

# ALLEN & OVERY

## Port Terminal Services Access Undertaking

by

**GrainCorp Operations Limited** (ABN 52 003 875 401) of Level 26,  
175 Liverpool Street, Sydney, NSW, 2000 ("**GrainCorp**")

in favour of

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

20 June 2011

# Port Terminal Services Access Undertaking

<b>1</b>	<b>Background</b>	<b>1</b>
1.1	Introduction	1
1.2	Objectives	2
<b>2</b>	<b>Structure</b>	<b>3</b>
2.1	Components	3
2.2	Priority	3
2.3	Obligation to procure	3
<b>3</b>	<b>Term and variation</b>	<b>3</b>
3.1	Commencement Date	3
3.2	Expiry	3
3.3	Early withdrawal of the Undertaking	4
3.4	Variation for a particular Port Terminal	4
3.5	Other variations	4
<b>4</b>	<b>Scope</b>	<b>5</b>
4.1	Application of Undertaking	5
4.2	Meaning of Port Terminal Services	5
4.3	Meaning of Port Terminal Facility	5
4.4	Nature of Port Terminal Services	6
4.5	What this Undertaking does not cover	6
<b>5</b>	<b>Price and non-price terms</b>	<b>7</b>
5.1	Access to Standard Port Terminal Services	7
5.2	Standard Port Terminal Services	7
5.3	Reference Prices	7
5.4	Standard Terms	7
5.5	Non-discriminatory access	8
5.6	Variation to Reference Prices and Standard Terms	8
5.7	Request for Information	9
<b>6</b>	<b>Negotiating for access</b>	<b>9</b>
6.1	Good faith negotiation	9
6.2	Framework	9
6.3	Preliminary inquiry	9
6.4	Access Application	11
6.5	Access to Standard Port Terminal Services before an Access Agreement is executed	12
6.6	Negotiation of Access Agreement	13
6.7	Prudential requirements	13
6.8	Access Agreement	15
<b>7</b>	<b>Dispute resolution</b>	<b>15</b>
7.1	Disputes	15
7.2	Negotiation	16
7.3	Mediation	16
7.4	Referral to arbitration	17
7.5	Appointment of arbitrator	17
7.6	Arbitration procedure if the ACCC is the arbitrator	18
7.7	Arbitration procedure if the ACCC is not the arbitrator	18

<b>8</b>	<b>Confidentiality</b>	<b>21</b>
8.1	Treatment of Confidential Information	21
8.2	Dispute resolution	22
<b>9</b>	<b>Capacity management</b>	<b>22</b>
9.1	Continuous Disclosure Rules	22
9.2	Port Terminal Services Protocols	23
9.3	Variation of Port Terminal Services Protocols	23
9.4	Objection notice	24
9.5	No hindering access	25
<b>10</b>	<b>Publication of other information</b>	<b>25</b>
10.1	Information on stock at the port	25
10.2	Publication of vessel booking applications	26
<b>11</b>	<b>Report on Performance Indicators</b>	<b>26</b>
<b>12</b>	<b>Contact details</b>	<b>27</b>
<b>13</b>	<b>Definitions</b>	<b>27</b>
13.1	Definitions	27
13.2	Interpretation	31
<b>Schedule 1 – Port Terminals</b>		<b>33</b>
<b>1</b>	<b>Fisherman Islands</b>	<b>33</b>
1.1	Location	33
1.2	Port Terminal Facilities	33
1.3	Additional published protocols and information	33
<b>2</b>	<b>Gladstone Port Terminal</b>	<b>34</b>
2.1	Location	34
2.2	Port Terminal Facilities	34
2.3	Additional published protocols and information	34
<b>3</b>	<b>Mackay Port Terminal</b>	<b>35</b>
3.1	Location	35
3.2	Port Terminal Facilities	35
3.3	Additional published protocols and information	35
<b>4</b>	<b>Port Kembla Port Terminal</b>	<b>36</b>
4.1	Location	36
4.2	Port Terminal Facilities	36
4.3	Additional published protocols and information	36
<b>5</b>	<b>Carrington Port Terminal</b>	<b>37</b>
5.1	Location	37
5.2	Port Terminal Facilities	37
5.3	Additional published protocols and information	37
<b>6</b>	<b>Geelong Port Terminal</b>	<b>38</b>
6.1	Location	38
6.2	Port Terminal Facilities	38
6.3	Other information	38

6.4	Additional published protocols and information	38
<b>7</b>	<b>Portland Port Terminal</b>	<b>39</b>
7.1	Location	39
7.2	Port Terminal Facilities	39
7.3	Additional published protocols and information	39
<b>Schedule 2 - Standard Port Terminal Services</b>		<b>40</b>
<b>1</b>	<b>Intake of wheat at Port Terminals ex GrainCorp country sites</b>	<b>40</b>
1.1	Services included	40
1.2	Services excluded	40
1.3	Conditions	40
<b>2</b>	<b>Intake of wheat at Port Terminals ex third party storage</b>	<b>41</b>
2.1	Third Party Storage Sites	41
2.2	Services included - treated wheat	41
2.3	Services excluded	41
2.4	Infested wheat loads delivered by rail	41
<b>3</b>	<b>Ship loading services</b>	<b>42</b>
<b>4</b>	<b>Storage services</b>	<b>42</b>
<b>5</b>	<b>Blending</b>	<b>42</b>
<b>6</b>	<b>Grain quality port sampling</b>	<b>42</b>
<b>7</b>	<b>Miscellaneous services</b>	<b>43</b>
<b>8</b>	<b>Additional services - Carrington</b>	<b>43</b>
<b>Schedule 3 – Initial Port Terminal Services Protocols</b>		<b>44</b>
<b>Schedule 5 – Indicative Access Agreement</b>		<b>63</b>
<b>Schedule 6 – Independent Auditor</b>		<b>104</b>
<b>1</b>	<b>Appointment of Auditor</b>	<b>104</b>
1.1	Appointment by GrainCorp	104
1.2	Independence	104
1.3	Notification to ACCC	104
<b>2</b>	<b>Scope of the audit</b>	<b>105</b>
2.1	Audit report	105
2.2	Assistance	105
2.3	Audit costs etc	105
<b>3</b>	<b>Limits on the audit process</b>	<b>106</b>

# Port Terminal Services Access Undertaking

## General terms

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### 1 Background

#### 1.1 Introduction

- (a) GrainCorp operates the Port Terminal Facilities at the Port Terminals.
- (b) The Port Terminal Facilities provide services relating to the export of Bulk Wheat and other commodities.
- (c) GrainCorp has historically provided access to services provided by the Port Terminals to third parties under open access policies.
- (d) GrainCorp is an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth). GrainCorp's current accreditation expires on 30 September 2011. GrainCorp intends to apply for accreditation under the WEMA for a further period commencing on 1 October 2011.
- (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) At the date of this Undertaking, 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) either there is:
    - (A) an access undertaking in operation (under Division 6 Part IIIA of the *Competition and Consumer Act 2010*) relating to the provision to Accredited Wheat Exporters 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 Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.
- (g) GrainCorp has submitted this Undertaking to the ACCC for approval under Part IIIA of the CCA for the purpose of satisfying the 'access test'.
- (h) The ACCC monitors compliance of undertakings accepted under Part IIIA of the CCA.
- (i) 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 conditions which the ACCC may impose.

## 1.2 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 Terminals in relation to the export of Bulk Wheat;
- (b) establishing a workable, open, 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 GrainCorp publishes reference prices annually and offers access to standard services on the terms and conditions contained in Schedule 5;
- (d) operating consistently with the objectives and principles in Part IIIA of the CCA and the Competition Principles Agreement;
- (e) reaching an appropriate balance between:
  - (i) the legitimate business interests of GrainCorp, including:
    - (A) the recovery of all efficient costs associated with the granting of access to the Port Terminal Services;
    - (B) a fair and reasonable return on GrainCorp's investment in the Port Terminal Facility commensurate with its commercial risk;
    - (C) GrainCorp'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 Terminals; 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 dispute resolution process in the event that GrainCorp and the 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 uniform approach to access to the Port Terminal Services at the different Port Terminals to the extent practicable having regard to the different characteristics of the Port Terminals.

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## **2 Structure**

### **2.1 Components**

This Undertaking applies in relation to access to Port Terminal Services provided by means of Port Terminal Facilities at a number of Port Terminals (listed in Schedule 1). The Port Terminal Facilities are geographically separate and have different physical and operating characteristics and modes of operation.

### **2.2 Priority**

To the extent of any inconsistency between the General Terms and the Schedules, they are to apply in the following order of priority:

- (a) Schedule 1 and Schedule 2;
- (b) the General Terms; and
- (c) Schedules 3 to 5.

### **2.3 Obligation to procure**

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

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## **3 Term and variation**

### **3.1 Commencement Date**

For the purposes of the WEMA:

- (a) all provisions of this Undertaking other than clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6 commence on 1 August 2011 and GrainCorp will comply with those provisions on and from this date; and
- (b) clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6 commence on 1 October 2011 and GrainCorp will comply with those provisions on and from this date.

### **3.2 Expiry**

This Undertaking expires on the earlier of:

- (a) 30 September 2014; or
- (b) the day the ACCC consents to GrainCorp withdrawing the Undertaking in accordance with Part IIIA of the CCA (including under clause 3.3).

### **3.3 Early withdrawal of the Undertaking**

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

- (a) GrainCorp or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEMA; or
- (b) the WEMA, and/or any other applicable legislation from time to time, is amended such that there is no longer any legislative requirement for GrainCorp to have in place an access undertaking under Part IIIA of the CCA in relation to access to any of the Port Terminal Services in order for GrainCorp or its Related Bodies Corporate to export Bulk Wheat.

### **3.4 Variation for a particular Port Terminal**

GrainCorp may seek the approval of the ACCC to the variation of this Undertaking by removing the Port Terminal Services provided at a particular Port Terminal on the occurrence of any of the following events:

- (a) the Port Terminal is disposed of to a person who is not a Related Body Corporate of GrainCorp and GrainCorp ceases to operate or control the Port Terminal Facilities at that Port Terminal; or
- (b) there is in force under Division 2A Part IIIA of the CCA a regime established by a State or Territory for access to services provided at the Port Terminal and under that regime persons seeking to export Bulk Wheat have access to Port Terminal Services (or services substantially similar to the Port Terminal Services) for purposes relating to the export of Bulk Wheat.

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### **3.5 Other variations**

- (a) If, during the term of the Undertaking, GrainCorp is of the opinion that circumstances have changed such that this Undertaking:
  - (i) is no longer commercially viable for GrainCorp or becomes inconsistent with the objectives set out in clause 1.2; or
  - (ii) is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA or any other applicable legislation,

GrainCorp may seek the approval of the ACCC to vary this Undertaking.

- (b) Prior to seeking the approval of the ACCC under clause 3.5(a), GrainCorp will first consult with counterparties to Access Agreements and Applicants regarding the proposed variation.



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## 4 Scope

### 4.1 Application of Undertaking

- (a) This Undertaking applies to:
  - (i) the negotiation of any new Access Agreement entered into, or to be entered into, by the Port Operator and a User in respect of Port Terminal Services to be provided by the Port Operator at any time during the period 1 October 2011 to 30 September 2014;
  - (ii) the negotiation of access to Port Terminal Services in addition to Port Terminal Services already the subject of an executed Access Agreement; and
  - (iii) a decision by GrainCorp to unilaterally vary the prices at which Port Terminal Services are provided under an executed Access Agreement.
- (b) This Undertaking does not apply to the negotiation of any Access Agreement which will have a commencement date before 1 October 2011 or after the expiry of this Undertaking.

### 4.2 Meaning of Port Terminal Services

- (a) This Undertaking applies only to access to Port Terminal Services.
- (b) “**Port Terminal Services**” means the services described in Schedule 2 in relation to Bulk Wheat provided by means of a Port Terminal Facility, and the use of a Port Terminal Facility and use of all other associated infrastructure owned, operated or controlled by GrainCorp at a Port Terminal which in each case is necessary to allow Applicants and Users to export Bulk Wheat through that Port Terminal.

### 4.3 Meaning of Port Terminal Facility

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

- (a) at a Port Terminal; and
  - (b) capable of handling Bulk Wheat;
- and includes any of the following facilities:
- (c) an intake/receival facility;
  - (d) a grain storage facility;
  - (e) a weighing facility;
  - (f) a shipping belt;
- that is:
- (g) at the Port Terminal; and

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

The Port Terminal Facilities at each Port Terminal are described in Schedule 1.

#### **4.4 Nature of Port Terminal Services**

The Port Terminal Services may include:

- (a) intake and receival services;
- (b) storage and handling services;
- (c) ship nomination, acceptance, booking, cancellation and preparation of a Site Assembly Plan; and
- (d) ship loading.

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

- (a) The grain supply chain comprises the following activities:
  - (i) intake and receival services (inland);
  - (ii) grain storage and handling (inland);
  - (iii) transportation (from inland facilities to at port facilities);
  - (iv) services at port terminals (at port); and
  - (v) shipping services (at port).
- (b) To avoid doubt, this Undertaking does not apply:
  - (i) to access to services not being Port Terminal Services provided by GrainCorp in relation to Bulk Wheat; or
  - (ii) in relation to other facilities owned by GrainCorp which are part of the grain supply chain such as up country receival and accumulation facilities; or
  - (iii) to the transportation of Bulk Wheat to port; or
  - (iv) to grains which are not wheat; or
  - (v) to wheat which is not Bulk Wheat.
- (c) Nothing in this Undertaking prevents GrainCorp 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.

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## 5 Price and non-price terms

### 5.1 Access to Standard Port Terminal Services

On request by an Applicant in accordance with clause 6, GrainCorp will offer to supply the Standard Port Terminal Services to the Applicant:

- (a) at the Reference Prices published under clause 5.3; and
- (b) on the Standard Terms under clause 5.4,

and this Undertaking recognises the ability of an Applicant to negotiate for, and an arbitrator to arbitrate on, access to:

- non Standard Port Terminal Services (that are nonetheless within the ambit of Port Terminal Services);
- non Standard Terms (for Port Terminal Services or Standard Port Terminal Services);
- prices other than Reference Prices (for Port Terminal Services or Standard Port Terminal Services); or
- any combination of the above.

### 5.2 Standard Port Terminal Services

- (a) The Standard Port Terminal Services for each Port Terminal are set out in Schedule 2.
- (b) GrainCorp is under no obligation to provide access to a Standard Port Terminal Service (or to enter into an Access Agreement for them) beyond the term of this Undertaking unless GrainCorp chooses to do so in its absolute discretion.

### 5.3 Reference Prices

- (a) By no later than 31 August of each year, GrainCorp must, for access to each Standard Port Terminal Service, publish reference prices (“**Reference Prices**”) on GrainCorp’s website.
- (b) Unless varied in accordance with clause 5.6 the Reference Prices must apply for a period not ending before 30 September of the next year.
- (c) If GrainCorp has not already complied with clause 5.3(a) at the commencement of this Undertaking, then it must do so within three Business Days of its commencement.
- (d) GrainCorp must give the ACCC copies of Reference Prices within three Business Days following publication.

