  - (viii) stock on hand at the end of month;
  - (ix) average daily receivals by road and rail.
- (b) The Port Operator will publish its report to the ACCC in a prominent position on its website within five Business Days of the date on which it provides it to the ACCC.

13. **Cooperation with ACCC**

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

14. **Contact details**

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

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

- (b) Applicants are also encouraged to review the Port Operator's Web Site which includes information relevant to the Port Terminal Services including:
  - (i) storage capacity;
  - (ii) shipping berth; and
  - (iii) terms and conditions on which the Port Terminal Services are provided.

END

Draft

## Schedule 2 – Access Application Information

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

Request details:

1. Season

Application details:

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

## Schedule 3 – Audit

### 1. Appointment of Auditor

#### 1.1 Appointment by the Port Operator

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

#### 1.2 Independence

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

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

#### 1.3 Notification of ACCC

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

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

### 2. Scope of the audit

#### 2.1 Audit report

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

## 2.2 Assistance

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

## 2.3 Audit costs etc

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

## 3. Limits on the audit process

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

## Schedule 4 – Port Terminal Facility

### Melbourne Port Terminal

#### 1. Description

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

#### 2. Services

##### a. Road

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

##### b. Rail

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

##### c. Storage

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

##### d. Weighing

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

##### e. Shiploading

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

#### 3. Shipping Management

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

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

#### **4. Publications**

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

Ship-loading Protocols

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

Shipping Stem

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

Other publications re shipping see

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

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## Annexure 1 - Intent to Ship Advice

**Load details**

	1 <sup>st</sup> port	2 <sup>nd</sup> port
Projected Load Ports		
Total tonnage		
Tolerance		
Shipping month		

**Quality parameters/comments**

Load Grade	Quality Specifications	Parcel 1	Parcel 1

Name.....

Signature.....

Date.....

## Annexure 2 - Vessel Nomination

### Vessel details

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

### Load details

Load ports	
Date	
Total tonnage	
Tolerance	
Contract grades	

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

**Quality parameters**

Load Grade	Quality Specifications	Parcel 1	Parcel 1

**Site accumulation plan**

Originating Site	Grade	Tonnes

|

Total		

Name.....

Signed.....

Date.....

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