### 5.4 Standard Terms

- (a) The Standard Terms are the terms and conditions set out in the Indicative Access Agreement in Schedule 5 to this Undertaking (“**Standard Terms**”).

- (b) Unless varied in accordance with clause 5.6, the Standard Terms must apply for the term of the Undertaking.
- (c) The Standard Terms offered to an Applicant must include the Port Terminal Services Protocols, 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 GrainCorp but, to avoid doubt, this Undertaking (including clauses 6 and 7) will only apply to the terms relating to the provision of access to Port Terminal Services.

### **5.5 Non-discriminatory access**

- (a) In providing access to Port Terminal Services, GrainCorp must not discriminate between different Applicants or Users in favour of its own Trading Division, except to the extent that the cost of providing access to other Applicants or Users is higher.
- (b) For the avoidance of doubt, Shipping Stem Maintenance is a Port Terminal Service, to which clause 5.5(a) applies.
- (c) Within five Business Days of executing an Access Agreement with its own Trading Division, GrainCorp must provide to the ACCC a copy of that Access Agreement.
- (d) During the term of this Undertaking, but not more than twice in every 12 month period, the ACCC may require GrainCorp to appoint an Independent Auditor to provide a report in relation to GrainCorp's compliance with clause 5.5(a). If the ACCC requires GrainCorp to appoint an Independent Auditor, the provisions set out in Schedule 6 will apply.
- (e) The ACCC may approve a member of the ACCC to exercise any powers under clause 5.5(d) or Schedule 6 of this Undertaking on behalf of the ACCC.

### **5.6 Variation to Reference Prices and Standard Terms**

- (a) GrainCorp may vary the Reference Prices from time to time. GrainCorp must provide the ACCC with copies of variations to the Reference Prices within three Business Days following publication.
- (b) GrainCorp 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 5.6(a) or 5.6(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) To avoid doubt, any variations to the Reference Prices or Standard Terms do not automatically override the terms of existing access agreements.

## 5.7 Request for Information

- (a) The ACCC may, by written notice, request GrainCorp 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 in relation to this Undertaking.
- (b) GrainCorp will provide any information requested by the ACCC under clause 5.7(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.

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## 6 Negotiating for access

### 6.1 Good faith negotiation

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

### 6.2 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 the Applicant;
  - (iii) **Negotiation**- negotiating an Access Agreement;
  - (iv) **Access Agreement** – 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 outlined in clause 7.

### 6.3 Preliminary inquiry

#### (a) Provision of information

- (i) Subject to clause 6.3(a)(iv), GrainCorp 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 GrainCorp to identify and collate the information sought by the Applicant, GrainCorp must notify the Applicant within three Business Days and seek further clarification of the Applicant's request.
- (iii) Upon receiving clarification from the Applicant, GrainCorp 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 6.3(a)(i) at any time prior to the completion of an Access Agreement.

- (iv) GrainCorp's obligation under clause 6.3(a)(i) and 6.3(a)(iii) is subject to:
- (A) GrainCorp not disclosing any information which would breach a confidentiality obligation binding on it or which it considers (acting reasonably) is commercially sensitive in relation to its own operations; and
- (B) GrainCorp being able to refuse the request if:
- (aa) it is unduly and manifestly onerous to GrainCorp, 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 GrainCorp has access to and control of the information requested, or whether compliance with the Applicant's request would require GrainCorp to engage third party consultants or advisers in order to gather, collate or present the information;
  - GrainCorp'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
- (ab) the information requested by the Applicant is not ordinarily and freely available to GrainCorp.

**(b) Parties to Negotiation**

- (i) GrainCorp reserves the right to negotiate only with an Applicant who complies with the requirements and processes set out in this Undertaking. If an Applicant does not comply with the relevant obligations and processes, and such non-compliance is material, GrainCorp will not be obliged to continue negotiations regarding the provision of access for that Applicant.
- (ii) At the date of this Undertaking, an Applicant is required to be an Accredited Wheat Exporter. However, if the requirement to

obtain accreditation under the WEMA, or any other applicable legislation, is removed at any time during the term of this Undertaking, an Applicant must otherwise be entitled to export Bulk Wheat. It is the responsibility of the Applicant to ensure that they are in compliance with the relevant legal requirements for the purposes of exporting Bulk Wheat.

- (iii) If GrainCorp refuses to negotiate, 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.
- (iv) If the Applicant considers that GrainCorp has unreasonably refused to commence, unreasonably delayed or unreasonably ceased negotiations for any reason, then the Applicant may refer the matter to the arbitrator in accordance with clause 7.4. If the arbitrator determines that GrainCorp has unreasonably refused to commence, unreasonably delayed or unreasonably ceased negotiations, GrainCorp will recommence negotiations immediately, subject to any other determination the arbitrator makes.
- (v) If at any time, GrainCorp is of the view that an Applicant's request for access is not in good faith or the Applicant is not negotiating in good faith, GrainCorp may refer the request to the arbitrator in accordance with clause 7.4 for determination. If the arbitrator determines that the request or negotiation is not in good faith, then GrainCorp will be entitled to cease negotiations, subject to any other determination the arbitrator makes. The arbitrator may consider whether or not an Applicant is negotiating in good faith as a preliminary or threshold question in any arbitration.

## **6.4 Access Application**

### **(a) Application process**

- (i) Requests for access to the Port Terminal Services are to be submitted to GrainCorp and must include the information contained in Schedule 4.
- (ii) Prior to an Applicant submitting an Access Application, GrainCorp will, if requested conduct initial meetings with the Applicant within three Business Days of the request, to discuss the Access Application and to provide clarification of the process as outlined in this Undertaking and in particular, the information requirements set out in Schedule 4.

### **(b) Acknowledgment**

- (i) Upon receiving an Access Application from an Applicant, GrainCorp will acknowledge receipt of the Access Application in writing (or electronically) to the Applicant within three Business Days of its receipt, or such longer period in accordance with clause 6.4(b)(iv).

- (ii) If the Application is incomplete, prior to acknowledging the Access Application, GrainCorp may seek in writing:
  - (A) such additional information; or
  - (B) 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 GrainCorp to consider the Access Application.
- (iii) If GrainCorp seeks additional information or clarification in accordance with clause 6.4(b)(ii), it will advise the Applicant of the additional information or the clarification required within three Business Days of receipt of the Access Application.
- (iv) Upon receiving the required information or clarification from the Applicant, GrainCorp will provide written acknowledgment of the receipt of the completed Access Application within three Business Days.

#### **6.5 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, GrainCorp will, subject to the Applicant satisfying the Prudential Requirements, 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 GrainCorp'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 7; or
  - (iv) if, by the end of the Negotiation Period, neither party has lodged a Dispute Notice, the end of the Negotiation Period.
- (d) To avoid doubt, the Interim Agreement does not preclude the parties from entering into an Access Agreement.
- (e) If an Interim Agreement terminates under clause 6.5(c), and an Applicant lodges a new Access Application, an Applicant may again request access to Port Terminal Services and clauses 6.5(a) to 6.5(d) and clause 6.5(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 7,and will replace the Interim Agreement.

## 6.6 Negotiation of Access Agreement

- (a) Following GrainCorp's acknowledgment under clause 6.4(b), GrainCorp 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 ("**Negotiation Period**") will commence upon GrainCorp acknowledging the Access Application under clause 6.4(b) and will cease upon any of the following events:
  - (i) execution of an Access Agreement in respect of access sought by the Applicant;
  - (ii) written notification by the Applicant that it no longer wishes to proceed with 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 6.3(b)(v), the arbitrator determines that the Applicant is not negotiating in good faith;
  - (v) following a determination or direction by the arbitrator in accordance with clause 7, 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; or
  - (vi) a notice issued by GrainCorp under clause 6.7(e) becomes effective.
- (c) Upon cessation of the Negotiation Period, GrainCorp 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.

## 6.7 Prudential requirements

- (a) Within seven Business Days of receiving an Access Application, or a request for access to the Standard Services under clause 6.5, GrainCorp may require the Applicant to demonstrate to GrainCorp that it is able to meet the Prudential Requirements and to undertake that it can meet the Prudential Requirements for the duration of the Negotiation Period.

- (b) Upon receiving a request by GrainCorp under clause 6.7(a), the Applicant must demonstrate that it can satisfy the Prudential Requirements within seven Business Days.
- (c) GrainCorp will assess whether the Applicant satisfies the Prudential Requirements within five Business Days of receiving all of the required documents or evidence from the Applicant.
- (d) In the event the Applicant cannot satisfy the Prudential Requirements, GrainCorp may issue a notice of intent to end the negotiation period, to become effective 10 Business Days after the issue of the notice.
- (e) If, at any time, GrainCorp receives evidence confirming that the Applicant no longer satisfies the Prudential Requirements, on receiving such evidence GrainCorp will advise the Applicant of such evidence and issue a notice of intent to end the negotiation period, to become effective 10 Business Days after the issue of the notice.
- (f) If GrainCorp issues a notice of intent GrainCorp will provide to the Applicant written reasons for its decision to end the Negotiation Period, including reasons why the Applicant does not meet the Prudential Requirements at the time it issues the notice.
- (g) For the purposes of clause 6.7(a) the Applicant will be required to satisfy the following Prudential Requirements:
  - (i) the Applicant must be Solvent; and
  - (ii) the Applicant, or a Related Body Corporate of the Applicant, must not be currently, or have been in the previous two years, in Material Default of any agreement with GrainCorp based on financial issues; and
  - (iii) the Applicant must be able to demonstrate to GrainCorp that it 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 timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance or otherwise provides Credit Support acceptable to GrainCorp (acting reasonably).
- (h) For the purposes of clause 6.7(g), GrainCorp may:
  - (i) require the Applicant to provide:
    - (A) details of the Applicant's credit rating (if applicable);
    - (B) the Applicant's most recent financial statements;
    - (C) commercial trade references (if available);
  - (ii) consider the Applicant's previous credit history with GrainCorp;
  - (iii) engage an external credit review company to undertake a credit review.

## 6.8 Access Agreement

- (a) The granting of access will be finalised by the execution of an Access Agreement. The parties to the Access Agreement will be GrainCorp and an Accredited Wheat Exporter.
- (b) Once the Applicant has notified GrainCorp that it is satisfied with the terms and conditions of the Access Agreement as drafted, GrainCorp 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.
- (c) If GrainCorp offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, GrainCorp will execute the Access Agreement within five Business Days of GrainCorp providing a final Access Agreement to the Applicant under clause 6.8(b), or such longer period as is agreed by the parties.

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## 7 Dispute resolution

### 7.1 Disputes

- (a) This clause 7 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; and
  - (iii) a decision by GrainCorp to unilaterally vary the prices at which Port Terminal Services are provided under an executed Access Agreement provided the User issues a Dispute Notice within 30 days of the publication of the variation in accordance with clause 5.6(c).
- (b) An Applicant is not entitled to raise a Dispute in relation to:
  - (i) the terms of the Initial Port Terminal Services Protocols or the Port Terminal Services Protocols applying at the time of the Access Application; or
  - (ii) a decision by GrainCorp to vary the prices at which Port Terminal Services are provided to reflect changes to the Consumer Price Index.
- (c) Any Dispute will, unless otherwise expressly agreed to the contrary by both parties, be resolved in accordance with this clause 7 and either party may give to the other party to the Dispute notice in writing ("**Dispute Notice**") specifying the Dispute and requiring it to be dealt with in the manner set out in this clause 7. The parties must act in good faith to settle the Dispute in accordance with this clause 7.
- (d) Other than as set out in clause 7.1(a)(ii) and 7.1(a)(iii), any disputes in relation to an Access Agreement once executed (including the

application of the Port Terminal Services Protocols) will be dealt with in accordance with the provisions of that Access Agreement.

- (e) GrainCorp 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 GrainCorp 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.

## **7.2 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.

## **7.3 Mediation**

- (a) If the Dispute is not resolved under clause 7.2 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 mediation pursuant to this clause 7.3; or
  - (ii) 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 7.4.
- (b) If the parties agree to attempt to resolve the Dispute by mediation, the Dispute will be referred to the chief executive officers of both parties 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 7.3(b), GrainCorp will refer the Dispute to formal mediation in New South Wales to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within three Business Days, a mediator appointed by either:
  - (i) the President of the New South Wales Chapter of the Institute of Arbitrators and Mediators of Australia (“IAMA”); or
  - (ii) CEO of Grain Trade Australia (“GTA”).

If the parties fail to agree on an organisation to appoint a mediator under clause 7.3(c) within three Business Days, a mediator will be appointed by the President of the New South Wales Chapter of IAMA.
- (d) Unless the parties agree otherwise:
  - (i) the mediation will be conducted by a mediator (howsoever appointed under clause 7.3(c)) under either the IAMA Mediation Rules or the GTA Trade and Dispute Resolution Rules (whether or not the mediator is a legal practitioner);
  - (ii) the parties may appoint a person, including a legally qualified person to represent it or assist it in the mediation;

- (iii) each party will bear their own costs relating to the preparation for and attendance at the mediation; and
- (iv) the costs of the mediator will be borne equally by the parties.

#### **7.4 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 7.4 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 7.3, that mediation will cease immediately.
- (c) Any arbitration will be conducted in accordance with clauses 7.5 to 7.7.

#### **7.5 Appointment of arbitrator**

- (a) If a Dispute is referred to arbitration in accordance with clause 7.4, GrainCorp 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 7 must be addressed to:

The General Manager  
Transport and General 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 7.5(a), the ACCC advises GrainCorp 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 7.6. The ACCC may approve a member of the ACCC to make a decision under this clause 7.5(b).
- (c) If the ACCC:
  - (i) advises GrainCorp and any other party to the Dispute in writing within five Business Days of receiving notice in accordance with clause 7.5(a) that it does not wish to be the arbitrator in respect of the Dispute; or
  - (ii) does not advise GrainCorp and any other party to the Dispute in writing within five Business Days of receiving notice in accordance with clause 7.5(a) that it wishes to be the arbitrator in respect of the Dispute,

then, subject to clause 7.5(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, GrainCorp must notify the ACCC of the name of the arbitrator.
- (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 7.5(c)(i) or (ii) respectively, or such longer period as may be agreed by the parties, then either party may request the President of the NSW Chapter of IAMA to appoint an arbitrator.

## **7.6 Arbitration procedure if the ACCC is the arbitrator**

- (a) If the ACCC is the arbitrator, then except as set out in clause 7.6(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 7.6 of this Undertaking.
- (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 the 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 (including clause 5.5);
  - (iv) sections 44ZO(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, GrainCorp will not be obliged to continue negotiations for the provision of access to Port Terminal Services for that Applicant.

## **7.7 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 issued the Arbitration Notice has agreed to pay the arbitrator's and other costs as determined in accordance with clause 7.7(h) and provided any indemnity as required in accordance with clause 7.7(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 GrainCorp and the Applicant agree otherwise, the arbitration must be conducted in private;
  - (iv) a party may appoint a 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 required to observe 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 its 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 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;
  - (xii) unless the parties to the Dispute agree otherwise, any determination by the arbitrator will be confidential;
  - (xiii) the arbitrator may make any determination or direction in relation to the Dispute that it considers 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 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.
- (c) In deciding a Dispute, the arbitrator must have regard to:
- (i) the provisions of this Undertaking (including clause 5.5); and
  - (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;
  - (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 it thinks 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 the 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 sections 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, GrainCorp 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 progress of the arbitration, including timelines and processes;
  - (ii) the arbitrator must provide a copy of any correspondence between the arbitrator and the ACCC relating to procedural or other matters to the parties within 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 it from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 7, such indemnity excluding circumstances where the conduct of the arbitrator constitutes negligence (whether wilful or otherwise), dishonest or unlawful conduct.
- (k) GrainCorp 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 (NSW)* will apply to any arbitration undertaken in accordance with this clause 7.7. To the extent of any inconsistency, the provisions of the Undertaking will have priority over the provisions of the *Commercial Arbitration Act 1984 (NSW)*.
- (m) A determination may conclusively resolve all disputes in a matter referred to it, rather than requiring recommencement of negotiations.

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## **8 Confidentiality**

### **8.1 Treatment of Confidential Information**

- (a) Subject to clause 8.1(b), if a party provides Confidential Information to another party either:
  - (i) as part of the negotiation process for access to the Port Terminal Services; or
  - (ii) for the purpose of resolving any Dispute,the recipient of that Confidential Information will treat that Confidential Information as confidential, the property of the provider of that information, and will use that information solely for the purpose of negotiating access to the Port Terminal Services or resolving any 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 in accordance with clause 7 of this Undertaking 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); or
- (iv) if and to the extent required by law, provided that it first consults with the party that provided the Confidential Information in relation to the manner and timing of that disclosure.

## 8.2 Dispute resolution

- (a) If Confidential Information is provided to a mediator or arbitrator for the purpose of assisting in the resolution of any Dispute in accordance with clause 7, the mediator or arbitrator must (and the terms and conditions of appointment of the mediator or arbitrator must require them to) take all reasonable steps to protect the confidentiality of information that any party to the dispute has identified as confidential or commercially sensitive. This clause 8.2 is subject to the ACCC's obligations under legislation.
- (b) For the purpose of clause 8.2, any arbitrator appointed in accordance with clause 7 may require the parties to a Dispute to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
  - (i) requiring each party and their advisers to give confidentiality undertakings to each other party; and
  - (ii) limiting access to Confidential Information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (c) Any arbitrator appointed in accordance with clause 7 may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.

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## 9 Capacity management

### 9.1 Continuous Disclosure Rules

GrainCorp must, as a condition of this Undertaking, comply with the Continuous Disclosure Rules from time to time, which, at the commencement of this Undertaking, is to publish on its website in relation to Port Terminal Services:

- (a) a statement setting out GrainCorp's policies and procedures for managing demand for the port terminal service (including GrainCorp's policies and procedures relating to the nomination and acceptance of ships to be loaded using the port terminal service) ("**Port Terminal Services Protocols**"); and

- (b) a Shipping Stem (to be updated each Business Day) setting out:
- (i) the name of each ship scheduled to load grain using a port terminal service;
  - (ii) for each cargo referred to in paragraph (i) — the date when the ship was nominated to load grain using a port terminal service;
  - (iii) for each cargo referred to in paragraph (i) — the date when the ship was accepted as a cargo scheduled to load grain using a port terminal service;
  - (iv) for each ship referred to in paragraph (i)) — the quantity of grain to be loaded into the vessel using a port terminal service;
  - (v) for each ship referred to in paragraph (i)) — the estimated date on which grain is to be loaded into the ship using a port terminal service.

The Shipping Stem is available at [www.graincorp.com.au](http://www.graincorp.com.au).

## 9.2 Port Terminal Services Protocols

- (a) As at the commencement date of this Undertaking, the Port Terminal Services Protocols which apply to the provision of Port Terminal Services at Port Terminals owned or operated by GrainCorp are set out in Schedule 3.
- (b) The Port Terminal Services Protocols must be, and continue to be, a comprehensive statement of GrainCorp's policies and procedures for managing demand for Port Terminal Services.
- (c) GrainCorp must comply with the Port Terminal Services Protocols as varied from time to time.
- (d) In the Port Terminal Services Protocols, the term 'Client' includes a person who is a User within the meaning of this Undertaking.

## 9.3 Variation of Port Terminal Services Protocols

- (a) GrainCorp may vary the Port Terminal Services Protocols from time to time subject to clause 9.3(b) and subject to the following conditions:
  - (i) any variations to the Port Terminal Services Protocols must be consistent with:
    - (A) the objectives of this Undertaking set out in clause 1.2;
    - (B) GrainCorp's obligations to provide non-discriminatory access in accordance with clause 5.5;
  - (ii) the Port Terminal Services Protocols must include an expeditious dispute resolution mechanism for dealing with disputes relating to decisions made by GrainCorp under the Port Terminal Services Protocols (but need not include independent binding dispute resolution);

- (iii) before GrainCorp can vary the Port Terminal Services Protocols, 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) allowing Users and Applicants at least 10 Business Days to review and respond to the proposed changes;
  - (C) GrainCorp collating, reviewing and considering the responses from interested parties in good faith;
  - (D) subject to clause 9.3(a)(iv), GrainCorp publishing on its website any written submissions received from interested parties under this clause 9.3(a)(iii) within 5 Business Days of receiving that submission;
  - (E) at any time during the consultation process under this clause 9.3(a)(iii) GrainCorp 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 9.3(a)(iii)(E) does not require GrainCorp to recommence the consultation process under clause 9.3(a)(iii).
- (iv) GrainCorp is not required under clause 9.3(a)(iii)(D) to publish on its website any written submissions which are offensive, abusive or inappropriate for publication. GrainCorp will however provide any such submission to the ACCC within 5 Business Days of receiving the submission.
- (v) any variation must be published at least 20 Business Days prior to the date on which it is to become effective in the same locations as GrainCorp publishes its Port Terminal Services Protocols.
- (b) This clause 9.3 does not prevent GrainCorp unilaterally amending the Port Terminal Services Protocols on a temporary basis during the period of Force Majeure, as defined in the Standard Terms.
- (c) GrainCorp must provide the ACCC with copies of variations to the Port Terminal Services Protocols promptly following publication.
- (d) The Port Terminal Services Protocols (as varied from time to time) are available at [www.graincorp.com.au](http://www.graincorp.com.au).

#### **9.4 Objection notice**

- (a) If GrainCorp seeks to vary the Port Terminal Services Protocols in accordance with clause 9.3, 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 GrainCorp stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 9.4(a) on the ACCC website;

- (b) Any notice issued under clause 9.4(a) must be issued at least 10 Business Days prior to the date on which the variation is proposed to become effective.
- (c) At least 5 Business Days before issuing a notice under clause 9.4(a), the ACCC must provide GrainCorp 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 9.4(c) or a final notice under clause 9.4(a), the ACCC must have regard to whether the proposed variation:
  - (i) is material; and
  - (ii) amounts to a breach of the anti-discrimination provision in clause 5.5 and/or the no hindering access provision in clause 9.5.
- (e) The ACCC may withdraw a draft notice issued under clause 9.4(c) or a notice issued under clause 9.4(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 9.4(c) or the notice issued under clause 9.4(a) no longer exist.
- (f) If the ACCC issues a notice under clause 9.4(a), GrainCorp will, within 3 Business Days:
  - (i) withdraw the proposed variation and commence a new variation process and place a notice to that effect in a prominent place on the GrainCorp website and notifying the ACCC in writing; or
  - (ii) withdraw the proposed variation and confirm the status of the existing Port Terminal Services Protocols by publishing a notice in a prominent place on the GrainCorp website and notifying the ACCC in writing.

## **9.5 No hindering access**

- (a) GrainCorp, or a Related Body Corporate of GrainCorp, 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) GrainCorp, or a Related Body Corporate of GrainCorp, may be taken to have engaged in conduct for the purpose referred to in clause 9.4(a) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of GrainCorp, or a body corporate related to GrainCorp, or from other relevant circumstances. This clause 9.5(b) does not limit the manner in which the purpose of GrainCorp may be established for the purposes of clause 9.4(a).

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## **10 Publication of other information**

### **10.1 Information on stock at the port**

- (a) In order to expressly satisfy ACCC's requirements GrainCorp will publish and update weekly in a prominent position on its website the following:

- (i) total stocks of Bulk Wheat held at each Port Terminal;
  - (ii) The three (3) grades of Bulk Wheat contributing the largest tonnage at each Port Terminal; and
  - (iii) total stocks of barley, sorghum, canola and an aggregate of all other grain held at each Port Terminal.
- (b) In order to expressly satisfy ACCC's requirements GrainCorp will publish and update monthly in a prominent position on its website the following:
- (i) cargo nominations; and
  - (ii) Nominated Elevation Capacity of each Port Terminal.
- (c) To avoid doubt, GrainCorp will not publish information in relation to up country services.

## **10.2 Publication of vessel booking applications**

- (a) GrainCorp will publish the following details of any booking applications that it receives for the export of grain on the Shipping Stem on the day that the Shipping Stem is next updated:
- (i) the name of the exporter; and
  - (ii) the volume of grain to be exported.
- (b) The Shipping Stem must be updated each Business Day.

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## **11 Report on Performance Indicators**

- (a) GrainCorp will publish the following key service performance indicators in a prominent position on its website:
- (i) in the case of the period from 1 October 2011 to 31 March 2012, by no later than 31 May 2012;
  - (ii) in the case of the period from 1 April 2012 to 30 September 2012, by no later than 30 November 2012;
  - (iii) in the case of the period from 1 October 2012 to 31 March 2013, by no later than 31 May 2013;
  - (iv) in the case of the period from 1 April 2013 to 30 September 2013, by no later than 30 November 2013;
  - (v) in the case of the period from 1 October 2013 to 31 March 2014, by no later than 31 May 2014; and
  - (vi) 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 in respect of the provision of Port Terminal Services for Bulk Wheat at each Port Terminal during the relevant period:

- (vii) vessels failing survey;
  - (viii) average daily road receipt rate (to be provided monthly);
  - (ix) CNA's rejected;
  - (x) monthly tonnes shipped;
  - (xi) port lockouts; and
  - (xii) average CNA assessment times.
- (b) GrainCorp will notify the ACCC within five Business Days of publication that it has published a report on the GrainCorp website under clause 11(a).

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## 12 Contact details

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

*General Manager, Ports and New Business  
GrainCorp Operations Limited  
Level 26  
175 Liverpool Street  
Sydney NSW 2000*

- (b) Applicants are also encouraged to review GrainCorp's web site at [www.graincorp.com.au](http://www.graincorp.com.au) which includes information relevant to the Port Terminal Services including:
- (i) storage capacity;
  - (ii) shipping berths; and
  - (iii) terms and conditions on which the Port Terminal Services are provided.

---

## 13 Definitions

### 13.1 Definitions

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

“**Access Application**” means an application for Port Terminal Services as described in clause 6.4;

“**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 6;

“**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 Sydney, except that if used in relation to a specific Port Terminal means the State or Territory in which the relevant Port Terminal is located;

“**Cargo Nomination Application**” means a document by which a User notifies GrainCorp of its intention to nominate a vessel to be loaded at a Port Terminal in accordance with the Port Terminal Services Protocols;

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

“**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 exchanged between GrainCorp 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 or for the purpose of compliance with other legal requirements; or
- (i) ceases to be confidential in nature by any other lawful means.

“**Consumer Price Index**” means the Eight Capital Cities Weighted Average All Groups Consumer Price Index number published by the Australian Bureau of Statistics;

“**Continuous Disclosure Rules**” means the continuous disclosure rules as defined in subsection 24(4) of WEMA, as amended or replaced by other legislation relating to the provision of Port Terminal Services by GrainCorp;



**“Credit Support”** means either:

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

**“Dispute”** means a bona fide dispute between an Applicant or User and GrainCorp arising under this Undertaking;

**“Dispute Notice”** means a written notice provided by an Applicant or User to GrainCorp or by GrainCorp to an Applicant or User specifying the Dispute and requiring the Dispute to be dealt with in the manner set out in clause 7.1;

**“Elevation Period”** is a period of one month, commencing on either the first or the fifteenth day of a calendar month, or a 15 day period as defined in a CNA.

**“Indicative Access Agreement”** means the indicative access agreement in Schedule 5;

**“Material Default”** means any breach of a fundamental or essential term or repeated breaches of any of the terms of the agreements referred to in clause 6.7(g);

**“Negotiation Period”** means the period during which negotiation in relation to a final Access Agreement is undertaken as specified in clause 6.6(b);

**“Nominated Elevation Capacity”** is the tonnage of Elevation Capacity published on the GrainCorp web site that is available during any one Elevation Period at a particular port.

**“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 GrainCorp (acting reasonably);

**“Performance Indicators”** means the performance indicators set out in clause 11;

**“Port Terminals”** mean:

- (a) Carrington Terminal
- (b) Fisherman Islands Terminal;
- (c) Geelong Terminal;
- (d) Gladstone Terminal;
- (e) Mackay Terminal;
- (f) Port Kembla Grain Terminal;
- (g) Portland Terminal;

**“Port Terminal Facility”** has the meaning given in clause 4.3;

**“Port Terminal Service”** has the meaning given in clause 4.2(b);

**“Port Terminal Services Protocols”** means the policies and procedures published by GrainCorp from time to time in accordance with the Continuous Disclosure Rules and clause 9.2. The Port Terminal Services Protocols as at the commencement date of this Undertaking are set out in Schedule 3;

**“Prudential Requirements”** means the requirements specified in clause 6.7(g);

**“Reference Prices”** means the reference prices described in clause 5.3, or as varied in accordance with clause 5.6;

**“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 GrainCorp and which is in a form reasonably satisfactory to GrainCorp;

**“Shipping Stem”** has the meaning given in clause 9.1(b);

**“Site Assembly”** means the receipt and positioning by GrainCorp at a Port Terminal of Bulk Wheat for assembly and loading onto vessels for export at a Port Terminal;

**“Site Assembly Plan”** means a document or documents recording, among other things, the approximate tonnage of Bulk Wheat to be delivered and accumulated by the User at each loading Port Terminal submitted by the User and accepted, subject to GrainCorp’s final determination, by GrainCorp;

**“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; or
- (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 Port Terminal Service”** means a Port Terminal Service specified as such in Schedule 2;

**“Standard Terms”** means the standard terms and conditions described in clause 5.4, or as varied in accordance with clause 5.6;

**“Trading Division”** means a business unit or division of GrainCorp or its Related Bodies Corporate which have responsibility for the trading and marketing of Bulk Wheat;

“User” means a person who has entered into an Access Agreement with GrainCorp in relation to Bulk Wheat;

“WEAS” means the Wheat Export Accreditation Scheme 2008;

“WEMA” means the *Wheat Export Marketing Act 2008 (Cth)*, as amended from time to time.

## 13.2 Interpretation

- (a) In this Undertaking, unless the context otherwise requires:
- (ii) singular words will also have their plural meaning and vice versa;
  - (iii) a reference to a person includes companies and associations;
  - (iv) a reference to a consent of a party means the prior written consent of that party;
  - (v) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
  - (vi) a reference to a clause, Part or a Schedule is a reference to a clause, Part or Schedule of this Undertaking;
  - (vii) a reference to a party includes its successors and permitted assigns;
  - (viii) notices that are required to be given in writing to GrainCorp may, if so agreed by GrainCorp, be provided in electronic form;
  - (ix) 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;
  - (x) 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
  - (xi) a reference to \$ and dollars is to Australian currency.

# Port Terminal Services Access Undertaking

**DATED:**

**SIGNED** for and on behalf of  
**GRAINCORP OPERATIONS LIMITED**  
(ABN 52 003 875 401) by its  
duly authorised officer.

*Alison Watkins*  
.....  
(Signature)

*ALISON WATKINS*  
.....  
(Name)

*CHIEF EXEC OFFICER & MANAGING DIRECTOR*  
.....  
(Position)

# Port Terminal Services Undertaking

## Schedule 1 – Port Terminals

---

### **1 Fisherman Islands**

#### **1.1 Location**

The Fisherman Islands Port Terminal is located at the Port of Brisbane, in Queensland.

The Port of Brisbane is overseen by the Port of Brisbane Corporation and consists of 29 operating berths.

#### **1.2 Port Terminal Facilities**

The Fisherman Islands Terminal facilities handle products including wheat, barley, sorghum, chickpeas, cottonseed, sugar, and woodchips.

The following facilities are located at the Fisherman Island Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal.

#### **1.3 Additional published protocols and information**

The Port of Brisbane is operated and managed by the Port of Brisbane Corporation, a Government Owned Corporation Company under the State of Queensland's Government Owned Corporations Act 1993.

Port notices, including information relating to dangerous goods, tanker requirements and ship maintenance, are published at <http://www.portbris.com.au/ShippingOperations/PortNotices>.

The Port Procedures Manual for the Port of Brisbane, which lists in detail all vessel-movement restriction, communication, towage, pilotage, emergency, navigation, berth, channel, depth and swing-basin information, is available at [www.msq.qld.gov.au/home/shipping/port\\_procedures/port\\_procedures\\_brisbane](http://www.msq.qld.gov.au/home/shipping/port_procedures/port_procedures_brisbane).

---

## **2 Gladstone Port Terminal**

### **2.1 Location**

GrainCorp's Gladstone Terminal is located on the Auckland Point No. 2 Wharf at the Port of Gladstone in Queensland.

It is one of 15 operating wharves at the Port of Gladstone overseen by the Gladstone Ports Corporation.

### **2.2 Port Terminal Facilities**

The Gladstone Terminal facilities currently handle products including wheat, sorghum, chickpeas, magnesia, oilseeds, maize and barley. The following facilities are located at the Gladstone Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal.

### **2.3 Additional published protocols and information**

The Port of Gladstone is managed and operated by the Gladstone Ports Corporation Limited, a Company Government Owned Corporation Company under the State of Queensland's Government Owned Corporations Act 1993.

Certain limited information in relation to shipping control and handling is provided in the Port Information Handbook at <http://www.cqpa.com.au/Pages/Publications/PortInfoBook/Port%20Information%20Handbook%202008.pdf>.

Port Notices in relation to berthing allocation, including the Central Queensland Port Authority's Port Rules, Priority of Ship Movements are available at <http://www.cqpa.com.au/Pages/Publications/Port%20Notice/Port%20Notice.pdf>

A copy of the Central Queensland Ports Authority Port Rules is available from the Central Queensland Ports Authority.

---

## **3 Mackay Port Terminal**

### **3.1 Location**

The Mackay Terminal is located at Berth no. 5 of the Port of Mackay in Queensland.

The Port of Mackay is overseen by the Mackay Port Authority and comprises 5 berths.

### **3.2 Port Terminal Facilities**

The Mackay Terminal facilities handle products including wheat, sorghum, chickpeas, oilseeds and maize. The following facilities are located at the Mackay Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal.

### **3.3 Additional published protocols and information**

The Port of Mackay is owned and operated by Mackay Ports Limited, a Government Owned Corporation under the State of Queensland's Government Owned Corporations Act 1993.

For further information about the Port Rules, please refer to the Port Notices for the Port of Mackay that set out the relevant regulations in relation to shipping control, berthing and security arrangements as well as the terms and conditions of port access (amongst other matters) at the Port of Mackay. They can be found at [http://www.mackayports.com/mpl/content/uploads/Port%20Notices\\_2007.pdf](http://www.mackayports.com/mpl/content/uploads/Port%20Notices_2007.pdf)

---

## **4 Port Kembla Port Terminal**

### **4.1 Location**

The Port Kembla Terminal is located at Berth 104 of the Port of Port Kembla in New South Wales. It is one of 18 berths overseen by the Port Kembla Port Corporation at the Port of Port Kembla.

### **4.2 Port Terminal Facilities**

The Port Kembla Terminal facilities manage products including wheat, barley, maize, oats, sorghum, legumes and oilseeds.

The following facilities are located at the Port Kembla Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal.

### **4.3 Additional published protocols and information**

The Port of Port Kembla is managed by the Port Kembla Port Corporation.

The Port Information Guide for the Port of Kembla provides information in relation to shipping control, pilotage, anchorage and some of the rules and regulations in relation to port access and security arrangements.

It can be found at

<http://www.kemblaport.com.au/system/files//f2/o781//Port%20Guide%202010%20CD.pdf>



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## **5 Carrington Port Terminal**

### **5.1 Location**

GrainCorp's Carrington Port Terminal (is located at Berth no. 3 at Carrington at the Port of Newcastle in New South Wales.

### **5.2 Port Terminal Facilities**

The Carrington Terminal facilities manage products including wheat, barley, oats, sorghum, canola, soya beans, sunflower, lupins and chickpeas.

The following facilities are located at the Carrington Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal or the Western Storage Facility.

### **5.3 Additional published protocols and information**

The Port of Newcastle is owned and operated by the Newcastle Port Corporation, a corporation owned by the New South Wales State government and established under the Ports Corporation and Waterways Management Act 1995.

The Ship Handling Safety Guidelines for the Port of Newcastle refer to relevant safety parameters in relation to shipping control and navigation at the Port of Newcastle. They can be found at [http://www.newportcorp.com.au/client\\_images/937956.pdf](http://www.newportcorp.com.au/client_images/937956.pdf).

The Tide Chart and Information Handbook sets out terms and conditions of access to the Port of Newcastle and relevant regulations in relation to security requirements, environmental obligations, shipping navigation and management. It can be found at [http://www.newportcorp.com.au/client\\_images/881395.pdf](http://www.newportcorp.com.au/client_images/881395.pdf).

---

## **6 Geelong Port Terminal**

### **6.1 Location**

The Geelong Terminal is located at the Port of Geelong in Victoria.

### **6.2 Port Terminal Facilities**

The Geelong Terminal facilities handles products including wheat, barley, oats, rice, legumes, oilseeds and woodchips.

The following facilities are located at the Geelong Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal or the Corio storage and receival facility.

### **6.3 Other information**

GrainCorp will pass through to Users the Geelong Terminal Wharf Hire Fee.

### **6.4 Additional published protocols and information**

The Port of Geelong is owned by Ports Pty Ltd. However the Port is managed by three separate entities. Geelong Port Pty Ltd leases the Port's land based assets from Port Pty Ltd and is the principal manager of piers and wharfs at the Port of Geelong. GrainCorp manages the storage, logistics and marketing facilities for free flowing bulk products at the Port of Geelong. The statutory corporation, the Victorian Regional Channels Authority manages the navigable waters around the Port of Geelong.

The Geelong Port Standards and Procedures for Geelong Port outline the general duties of Port Users, the general terms and conditions in relation to use of facilities and equipment and the rules and regulations of the Port in relation to navigation, vessel management, cargo and berth management, emergencies, access and security and conduct at the port.

It is found at <http://www.geelongport.com.au/downloads/PortStandProc.pdf>

Geelong Port Standards and Procedures should be followed in conjunction with the directions of the Harbour Master in relation to a variety of matters including shipping control, channel management and the provision of navigation aids as set out in the Port Waters of Geelong Operating Handbook including Harbour Masters Directions.

This is found at <http://www.regionalchannels.vic.gov.au/index.php/news-a-publications/harbour-masters-directions>.

---

## **7 Portland Port Terminal**

### **7.1 Location**

The Portland Terminal is located at K.S. Anderson Wharf Berths No. 1 and No. 2.

### **7.2 Port Terminal Facilities**

The Portland Terminal facilities manage products including wheat, barley, legumes and oilseeds and woodchips.

The following facilities are located at the Portland Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal. There is an additional fee for a shunting service provided at the Port of Portland which will be passed through to Users at cost.

### **7.3 Additional published protocols and information**

The Port of Portland is currently vested in two funds managed by Hastings Funds Management - the publicly listed Australian Infrastructure Fund and a Utilities Trust of Australia. The statutory corporation, the Victorian Regional Channels Authority manages the navigable waters around the Port of Geelong.

Shipping services, including pilotage, towage, mooring and stevedoring provided by the Port of Portland are described at

[http://www.portofportland.com.au/index.php?option=com\\_content&task=view&id=36&Itemid=49](http://www.portofportland.com.au/index.php?option=com_content&task=view&id=36&Itemid=49).

Berthing protocols that outline procedures in relation to berth allocation are provided at

[http://www.portofportland.com.au/index.php?option=com\\_content&task=view&id=41&Itemid=54](http://www.portofportland.com.au/index.php?option=com_content&task=view&id=41&Itemid=54)

Regulations and permits set out by the Port of Portland in relation to use of Port terminal facilities are set out at

[http://www.portofportland.com.au/index.php?option=com\\_content&task=view&id=66&Itemid=79](http://www.portofportland.com.au/index.php?option=com_content&task=view&id=66&Itemid=79)

# Schedule 2 - Standard Port Terminal Services

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## **1 Intake of wheat at Port Terminals ex GrainCorp country sites**

### **1.1 Services included**

GrainCorp will provide the following services for the intake of wheat outloaded from GrainCorp storages in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Protocols:

- (a) Site Assembly Plan co-ordination;
- (b) Unloading of rail and road trucks into the Terminal during the hours and days as specified by GrainCorp;
- (c) Sampling and classification on delivery;
- (d) Weighing on delivery;
- (e) Transfer of wheat to storage cells;
- (f) Recording and provision of delivery information;
- (g) Wheat hygiene and quality management;
- (h) Elevation to outloading paths;
- (i) Vessel loading;
- (j) Shipping stem maintenance;
- (k) Insurance for all general physical risk (i.e. fire, flood, storm, etc).

### **1.2 Services excluded**

The Standard Port Terminal Services for intake of wheat at Port Terminals ex GrainCorp country sites do not include:

- (a) procurement of road and rail transport;
- (b) all Port Terminal stevedoring costs; and
- (c) Geelong Terminal wharfage.

### **1.3 Conditions**

These services are provided as per the shift hours listed in the Port Terminal Protocols and relevant Access Agreement. Overtime fees and other conditions will apply for intake and unloading outside of those shift hours.

---

## **2 Intake of wheat at Port Terminals ex third party storage**

### **2.1 Third Party Storage Sites**

“Third Party Storage Sites” means those sites, not operated by GrainCorp, including on-farm storage sites.

### **2.2 Services included - treated wheat**

GrainCorp will provide the following services for the intake of wheat outloaded from Third Party Storage Sites in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) Site Assembly Plan co-ordination;
- (b) Unloading of rail and road trucks into the Terminal during the hours and days as specified by GrainCorp;
- (c) Sampling and classification on delivery;
- (d) Weighing on delivery;
- (e) Transfer of wheat to storage cells;
- (f) Recording and provision of delivery information;
- (g) Wheat hygiene and quality management;
- (h) Elevation to outloading paths;
- (i) Vessel loading;
- (j) Shipping stem maintenance;
- (k) Insurance for all general physical risk (i.e. fire, flood, storm, etc).

### **2.3 Services excluded**

The Standard Port Terminal Services for intake of wheat at Port Terminals ex Third Party Storage Sites do not include:

procurement of road and rail transport;

all Port Terminals - stevedoring costs; and

Geelong Terminal – wharfage.

### **2.4 Infested wheat loads delivered by rail**

GrainCorp will provide, and the User is deemed to have requested, the following port intake services in relation to intake at the Port Terminal by rail from Other Approved Bulk Handling Company Sites of infested loads in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) Rail receipt path cleaning fee; and either of
- (b) Fumigation of the infested grain (where this service is available); or

- (c) Removal of the grain from the terminal to a “hospital” facility for disinfestation.

These services will be provided in accordance with relevant AQIS biosecurity conditions.

---

### **3 Ship loading services**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) Cargo nomination booking and re-nomination;
- (b) Provision of a Shipping and Domestic Outturn Quality Certificate.

---

### **4 Storage services**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) maintenance and provision of wheat stock records by terminal and grade;
- (b) pesticide and fumigation application as required during the storage period;
- (c) condition monitoring;
- (d) storage of residual wheat remaining in the Port Terminal after the completion of loading.

---

### **5 Blending**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Protocols:

- (a) blending of segregated grades in store or on outturn (including loading separately segregated wheat into ship’s holds);
- (b) blending of grain to meet a customised grade ie any commodity specification that does not meet the standard grade, for example blending to increase protein, or blending to reduce screenings to meet contract specifications; and
- (c) pre-blending services where the exporter requires three or more segregated grades to be blended.

---

### **6 Grain quality port sampling**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) storage unit sampling;
- (b) composite pre-shipment sampling;
- (c) parcel sampling;

- (d) hatch sampling.

These services do not include services by GrainCorp Technical Services (such as independent analysis).

---

## **7 Miscellaneous services**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) truck marshalling at terminals where required;
- (b) buyer to buyer stock transfer services;
- (c) supply of User requested receipt;
- (d) pesticide residue free grain specific services;
- (e) pesticide residue restricted grain specific services.

---

## **8 Additional services - Carrington**

GrainCorp will provide services provided by the Carrington Grading Plant at the Carrington Port Terminal.

### Schedule 3 – Initial Port Terminal Services Protocols



GRAINCORP OPERATIONS LIMITED

(ABN: 52 003 875 401)

#### **BULK WHEAT and BULK GRAIN PORT TERMINAL SERVICES PROTOCOLS**

Document Date: June 2011  
Season: 2011/12  
Appended as Annexure B to: 2011 / 14 Bulk Wheat Port Terminal Services Agreement  
2011 / 12 Bulk Grain Port Terminal Services Agreement (Non-wheat)

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These Port Terminal Services Protocols apply to the handling of regulated grain (bulk wheat) and to other non-regulated grains handled through Port Terminals owned by GrainCorp.

#### **Application**

If the customer requests GrainCorp to load grain on a vessel at a Port Terminal owned by GrainCorp, the customer must seek to book Elevation Capacity and indicate their Requested Elevation Period by submitting a Cargo Nomination Application (CNA).

The following procedures apply to requesting Elevation Capacity and an Elevation Period, accepting or declining a CNA, modifying a CNA and for managing the allocation of Terminal Elevation Capacity at GrainCorp's Port Terminals.

#### **Applications and Notices - Important directions**

All CNA applications, Acknowledgements of Acceptance (AOA), amendments to CNA's, 21 day ETA nominations, 10 day Vessel Nominations, and other related matters and modifications and other relevant notices, must be completed using the GrainCorp Workflow Online Platform. Customers will receive a Workflow online login. The Workflow platform is operated through a web browser. Any notices and applications pursuant to these Protocols and directed to GrainCorp that cannot be completed on the GrainCorp Workflow platform are to be sent to the email addresses for the applicable Port Terminal(s) set out below. GrainCorp will make available on its web site PDF document versions of all forms relevant to these protocols. These forms should only be used if the Workflow platform is not available.

**To avoid doubt, notices and applications other than those required to be completed on the GrainCorp Workflow platform are to be directed to the email addresses of any relevant Port Terminal.**

Note – vessels requiring two port loading should forward relevant information to BOTH ports.

As a provider of port terminal services, GrainCorp is subject to audit by both Wheat Exports Australia and the Australian Competition & Consumer Commission (ACCC). Therefore, GrainCorp must ensure that all actions relating to the provision of port terminal services are recorded and that an 'audit trail' is established.

GrainCorp staff have been instructed not to act on, or confirm, any verbal instruction from customers unless those instructions are confirmed in writing or via the workflow system.

<b>PORT</b>	<b>EMAIL ADDRESS</b>
Mackay	<a href="mailto:mackayshipping@graincorp.com.au">mackayshipping@graincorp.com.au</a>
Gladstone	<a href="mailto:gladstoneshipping@graincorp.com.au">gladstoneshipping@graincorp.com.au</a>
Fisherman Is	<a href="mailto:fishermanisshipping@graincorp.com.au">fishermanisshipping@graincorp.com.au</a>
Carrington	<a href="mailto:carringtonshipping@graincorp.com.au">carringtonshipping@graincorp.com.au</a>



Port Kembla

[portkemblashipping@graincorp.com.au](mailto:portkemblashipping@graincorp.com.au)

Geelong

[geelongshipping@graincorp.com.au](mailto:geelongshipping@graincorp.com.au)

Portland

[portlandshipping@graincorp.com.au](mailto:portlandshipping@graincorp.com.au)

## Contents

1	Terms and Acronyms.....	47
2	Shipping Stem .....	48
3	Cargo Nomination Application Procedure .....	48
4	Cargo Nomination Application .....	48
5	Cargo Nomination Application - Time of Lodgement .....	49
6	Cargo Nomination Application Assessment Timing.....	49
7	Cargo Nomination Application - Assessment Criteria.....	49
8	Notification of a CNA Acceptance or Rejection.....	50
9	Acknowledgement of Acceptance of a CNA.....	50
10	Execution of Booked Elevation Capacity.....	51
11	Conditional Refund on Surrender of Bookings at Peak Periods .....	51
12	Request for a change to Load Port and/or Confirmed Elevation Period.....	52
16	Estimated Time of Arrival (ETA) Nomination – Minimum 21 Day Notice .....	53
17	Assigned Load Date .....	53
18	Vessel Nomination – Minimum 10 Day Notice.....	53
19	Variations to ETA Nomination or Vessel Nomination Notice Periods.....	54
20	Substituting Nominated Vessels.....	54
21	Changing a Load Port.....	55
22	Vessel Loading Order.....	55
23	Vessels Arriving Outside the Confirmed Elevation Period – No Amendment to Assigned Load Date Requested.....	55
24	Two Port Loading.....	56
25	Cargo Assembly Planning – Site Assembly Plan .....	56
26	Cargo Assembly by Road from non GrainCorp Storage .....	56
27	Insufficient Grain Accumulated to Load Vessel.....	57
28	Port Terminal Stock Swaps.....	57
29	Grain Origination - Ex GrainCorp Storage .....	57
30	Grain Origination - Ex Non GrainCorp Storage .....	58
31	Treated or Fumigated Grain.....	58
32	Fumigation Clearance Certificate .....	58
33	Additional Terminal Storage Charge for Residual Grain at the Port Terminal .....	58
34	Provision of Transport for the Accumulation of Cargo Tonnage.....	59
35	Vessel Readiness to Load – In Transit Marine Survey.....	59
36	Vessel Authority to Load.....	59
37	Vessels Failing Regulatory Survey.....	60
38	Late or Cancelled Vessels.....	60
39	Dispute Resolution .....	60

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## 1 Terms and Acronyms

Any terms not defined in this Protocol have the same meaning as those defined in the GrainCorp Bulk Wheat Port Terminal Services Agreement and / or the Bulk Grain Port Terminal Services Agreement (Non-Wheat) for the relevant season.

**Acknowledgement of Acceptance (AOA).** GrainCorp will forward an AOA to a customer following receipt and approval of a CNA. By sending an AOA to a customer, GrainCorp is making an 'offer' to confirm the booking of Elevation Capacity at a particular terminal during a particular Elevation Period. By accepting an AOA, the customer is agreeing to pay the relevant Booking Fee and assuming responsibility for advising GrainCorp of the manner in which Elevation Capacity is to be supplied.

**Booked Elevation Capacity.** This is the number of tonnes of grain cargo elevation GrainCorp agrees to provide to a customer at a particular time during the Confirmed Elevation Period, following completion and return to GrainCorp of an AOA. Booked Elevation Capacity can consist of one or more 'lifts' of 'cargos' onto vessels.

**Booking Fee.** This is the per tonne fee a customer is liable to remit to GrainCorp once they acknowledge and accept an offer of Elevation Capacity by completing and returning an AOA.

**Application CNA.** This is the application submitted to GrainCorp via the online workflow platform by customers seeking to book grain Elevation Capacity at one or multiple GrainCorp grain export Port Terminals.

**Confirmed Elevation Period (CEP).** This is the period of time in which Elevation Capacity is confirmed as being accepted by a customer, and will be available at a particular Port Terminal. The Confirmed Elevation Period can be a period of one month, commencing on either the first or the fifteenth day of a calendar month, or a 15 day period within the confirmed elevation period, as nominated no less than 28 days prior to the commencement of that confirmed elevation period.

**Elevation Capacity.** This is the number of tonnes of grain cargo elevation GrainCorp agrees to provide to a customer at a particular time during a particular period.

**Elevation Period.** This can be a period of one month, commencing on either the first or the fifteenth day of a calendar month, or a 15 day period as defined in a CNA.

**ETA Nomination.** This has the meaning given in clause 19.1.

**Load Port.** This has the meaning given in clause 4.1.1.

**Nominated Elevation Capacity.** This is the tonnage of Elevation Capacity published on the GrainCorp web site that is available during any one Elevation Period at a particular port.

**Nominated Vessel.** This has the meaning given in clause 4.1.3.

**Non-Peak period.** A 'non-peak' period occurs when the total of Booked Elevation Capacity shown as 'accepted' CNA's on the GrainCorp Shipping Stem is less than an amount 10,000 tonnes less than the Nominated Elevation Capacity of a port during a relevant Elevation Period.

**Peak period.** A 'peak' period occurs when the total of Booked Elevation Capacity shown as 'accepted' CNA's on the GrainCorp Shipping Stem is at least equal to an amount 10,000 tonnes less than the Nominated Elevation Capacity of a port during a relevant Elevation Period.

**Requested Elevation Period (REP).** This is the period in which a customer has requested Elevation Capacity and is a period commencing on the first day and ends five (5) days from the last day of each month

**Shipping Stem.** This has the meaning given in clause 2.

**Vessel Nomination.** This has the meaning given in clause 18.

**Workflow Online Platform or Workflow.** This means the platform for booking elevator capacity on GrainCorp's website.

## 2 Shipping Stem

Pursuant to the obligations of wheat export Port Terminal service providers under the Wheat Export Accreditation Scheme 2008 established under the Wheat Export Marketing Act 2008 (Cth) ("Act"), GrainCorp will publish Shipping Stem information on its website in accordance with Section 24(4) of the Act (Shipping Stem).

### 2.1 Opening of the Shipping Stem

GrainCorp will open the Shipping Stem by the end of June each year for the following Shipping Year.

### 2.2 Provision of Announcement of Stem Opening

At least two (2) weeks prior to the day on which the Shipping Stem will be opened, GrainCorp will provide all customers with current Bulk Wheat or Bulk Grain Port Terminal Services Agreements with a notice in writing of the date and time upon which the stem will open, and will place a copy of the announcement on the Shipping Stem web page.

### 2.3 The Elevation Capacity of GrainCorp port infrastructure will be determined from time to time, and the Elevation Capacity of each facility will be published on the GrainCorp web site.

#### 2.3.1 GrainCorp will inform customers in writing of any changes to elevator capacity two (2) weeks prior to any capacity change being implemented.

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## 3 Cargo Nomination Application Procedure

### 3.1 If a customer requests elevation of grain onto a vessel at a Port Terminal operated by GrainCorp, the customer must submit a **Cargo Nomination Application (CNA)** to GrainCorp via the Workflow Online Platform.

#### *28 Day Rule*

### 3.2 A CNA must be submitted to GrainCorp by a date not less than 28 days prior to the commencement date of the **Requested Elevation Period** (Clause **Error! Reference source not found.**).

### 3.3 For the avoidance of doubt, the customer is responsible for nominating the Requested Elevation Period.

#### *Variation of the 28 Day Rule*

### 3.4 The customer may submit a CNA less than 28 days prior to the commencement date of the Requested Elevation Period, but should only seek to do so after consulting with GrainCorp.

#### 3.4.1 Should a client fail to consult with GrainCorp in compliance with Clause 3.4, any CNA submitted within the 28 day period will be automatically rejected.

### 3.5 Acceptance of a CNA is subject to meeting all of the relevant criteria in this Protocol.

---

## 4 Cargo Nomination Application

### 4.1 A CNA submitted under Clause 3 must include the following information.

#### 4.1.1 The port or ports at which the cargo is to be loaded (**Load Port**).

#### 4.1.2 A separate CNA is required for each port if a customer requires a two port load.

#### 4.1.3 The name of the vessel ("**Nominated Vessel**") (if known) (refer to Clause 18).

#### 4.1.4 A **Requested Elevation Period** that may consist of either,

##### a) A period of one month, commencing on either the first or fifteenth day of a calendar month, or

##### b) A 15 day period within the confirmed elevation period as nominated no less than 28 days prior to commencement of the confirmed elevation period.

#### 4.1.5 A cargo specification that outlines the grain(s) and / or grade(s) of the nominated cargo.

Where possible, on lodgement, a CNA should also contain the following.

- 4.1.6 Details of any special or unusual features of the nominated vessel that may affect in any way vessel loading performance. (For the avoidance of doubt, Tween Decker vessels will not be accepted for loading at GrainCorp Port Terminals).
- 4.1.7 Details of the holders of any encumbrances over the commodities that will comprise the cargo and the proposed release of any encumbrances.
  - 4.1.1 The intended destination of the cargo.
  - 4.1.2 All relevant phytosanitary and other certification or regulatory requirements of the destination country that will ensure the cargo meets all relevant market access requirements.
- 4.2 Where a customer is unable to furnish the information required in Clause 4 on lodgement of a CNA, the customer has until 21 days prior to the estimated time of arrival (Clause 16) of a vessel to provide the information required. **Should the information not be supplied at that time, the Booked Elevation Capacity may be cancelled and any associated Booking Fee will be forfeited.**

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## 5 Cargo Nomination Application - Time of Lodgement

- 5.1 A CNA sent to GrainCorp outside business hours (8:00 am to 4:00 pm AEST) Monday to Friday or on public holidays, is taken to have been received at the commencement of the next business day.
- 5.2 GrainCorp will place all CNA's received on the Shipping Stem the next business day following receipt. Each CNA will be noted as 'Pending Assessment'.
- 5.3 All matters related to the management of CNAs will be recorded in an individual 'shipping file', which will include a copy of the original CNA upon which the date and time of receipt of the CNA will be recorded.

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## 6 Cargo Nomination Application Assessment Timing

- 6.1 CNAs will be assessed in chronological order of receipt, where the chronology will be determined by the time and date allocated to a CNA by the Online Workflow system.
- 6.2 GrainCorp will complete an Assessment of a CNA within a maximum of five (5) business days following receipt, commencing from 8.00 AM on the first business day following receipt of a CNA.

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## 7 Cargo Nomination Application - Assessment Criteria

The initial CNA assessment will take consideration of the following -

- 7.1 That the customer has used the approved method of lodging a CNA (Clause 3).
- 7.2 Where the assessment of a CNA is for the export of bulk wheat, that the customer is accredited by Wheat Exports Australia to export wheat in bulk.
- 7.3 That, in the case of the export of regulated grain (bulk wheat), the customer has signed and lodged with GrainCorp a *Bulk Wheat Port Terminal Services Agreement*.
- 7.4 That, in the case of the export of non-regulated grain, the customer has signed and lodged with GrainCorp a *Bulk Grain Port Terminal Services Agreement (Non-wheat)*.
- 7.5 Whether GrainCorp has available sufficient intake, grain segregation, storage and Elevation Capacity at the Port Terminal that will allow accumulation of the cargo at the Port Terminal, taking into account, other Booked Elevation Capacity previously accepted by GrainCorp that appears as 'accepted' on the GrainCorp Shipping Stem.
- 7.6 Any Regulatory and Market risks (Refer to relevant definition in the GrainCorp Bulk Wheat Port Terminal Services Agreement and / or BulkGrainPort Terminal Services Agreement (Non wheat)).
- 7.7 Confirmation that the customer will/has contract(ed) sufficient rail and/or road transport prior to the Requested Elevation Period to accumulate the grain tonnage at the Port Terminal for the Booked Elevation Capacity.

## 8 Notification of a CNA Acceptance or Rejection

- 8.1 If GrainCorp completes the assessment of a CNA and accepts it, on the same day GrainCorp will notify the customer by forwarding to the customer an **Acknowledgement of Acceptance of a CNA (AOA)** (Clause 9).
  - 8.2 If GrainCorp completes the assessment of a CNA and rejects the CNA, GrainCorp will, on the day of rejection, notify the customer of the decision to reject and will provide to the customer in writing reason(s) for the decision.
- 

## 9 Acknowledgement of Acceptance of a CNA

- 9.1 To confirm the booking of Elevation Capacity and the Confirmed Elevation Period, the customer must complete and return to GrainCorp an AOA within two (2) business days of 5.00 pm AEST of the day of notification of acceptance of a CNA (Clause 8).
  - 9.1.1 If a customer fails to submit an AOA within the time specified in Clause 9.1, the CNA will lapse and become invalid as a consequence of not having been confirmed by the customer. The Booked Elevation Capacity related to a lapsed CNA will become available for booking by another customer from the commencement of the first business day following the end of the period specified in Clause 9.1.
- 9.2 A customer is only able to either **accept or reject** the offer of Elevation Capacity and the Confirmed Elevation Period made by GrainCorp. No amendments to the requested Elevation Capacity or Confirmed Elevation Period can be made on an AOA.
- 9.3 Upon returning to GrainCorp an AOA in accordance with clause 9.1, the customer will be liable for the Booking Fee and will agree to the payment terms of Booking Fee invoicing and payment contained within Annexure A of either the *Bulk Wheat Port Terminal Services Agreement* or the *Bulk Grain Port Terminal Services Agreement (Non wheat)*.
- 9.4 On the business day following the receipt of an AOA from the customer, GrainCorp will change the status of any relevant CNA(s) on the Shipping Stem, from 'Pending Assessment' to 'Accepted'.
- 9.5 The Booking Fee payable upon the return of an AOA to GrainCorp is in addition to any other fees that may be applicable to the receipt, storage, and elevation of grain for the BEC.
- 9.6 Failure to make payment in cleared funds within seven (7) days of receiving a tax invoice for a Booking Fee will cause the customer to lose any allocated Booked Elevation Capacity and Confirmed Elevation Period relevant to the unpaid invoice(s).
- 9.7 In a circumstance where the customer
  - (a) provides an AOA but subsequently fails to comply with the requirements of Clauses 9.6, 16, 18, 21, 20, 21, 22, 23, 24, 25 or 38, or
  - (b) cancels the Booked Elevation Capacity;the Booked Elevation Capacity and Confirmed Elevation Period may be cancelled by GrainCorp and the customer will forfeit any Booking Fee previously paid, and / or remain liable for any Booking Fee agreed to under Clauses 9.3, 9.5 and 9.9 (even if not yet invoiced).
- 9.8 Where a customer executes Booked Elevation Capacity and the total tonnage elevated is **less** than the booked tonnage for which a Booking Fee has been paid, GrainCorp will rebate to the customer an amount at the relevant Booking Fee rate equivalent to the difference between the booked tonnage and the actual tonnage elevated, up to an amount not exceeding 10% of the original Booking Fee amount.
- 9.9 Where a customer executes Booked Elevation Capacity and the total tonnage elevated is **more** than the booked tonnage for which a Booking Fee has been paid, GrainCorp will invoice the customer an amount at the relevant Booking Fee rate equivalent to the difference between the actual tonnage elevated and the original Booking Fee.

## 10 Execution of Booked Elevation Capacity

- 10.1 Booked Elevation Capacity will not be executed prior to the first day of a Confirmed Elevation Period, and must be executed before the last day of a Confirmed Elevation Period.
- 10.2 If due to factors within the control of the customer, that customer is unable to execute Booked Elevation Capacity within the Confirmed Elevation Period (plus 5 business days from the last day of that Period), or within another elevation period to which Booked Elevation Capacity has been moved, the Booking Fee related to any unused Booked Elevation Capacity will be forfeited.
- 10.3 Elevation Capacity booked between 1<sup>st</sup> October and 30<sup>th</sup> September (the shipping year) **must be used** within that shipping year.
- 10.4 Elevation Capacity not executed during a shipping year **cannot be carried** forward into the next shipping year.
- 10.5 Any Booking Fees related to unused Booked Elevation Capacity **will be forfeited** after the end of a shipping year (30<sup>th</sup> September) and Booking Fees relating to forfeited Booked Elevation Capacity will also be forfeited.

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## 11 Conditional Refund on Surrender of Bookings at Peak Periods

Should a customer wish to surrender BEC during a Peak period, the following will apply.

- 11.1 A customer may surrender BEC by amending the relevant CNA(s) using Workflow **no later than 35 days prior** to the first day of the CEP in which the surrendered BEC is to be executed. As soon as GrainCorp receives a notification to surrender BEC in this manner it will be deemed final and cannot be reversed. Hereinafter such BEC will be referred to as 'Surrendered BEC'.
  - 11.1.1 The total tonnage of Surrendered BEC will be placed back on the Shipping Stem the next business day following receipt by GrainCorp of notice in accordance with Clause 11.1. Customers will be notified that BEC has been returned to the Shipping Stem and is available for booking via the daily 'Available Elevation Capacity' email.
  - 11.2 Refund of any booking fee(s) related to Surrendered BEC will be managed in the following manner.
    - 11.2.1 If no later than 28 days prior to the first day of the Confirmed Elevation Period in which the Surrendered BEC was to be executed no new booking is made by a customer:
      - a) for an amount of tonnes equivalent to or greater than the quantity of tonnes surrendered, and
      - b) at the same port and for the same Elevation Period in which the Surrendered BEC was to be executed,The customer shall not be entitled to any refund of the Booking Fee in whole or part.
    - 11.2.2 If no later than 28 days prior to the first day of the CEP in which the Surrendered BEC was to be executed and a new booking is made by a customer (other than the customer that Surrendered BEC under Clause 11.1);
      - a) for an amount of tonnes equivalent to or greater than the quantity of tonnes surrendered; and
      - b) at the same port and for the same Elevation Period in which the Surrendered BEC was to be executed that would replace as the Surrendered BEC,GrainCorp will refund 50% of the original Booking Fee to the customer that Surrendered BEC under Clause 11.1
    - 11.2.3 For the avoidance of doubt;
      - a) A new booking is defined as the lodgement of a new CNA under Clause 3; and
      - b) BEC transferred from another elevator, or from another Elevation Period at the same elevator, is not considered a 'new' booking for the purposes of this Clause 11.

## 12 Request for a change to Load Port and/or Confirmed Elevation Period

- 12.1 A customer may seek to make a Load Port and/or Confirmed Elevation Period change to a CNA shown as 'Approved' on the GrainCorp shipping stem by,
    - a. Consulting with GrainCorp Logistics and discussing the details of the change to the Load Port and/or Confirmed Elevation Period required by the customer.
    - b. Amending the relevant CNA in workflow and submitting the request to GrainCorp.
  - 12.2 A request to change a Confirmed Elevation Period and/or Load Port must be lodged no later than 21 days prior to the nominated estimated time of arrival (ETA) of a vessel. Refer to Clause 9 and 14 of the Protocols.
  - 12.3 Assessment of a request to make a Load Port or Confirmed Elevation Period change will be made subject to all relevant clauses in these Protocols, including Clause 6.
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## 13 Managing Elevation Capacity

- 13.1 Once Elevation Capacity has been booked, the period of time in which the capacity is to be delivered becomes the Confirmed Elevation Period.
  - 13.2 A customer that has accepted Elevation Capacity by accepting any or all AOA's sent to them by GrainCorp, has 'Booked Elevation Capacity'.
  - 13.3 Booked Elevation Capacity can be divided by the customer into more than one parcel during the Confirmed Elevation Period. For example, if a customer has Booked Elevation Capacity of 50,000 T, in a Confirmed Elevation Period, they can elect to have that capacity delivered as multiple lifts into multiple vessels. Booked Elevation Capacity **cannot be increased by dividing the booked capacity into multiple lifts and adding the +10% cargo elevation allowance to each multiple**. Multiple lifts shall collectively equal no more than the sum of the Booked Elevation Capacity. If a customer wishes to divide Booked Elevation Capacity into multiple lifts, they must,
    - a) Contact GrainCorp shipping operations in Toowoomba and provide advice on their intentions.
    - b) Amend existing CNA's to reflect the change in vessel tonnes
    - c) Submit new 'supplementary' CNA's via workflow for the relevant tonnages, making note of the reference number of the existing original CNA that refers to the Booked Elevation Capacity that appears on the shipping stem.
    - d) Ensure that GrainCorp shipping operations in Toowoomba is aware of the request of the customer.GrainCorp will then assess the 'supplementary' CNA(s) against Clause 7.5 of the Protocols. Acknowledgement of Acceptance(s) will be forwarded to the customer after the assessment of the CNA's is complete.
  - 13.4 The ability of GrainCorp to divide Booked Elevation Capacity into multiple lifts during the Confirmed Elevation Period will depend upon other elevation bookings during that period.
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## 14 Reducing Booked Elevation Tonnage

- 14.1 To **decrease** the elevation tonnage requested for a particular elevation period, a customer must firstly accept an AOA and then submit an amended CNA via the GrainCorp Workflow system to reflect the reduced elevation tonnage required. GrainCorp will then assess the amended CNA against criteria noted in Clause 7 of the Protocols, with particular reference to Clause 7.5.

### Note.

Reducing the requested elevation tonnage does not reduce the liability for the Booking Fee applied to the original CNA. The amount that represents the difference between the CNA tonnage accepted by the customer through the submission of an AOA and any subsequent reduction to the requested elevation tonnage made by a customer **will be forfeited**.



Where a customer requests a reduction in the Booked Elevation Tonnage and the actual tonnage elevated to vessel is more than 10% above the Booked Elevation Capacity, the customer will be liable to pay a Booking Fee on the difference between the Booked Elevation Capacity plus 10%, and the actual tonnage elevated to vessel.

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## 15 Increasing Booked Elevation Tonnage

- 15.1 To **increase** the Elevation Capacity requested for a particular elevation period, a customer must firstly submit a CNA, then accept the related AOA and then submit an amended CNA via the GrainCorp Workflow system requesting that additional Elevation Capacity be added to the Booked Elevation Capacity. Customers should consult the GrainCorp shipping stem prior to submitting additional requests for elevation tonnage, to ensure that the relevant Port Terminal has sufficient Elevation Capacity to meet additional demand in the Requested Elevation Period.
- 15.2 GrainCorp will assess an amended CNA against the criteria noted in Clause 7 of the Protocols, with particular reference to Clause 7.5. Should sufficient grain Elevation Capacity be available, GrainCorp will send to the customer an AOA relating to the CNA requesting additional Elevation Capacity.
- 15.3 If a customer accepts the offered Elevation Capacity, they will be **liable to pay a Booking Fee** equal to the total of the additional elevation tonnage requested (Refer to Clause 9).

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## 16 Estimated Time of Arrival (ETA) Nomination – Minimum 21 Day Notice

- 16.1 At any time from the return of an AOA to GrainCorp by a customer (Clause 9), up to but no later than 10 days prior to the date of the Nominated ETA, the customer must lodge a formal **ETA Nomination** by updating the original CNA.
- 16.2 The ETA nominated by the customer must be within the Confirmed Elevation Period.
- 16.3 Should a customer fail to comply with this minimum notice period, the customer will forfeit their Booked Elevation Capacity and Booking Fee (Clause 9.7).
- 16.4 An ETA nomination received by GrainCorp outside business hours (8:00 am to 4:00 pm AEST) Monday to Friday or on public holidays is taken to have been received at the commencement of the next business day.

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## 17 Assigned Load Date

- 17.1 Following the nomination of a vessel ETA (Clause 16.1) and within 1 business day of receipt of an ETA Nomination, GrainCorp will notify the customer of an **Assigned Load Date**, which is the date on which GrainCorp has scheduled the commencement of vessel loading. On provision of such advice to a customer, GrainCorp will update the shipping stem with the relevant information.
- 17.2 Where required and in the order in which CNAs were initially received and with reference to Clauses 16, 21, 22, 23, 24, 25, 36, 37, and 38, GrainCorp will update the Assigned Load Date taking into account:
  - 17.2.1 Other Booked Elevation Capacity previously accepted by GrainCorp that appear as 'accepted' on the GrainCorp shipping stem, and
  - 17.2.2 The sufficiency of capacity to receive and handle the customer's grain at the time of the anticipated commencement of cargo accumulation at the port.
- 17.3 GrainCorp reserves the right to change the Assigned Load Date and will immediately notify the customer of any such decision, taking into account factors mentioned in sub clauses 17.2.1, 17.2.2 and other relevant factors.

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## 18 Vessel Nomination – Minimum 10 Day Notice

- 18.1 At any time from the ETA Nomination (Clause 16.1) up to but no later than 10 days prior to the date of the Nominated ETA, the customer must lodge a **Vessel Nomination** by adding the information required in Clauses 18.1.1 to 18.1.5 to the original CNA.

- 18.1.1 The name of the Nominated Vessel;
  - 18.1.2 Details of the vessel length, depth, and maximum air draft, or any other vessel characteristic that may inhibit or affect loading performance;
  - 18.1.3 Any variations that may have been applied and accepted to the original CNA,
  - 18.1.4 Details of the last three (3) cargoes carried and the last three (3) ports of call,
  - 18.1.5 Information relating to any preparations made to the vessel to ensure it passes the regulatory Marine and AQIS pre-loading surveys.
- 18.2 Should a customer fail to comply with this minimum notice period, the customer will forfeit their Booked Elevation Capacity and Booking Fee.
- 18.3 A Vessel Nomination received by GrainCorp outside business hours (8:00 am to 4:00 pm AEST) Monday to Friday or on public holidays is taken to have been received at the commencement of the next business day.
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## **19 Variations to ETA Nomination or Vessel Nomination Notice Periods**

- 19.1 At the request of a customer GrainCorp may vary or waive the minimum notice periods noted in Clauses 16 and / or 18 following consultation with a customer.
  - 19.2 GrainCorp will not consider any variation to, or waiving of, the notice periods noted in Clauses 16 and / or 18 unless a customer provides a written request seeking GrainCorp to do so, before the notice period expires.
  - 19.3 The action of submitting a request under sub clause 19.1 does not guarantee that GrainCorp will grant a variation or waiver. In making any decision to vary or waive the minimum notice periods noted in Clauses 16 and / or 18, GrainCorp will consider the extent to which customer's inability to comply with the notice periods is within the customer's control and the impact of the variation on the efficient operation of the Port Terminal and will notify the customer in writing of the relevant decision within one (1) business day of receipt of a request.
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## **20 Substituting Nominated Vessels**

- 20.1 Subject to Clause 18, the customer may, by submitting amendments to Section 1 of the relevant CNA, substitute a Nominated Vessel with another vessel at the nominated Port Terminal for the Booked Elevation Capacity (+/- 10% tolerance on elevated tonnes), provided the substituted vessel is a 'similar performing' vessel<sup>1</sup>.
- 20.2 The customer will not be required to pay a new Booking Fee, or to submit a new CNA if a vessel substituted under Clause 20.1 will arrive within five (5) days of the most recent Nominated ETA (Clause 16).
- 20.3 If the customer's substitution involves an increase in Booked Elevation Capacity of more than 10%, commodity or grade substitution, or any alteration to the Site Accumulation Plan that will impact upon the accumulation or elevation of other customers' cargo, the customer, if demand for elevation at the Port Terminal is committed to other customers or if the substitution request requires activities that will decrease the efficiency of grain elevation at the Terminal, may be required to pay a new Booking Fee and / or may be required to submit a new CNA (Clause 4).
- 20.4 Notification of a request for substitution of a Nominated Vessel received by GrainCorp outside business hours (8:00 am to 4:00 pm AEST) Monday to Friday or on public holidays is taken to have been received at the commencement of the next business day.

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<sup>1</sup> 'Similar performing' is a vessel of similar size and capacity, with similar rates of ballasting and loading capability, as the originally nominated vessel.

## 21 Changing a Load Port

- 21.1 The customer must inform GrainCorp no later than 21 days from the Assigned Load Date of the customer's desire to change the Load Port. If a customer wishes to submit a request to change a Load Port, and to secure a new Assigned Load Date (refer to Clauses 3 through 9) the request can only be processed by updating the relevant CNA by updating the original CNA using the GrainCorp Workflow Online Platform.
- 21.2 Any notification of a change in Load Port must be submitted to GrainCorp during business hours (8:00 am to 4:00 pm AEST). Any notification received outside business hours (as specified elsewhere in this Protocol) will be deemed to have been received at the commencement of the next business day.
- 21.3 Any grain accumulated by a customer that is stored in a Port Terminal for a cargo for which the Load Port has been changed, will accrue storage charges in addition to the standard storage charges detailed in Annexure A of either the *Bulk Wheat Port Terminal Services Agreement* or the *Bulk Grain Port Terminal Services Agreement (Non wheat)*.
- 21.3.1 Charges mentioned under Clause 21.3 will apply from the sixth day after the original Assigned Load Date, until the grain is either loaded to a vessel, or removed from the Port Terminal. Any additional fees accrued are payable prior to the elevation of the grain to a vessel or to other transport.
- 21.4 If a change in Load Port creates operational efficiencies for GrainCorp, GrainCorp in its sole right and discretion may elect to waive some (or all) of Clauses 21.1 and 21.2, and assign a new Load Date for the new Load Port with the agreement of the customer.
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## 22 Vessel Loading Order

- 22.1 Where a customer's vessel is delayed due to late arrival or is cancelled (Clause 38), where a customer notifies GrainCorp of a requirement to change a Load Port (Clause 21), where a customer's vessel fails regulatory or related surveys (Clause 37), or where a customer has failed to accumulate sufficient grain at a Port Elevator to complete loading (Clause 27), GrainCorp shall have the right to change the Assigned Load Date (Clause 17) of a vessel or to change the order in which vessels are loaded from the order shown on the shipping stem. GrainCorp will only make changes to the vessel loading order to –
- 22.1.1 Ensure efficient provision of port terminal services to all customers.
- 22.1.2 Avoid situations arising where a customer or customers with a vessel or vessels scheduled to load after a vessel that is affected by occurrences noted under Clauses 26, 27, 29, 36, 35,36, 37, or 38 would suffer delays and / or additional costs that could be avoided by changing the order in which vessels are loaded.
- 22.2 In making a change to vessel loading order, GrainCorp shall notify all affected parties in writing, where such notice will contain details of -
- 22.2.1 The specific changes to vessel loading order and the affected parties.
- 22.2.2 The reason(s) for the changes made to vessel loading order.
- 22.3 Where GrainCorp changes an Assigned Load Date, or changes the order in which vessels are loaded, GrainCorp shall make appropriate changes to the shipping stem on the next business day after the notification referred to in Clause 22.2 has been issued.
- 

## 23 Vessels Arriving Outside the Confirmed Elevation Period – No Amendment to Assigned Load Date Requested

- 23.1 If a vessel presents for loading no more than 5 days after the end of either a 15 or 30 day Confirmed Elevation Period, and ***no amendment to the Confirmed Elevation Period or the Assigned Load Date has been requested***, the following will apply.
- a) The customer will forfeit their Assigned Load Date and in the event of there not being available capacity in the subsequent 15 or 30 day elevation period, the Booking Fee will also be forfeited.
- b) GrainCorp may assign a new Load Date using Clauses 7.5 and 10.3.

- c) Loading priority will be given to vessels that have Booked Elevation Capacity in the relevant elevation period.
- d) GrainCorp will apply the Additional Terminal Storage Fee of \$0.51 / T per day to the total tonnage of an assembled cargo for each day from the first day of the **Elevation Period** following the Confirmed Elevation Period until the commencement of vessel loading.

23.2 GrainCorp **will not** apply the abovementioned fee where delays caused by rain, elevator mechanical failure or other factors that can reasonably be described as relating to the failure of GrainCorp to meet the Assigned Load Date may be the cause of a vessel rolling-back into a following elevation period.

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## 24 Two Port Loading

24.1 Where Booked Elevation Capacity requires loading from two Port Terminals, an Assigned Load Date will be allocated at both Port Terminals after the customer's ETA Nomination (Clause 16 ) is received.

### *Two Port Loading Delay – No customer Fault*

24.2 Providing that all cargo tonnage has been accumulated at the second Load Port, Assigned Load Date priority at the second Port Terminal will be retained if a delay during loading at the first Port Terminal is no fault of the customer, where delays may include but are not limited to those caused by weather, mechanical breakdown of Port Terminal equipment, or AQIS rejection of infested grain.

### *Two Port Load Delay – customers Fault*

24.3 The Assigned Load Date of a vessel at a second load port will lose priority if, during loading at the first Port Terminal, the vessel is delayed due to the customer's fault, including but not limited to, the customer's vessel being late, the customer's failure to accumulate sufficient cargo tonnage at the first Port Terminal, failure of the customer's vessel to pass relevant Marine, AQIS and any other survey required by regulation.

24.4 Should priority at a second port be lost due to circumstances noted in Clause 24.3, GrainCorp will review the original Booked Elevation Capacity and will allocate a new Assigned Load Date in the chronological order in which the CNA was originally received, taking into account other Elevation Capacity booking(s) previously accepted by GrainCorp that appear as 'accepted' on the GrainCorp Shipping Stem and the sufficiency of capacity to receive and handle the customer's grain.

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## 25 Cargo Assembly Planning – Site Assembly Plan

25.1 The customer will work with GrainCorp Logistics and will be required to compile the detailed content of a **Site Assembly Plan** (SAP) prior to commencement of accumulation of a cargo tonnage at the nominated Port Terminal at any time from the date of return of an AOA to GrainCorp (Clause 9), up to, but no later than, the minimum notice period for an ETA Nomination (Clause 16).

25.2 The Site Assembly Plan will contain details of,

25.2.1 The location of the commodity(s),

25.2.2 The grade(s) and,

25.2.3 The method of accumulation of the cargo tonnage.

25.3 GrainCorp is under no obligation to receive grain at any of its Port Terminals for Booked Elevation Capacity more than 21 days in advance of the Assigned Load Date.

25.4 Where both GrainCorp and the customer agree, an SAP may allow for the accumulation of cargo tonnage at a Port Terminal more than 21 days in advance of an Assigned Load Date.

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## 26 Cargo Assembly by Road from non GrainCorp Storage

26.1 Where a customer intends to accumulate cargo tonnage by road from bulk grain storages not managed by GrainCorp, the customer may request to accept sampling and testing services offered by GrainCorp at a site other than the nominated Port Terminal.

## 27 Insufficient Grain Accumulated to Load Vessel

- 27.1 A customer shall accept full responsibility for the accumulation of all cargo tonnage at a GrainCorp Port Terminal and for procuring all transport for the accumulation of such cargo tonnage.
- 27.2 Recognising the responsibilities of the customer for the accumulation of cargo(s) (Clause 27) GrainCorp is not liable for, and does not guarantee, that individual cargo tonnage will be available at a Port Terminal by the Assigned Load Date, regardless of the date(s) upon which CNA(s) were lodged by the customer.
- 27.3 If a customer has not accumulated sufficient grain to complete loading of the vessel at a Port Terminal by the Assigned Load Date, and the vessel has berthed and passed all required Marine, AQIS or other relevant surveys, GrainCorp may commence to load the vessel with any and all applicable grain owned by the customer at the Port Terminal, in such a manner as to comply with the directions of the captain of the vessel and / or stevedore that will ensure the stability of the vessel. GrainCorp may then request the movement of a part loaded vessel off the berth at the customer's expense, if the next vessel on the Shipping Stem is ready to berth and has sufficient cargo tonnage assembled to commence and complete loading.
- 27.4 A relocated vessel may be allowed back on the berth for the recommencement of loading when the balance of the cargo tonnage has been accumulated at the Port Terminal, taking into account:
- 27.4.1 Other Booked Elevation Capacity
- 27.4.2 The sufficiency of capacity to receive and handle the customer's grain at the time of the anticipated commencement of cargo tonnage accumulation at the port.
- 

## 28 Port Terminal Stock Swaps

- 28.1 Should a customer fail to accumulate sufficient cargo tonnage in a timely manner (Clause 29), the customer is permitted to 'swap' stock with another customer holding title to suitable grain at the Port Terminal.
- 28.2 When a 'stock swap' occurs, all transactions related to such a swap(s) must be completed prior to completion of elevation of grain to a vessel.
- 28.3 Charges described in Annexure A of either the *Bulk Wheat Port Terminal Services Agreement* or the *Bulk Grain Port Terminal Services Agreement (Non wheat)* will apply to all stock swaps involving the transfer of title of grain held in storage at all GrainCorp Port Terminals.
- 

## 29 Grain Origination - Ex GrainCorp Storage

- 29.1 If grain arriving at the Port Terminal from a GrainCorp country site cannot be elevated to a nominated vessel due to quality reasons that are no fault of the customer (excluding infestation or where the customer's cargo quality / grade specifications vary from the relevant Grain Trade Australia receival standards) GrainCorp will -
- 29.1.1 Replace that grain with grain of the nominated grade and at GrainCorp's cost, or
- 29.1.2 Deem the customer's 'Grain Accounting Stock Tonnes' in the GrainCorp storage network for that component of stock outside of the quality requirements referred to in Clause 28.1 to have remained at the originating GrainCorp country site, or
- 29.1.3 'Stock swap' at the Port Terminal the rejected grain with grain of an equivalent quality profile to that specified in the CNA, in doing so, GrainCorp will assume ownership of the rejected grain at the Port Terminal.
- 29.2 If insect infestation is detected in grain arriving at the Port Terminal from a GrainCorp Storage, GrainCorp will comply with its obligations under the *Bulk Wheat Port Terminal Services Agreement* or the *Bulk Grain Port Terminal Services Agreement (Non wheat)*.

### 30 Grain Origination - Ex Non GrainCorp Storage

- 30.1 GrainCorp will not assume any liability for any losses associated with grain sent to the Port Terminal from non-GrainCorp storage facilities that does not meet the quality specifications specified in an accepted CNA and related SAP.
- 30.2 If grain received from non-GrainCorp storage facilities fails to meet the quality specifications defined by the customer in the relevant CNA and related SAP, or such grain is rejected by AQIS as being unfit for elevation onto a vessel, the customer remains the owner of the grain until it is removed from the Port Terminal in its entirety. Until such grain is removed, the grain will be subject to any applicable storage and related fees detailed in Annexure A of either the *Bulk Wheat Port Terminal Services Agreement* or the *Bulk Grain Port Terminal Services Agreement (Non wheat)*.

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### 31 Treated or Fumigated Grain

- 31.1 The customer must advise, prior to the dispatch of any grain to a Port Terminal, if that grain is to be, or has been, treated or fumigated with any grain protectants or insecticides approved for application to grain.
- 31.2 The customer must also provide advice on the chemical treatment used, or planned to be used on grain, and must not deliver grain to the Port Terminal
- (a) until advised that such treatments are acceptable to GrainCorp, or
  - (b) that poses any significant market risks that may cause AQIS to reject the grain on inspection, or would cause the grain to fail Australian or importing country residue surveillance.

**Note** - Port Terminals have a nil tolerance for fumigant residues above accepted Maximum Residue Levels.

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### 32 Fumigation Clearance Certificate

- 32.1 Where grain has been fumigated, the customer must provide a '**Clearance Certificate**' stating that the commodity is free from all fumigant residues, issued by a licensed fumigator.
- 32.2 The requirement under this Clause does not apply to grain received from GrainCorp Storages, as all grain treatment and fumigation activities are carried out in a manner that ensures they meet Port Terminal grain receipt requirements.

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### 33 Additional Terminal Storage Charge for Residual Grain at the Port Terminal

- 33.1 Any residual grain remaining in the Port Terminal after the completion of vessel loading, or as the result of a vessel cancellation, will accrue an **Additional Terminal Storage Charge** detailed in Annexure A of either the *Bulk Wheat Port Terminal Services Agreement* or the *Bulk Grain Port Terminal Services Agreement (Non wheat)*.
- 33.2 If the customer continues to retain title to residual grain, or is unable to relocate residual grain, the customer acknowledges that GrainCorp may reposition or relocate grain to another (non Port Terminal) site at the customer's cost, including storage, freight and weighing.
- 33.3 Where grain has been delivered to a Port Terminal from non-GrainCorp storage facilities and is rejected as being unfit for loading onto a vessel, GrainCorp will not be liable for any loss relating to the degradation of the quality of that grain. The customer remains the owner of this grain at all times and until the grain is sold or removed from the Port Terminal.
- 33.4 Clause 33.1 will not apply if:

- 33.4.1 Residual stock remaining in the Port Terminal as a result of a rejection to load to vessel by AQIS was moved to the Port Terminal from a GrainCorp country storage, or
- 33.4.2 The customer has Booked Elevation Capacity with an Assigned Load Date within 14 days of the previous vessel's completion of loading, where previously rejected grain may be included as part of that cargo tonnage, or;
- 33.4.3 The customer sells residual grain to another customer, or agrees that the grain can be included as a component of the cargo of a vessel of another customer, where cargo tonnage accumulation for that customer commences within 14 days of the completion of loading of the vessel upon which the rejected grain was originally to be loaded.

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#### 34 Provision of Transport for the Accumulation of Cargo Tonnage

- 34.1 For the avoidance of doubt, the customer is responsible for organising all matters related to the booking and / or provision of transport.
- 34.2 By accepting a CNA, GrainCorp does not undertake to provide to the customer any grain transportation services associated with the accumulation of grain for an accepted CNA.
- 34.3 Where a customer specifically contracts GrainCorp to provide cargo tonnage accumulation services, or where GrainCorp is specifically contracted to supply grain transportation services to a customer, a contract for the provision of such services will be entered into, and such a contract will be separate to the provision of port Terminal services described under this Protocol.

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#### 35 Vessel Readiness to Load – In Transit Marine Survey

- 35.1 If GrainCorp assesses that a vessel presents a higher than acceptable risk of failing a Marine, AQIS or related survey required under Regulation, GrainCorp may request that the customer provide assurance of the fitness or readiness of a vessel to load by procuring an 'in transit' marine surveyor report, either at the previous discharge port or at anchor at the Load Port. GrainCorp may refuse to accept a vessel 'alongside' to present for the Marine, AQIS or related survey required under Regulation if such a request is not complied with, within three (3) Business Days.
- 35.2 Any costs incurred in relation to Clause 35.1, shall be the responsibility of the customer.
- 35.3 GrainCorp may record all information relating to the vessel readiness to load performance of the customer, its shipping agents and shipping lines, and may incorporate this information into relevant CNA assessment procedures in the future.

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#### 36 Vessel Authority to Load

- 36.1 Prior to calling a vessel to the berth and commencing loading, GrainCorp will forward to the customer an **Authority to Load** for the customer's approval. The Authority to Load will include all quality information relating to the customer's cargo.
- 36.2 The customer must approve the Authority to Load and return it to GrainCorp prior to the commencement of elevation of grain to a vessel.
- 36.3 The customer acknowledges that GrainCorp has the right to mitigate dust emissions at the Port Terminal. Such mitigation may include moisture conditioning of grain paths.
- 36.4 Notwithstanding any other provision in this Protocol, the customer understands and accepts that matters and events beyond GrainCorp's control may occur, including but not limited to, changes in vessel scheduling and arrival or departure times, failure of vessels to pass any quarantine requirements or other inspections, grain quality related matters, harbour / port congestion, berth occupation by vessels under the direction of a Port Authority, lack of performance and delays due to freight or other service providers and rain or high winds that prevent vessel loading which means GrainCorp cannot guarantee that cargo tonnage will be ready for loading, or that they can or will be loaded as scheduled. GrainCorp will try to avoid any changes or delays where possible, and will keep the customer informed.

### 37 Vessels Failing Regulatory Survey

- 37.1 The customer is responsible for the condition and state of readiness of vessels presented to GrainCorp for loading and for a vessel passing relevant Marine, AQIS and any other survey required by regulation relating to the export of grain from Australia.
- 37.2 In the event of the customer's vessel failing a Marine, AQIS or other survey that may be required by regulation, GrainCorp reserves the right to give berthing and elevating priority to other vessels on its Shipping Stem, and to assign any vessel that has failed a survey, which is re-presented for loading, a new Assigned Load Date.
- 37.3 Where a vessel fails Marine, AQIS or other survey and loading is delayed until the elevation period following the Confirmed Elevation Period, the following will apply.
- a) On the eleventh day after the original Assigned Load Date, GrainCorp will apply the Additional Terminal Storage Fee of \$0.51 / T per day to the total tonnage of the assembled cargo until the commencement of vessel loading.
- b) GrainCorp will assign a new Assigned Load Date using Clauses 7 and 17.
- 37.4 Where a vessel is not able to load until an Elevation Period following the end of a Confirmed Elevation Period, loading priority will be given to vessels that have Booked Elevation Capacity in the relevant elevation period.
- 

### 38 Late or Cancelled Vessels

- 38.1 If a vessel fails to be available for loading within ten (10) days of the Assigned Load Date, or if a vessel has been cancelled by the customer then -
- 38.1.1 The customer forfeits any Booking Fee previously paid and remains liable for any Booking Fee not paid (even if not yet invoiced).
- 38.1.2 If the customer wishes to make a new Elevation Capacity booking, the customer must submit a new CNA per Clauses 3 through 9 and must pay a new Booking Fee.
- 38.2 All grain in a Port Terminal accumulated for a vessel that is late or cancelled, will accrue additional storage charges (in addition to the standard storage charges detailed in *Annexure A of either the Bulk Wheat Port Terminal Services Agreement or the BulkGrainPort Terminal Services Agreement (Non wheat)*).
- 38.2.1 Such charges will apply from the eleventh (11<sup>th</sup>) day after the Assigned Load Date relating to late or cancelled Booked Elevation Capacity (Clause 38.1 and 38.2) until the grain is either elevated to a vessel or removed from the Port Terminal.
- 38.3 Any additional fees accrued are payable prior to the elevation of the relevant grain to a vessel or other transport.
- 

### 39 Dispute Resolution

If a customer wishes to dispute a decision to reject a CNA (refer to Clause 7 for CNA assessment criteria) or to change the vessel loading order (refer to Clause 22), the following procedures will apply:

- 39.1 The customer must notify GrainCorp in writing of their intent to dispute, the reason(s) for the dispute and any requested resolution (**Dispute Notice**) by 4.00 pm AEST of the next business day following issue of a notice of rejection of a CNA or the publication of a change to the vessel loading order.
- 39.2 GrainCorp must respond to the customer raising a dispute within two business days after 4.00 pm AEST of the day of receipt of a Dispute Notice (**Response**).
- 39.3 A Response must set out whether GrainCorp intends to reverse its decision to reject a CNA, or to change the vessel loading order, and if not, must provide a written explanation or basis for GrainCorp's decision.
- 39.4 If the customer is not satisfied with the Response, or GrainCorp fails to respond in the manner set out in Clause 39.3, the customer may serve a notice to escalate (**Escalation Notice**) on GrainCorp no later than



two Business Days after 4.00 pm AEST of the day of receipt of a Response or from the last day the Response should have been received.

- 39.5 Upon receipt of an Escalation Notice, GrainCorp must at the request of the customer, arrange a meeting within five (5) business days of receipt of the Escalation Notice between GrainCorp's General Manager, Ports and the customer to discuss and resolve the dispute.
- 39.6 To avoid doubt, Clauses 39.1 to 39.5 do not apply to any other dispute under these Protocols including, to avoid doubt, a dispute relating to the grade, quality, sampling, testing, or classification of grain that accumulated for or has been accumulated for elevation onto a vessel.

## Schedule 4 – Access Application information

Access Applications are to be submitted to GrainCorp 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:**

- Season
- Customer Application Type
- Business Category

### **Applicant details:**

- Company name
- ABN/ACN
- Website (if available)
- Address
- Contact details
- Details of authorised company representative (including authorisation)
- Duration of the Access Agreement sought

# Port Terminal Services Access Undertaking

## Schedule 5 – Indicative Access Agreement



**GrainCorp**

**GRAINCORP OPERATIONS LIMITED**

**(ABN: 52 003 875 401)**

**BULK WHEAT PORT TERMINAL SERVICES  
AGREEMENT (“Agreement”)**

Date:

Season:

Parties:

**GRAINCORP OPERATIONS LIMITED (ACN 003 875 401)**

of Level 26, 175 Liverpool Street, Sydney, NSW, 2000 (“**GrainCorp**”)

and:

Client Name:	
Address 1:	
Address 2:	
ABN / ACN :	
Client Contact:	
Phone:	
Fax:	
Email:	
Client Code:	

(“**Client**”)

### **1. CONSIDERATION & TERM OF AGREEMENT**

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1.1 In consideration of the Client:

(a) paying to GrainCorp the Fees payable under this Agreement;  
and

(b) complying with the terms and conditions of this Agreement,

GrainCorp agrees to provide the services set out in this Agreement, including the Port Terminal Services, to the Client at a nominated Port Terminal owned by GrainCorp (“**Services**”) in accordance with the terms and conditions set out in this Agreement. This Agreement does not apply to services which are subject to separate agreements (**Bulk Grain Port Terminal Services Agreement (Non-Wheat) and Country Storage and Handling Agreement**).

1.2 This Agreement applies to all Services supplied by GrainCorp for or on behalf of the Client in relation to the Client’s Wheat for the period commencing on 1 October 2011 (“**Commencement Date**”) and

concluding on 30 September 2014 (“**Termination Date**”) (“**Term**”). To avoid doubt, GrainCorp will publish Reference Prices on GrainCorp’s website by no later than 31 August of each year.

- 1.3 Subject to **Clause 13.5**, this Agreement shall be deemed to have been accepted by the Client and the Client and GrainCorp will be bound by the terms and conditions of this Agreement from the earlier of:
  - (i) the later date of execution of this Agreement by either party; or
  - (ii) the date that GrainCorp provides any Services.
- 1.4 On and from the Commencement Date, this Agreement supersedes any prior agreement between the parties that relates to the Services.

## **2. SCOPE OF AGREEMENT**

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- 2.1 This Agreement applies to the Services provided by GrainCorp for the Client at a nominated Port Terminal, including in relation to:
  - (a) Wheat physically received into the Port Terminal directly from or on behalf of the Client;
  - (b) Wheat which is transferred to the Client where the transferred Wheat was the subject of a Grower Warehouse Agreement; and
  - (c) Wheat which is transferred to the Client where the transferred Wheat was the subject of a Bulk Wheat Port Terminal Services Agreement or a Country Storage and Handling Agreement.
  - (d) For the avoidance of doubt, where a Client has a relationship with GrainCorp governed by a Country Storage and Handling Agreement, a Bulk Wheat Port Terminal Services Agreement and a Bulk Grain Port Terminal Services (Non Wheat) Agreement, all of the Client’s stock contracted under the separate agreements will be considered in concert for the purposes of **Clauses 6.30 and 6.31** of this Agreement.
- 2.2 During the Term, GrainCorp will sample, provide quality testing services for, weigh, store and load to vessel or (if available) rail or (if available) road transport, all Wheat received by it under the terms of this Agreement.
- 2.3 The terms of this Agreement do not extend to loading Wheat into shipping containers at Port Terminals. Other than as set out here, the terms for loading containers are the subject of separate terms and conditions which may be agreed between the parties.
- 2.4 These terms and conditions do not extend to the importation of Wheat from vessels at the Port Terminal which are subject to separate terms and conditions between the parties.
- 2.5 This Agreement is not an open offer or a representation that GrainCorp will provide the Services to the Client for any minimum or maximum quantity or quality of Wheat, nor is it a representation that GrainCorp will provide the Services for all of the Client’s requirements. Where GrainCorp does provide the Services, it does so in compliance with the

terms of this Agreement which include the annexures, and both parties commit to the procedures included in the Agreement.

### **3. SERVICES PROVIDED BY GRAINCORP UNDER THIS AGREEMENT**

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#### **Receival of Wheat**

- 3.1 During the Term of this Agreement GrainCorp will use its reasonable endeavours to receive Wheat into the Port Terminal in accordance with the Client's request and subject to any restrictions, limitations or other conditions in this Agreement. At all times GrainCorp retains the final discretion as to what specifications and quantities of Wheat it will receive into the Port Terminal. Notwithstanding this Clause 3.1, all Wheat of the Client that forms part of an agreed Site Assembly Plan ("SAP") will be received at the Port Terminal provided it meets the standards as prescribed on the Cargo Nomination Application ("CNA").
- 3.2 GrainCorp will only receive Wheat at Port Terminals from sources other than GrainCorp Storages where the Client and the Wheat it seeks to deliver, satisfy the requirements specified in Annexure B: *Port Terminal Services Protocol*.
- 3.3 Notwithstanding any other provision of this Agreement, the Client acknowledges that:
- (a) Wheat received and stored by GrainCorp may be stored in common (i.e. commingled) with Wheat received from other GrainCorp clients, and Wheat may be segregated due to, but not limited to, pesticide residues, genetic status and phytosanitary requirements;
  - (b) Wheat received and stored by GrainCorp of Feed Grade may be commingled with Wheat of the same type and grade but of a different growing season;
  - (c) it understands and has advised all of its suppliers, that Wheat suspected to contain residues or which may otherwise be contaminated may **not** be delivered to or accepted at any GrainCorp facility. If such delivery is made for or on behalf of the Client, GrainCorp will not be responsible to any party for any Claim of Loss howsoever alleged or suffered; and
  - (d) this Agreement shall not be construed as a lease or licence of any storage facilities or land upon which any storage facility is located.
- 3.4 For the purposes of this Agreement, the grade of Wheat will be determined by GrainCorp in accordance with the Receival Standards unless otherwise agreed in advance of any testing or sampling by GrainCorp, and in writing between GrainCorp and the Client.

#### **Quality Testing Services**

- 3.5 Where Wheat has been received into GrainCorp Storages, the same grade classification of this Wheat given at the GrainCorp Storage will apply to Wheat being received into the Port Terminals.
- 3.6 GrainCorp will provide protein, moisture, screenings, defective grain and contaminant testing services for Wheat prior to or following receival at

Port Terminals. GrainCorp will provide falling number testing of Wheat upon receipt at Port Terminals as determined by GrainCorp. Wheat analysis resulting in grade or scale classification will be performed using instruments which comply with the provisions of the Commonwealth Government's National Measurement Act (1960) and National Measurement Regulations (1999). All other testing will be performed in accordance with the Receival Standard for the relevant Wheat type and grade.

- 3.7 GrainCorp defines "Nil" as less than 0.01% by weight where a Nil tolerance is specified in the Approved Receivals.

### **Pest Control**

- 3.8 Unless otherwise agreed in advance by the parties in writing, GrainCorp may treat all Wheat with approved chemicals or treatments as per applicable codes and regulations including the Australian Pesticides and Veterinary Medicines Authority and Food Safety Australia and New Zealand codes. GrainCorp will provide a list of approved chemicals and treatments to the Client on an annual basis.
- 3.9 If the Client requests and GrainCorp agrees to a different chemical or treatment strategy for a specific Port Terminal, an additional fee may be charged by GrainCorp and payable by the Client for the agreed treatment.
- 3.10 Where fumigation or other certificates are required by the Client, GrainCorp will apply a charge for the administration of these certificates. Any certification requirements must be lodged as part of a Cargo Nomination Application or Grain Stock Order Form. These certificates may not be obtainable in a format suitable for some requirements. GrainCorp accepts no responsibility for certification requests that have not been agreed between the Client and GrainCorp prior to a Cargo Nomination Application or Grain Stock Order Form approval.
- 3.11 GrainCorp will regularly inspect Wheat stored for the Client. If infestation is detected in Wheat arriving at the Port Terminal from a GrainCorp Storage, the Wheat will be disinfested and treated at GrainCorp's cost. If infestation is detected in Wheat arriving at the Port Terminal which is not sourced from a GrainCorp Storage, the Wheat will be disinfested at the Client's risk and cost. Applicable fees for this service are detailed in Annexure A. GrainCorp is not required to obtain the Client's approval to disinfest Wheat.

### **Outloading of Wheat**

- 3.12 If a Client wishes to remove a tonnage of its Wheat from a Port Terminal by loading rail or road transport, the Client must complete and execute a GrainCorp approved Grain Stock Order Form and follow the procedure set out in the instructions on that form. GrainCorp is not required to load Wheat until:
- (a) the Grain Stock Order Form has been properly completed and executed by the Client; and
  - (b) the procedures set out on the Grain Stock Order Form have been followed.

- 3.13 The minimum period for notifying GrainCorp of rail outloading is 12 noon on Monday (or the next working day if the Monday is a public holiday in the state of Queensland from where GrainCorp manages its company wide logistics operations) in the week prior to the week that the Client requires the outloading services.
- 3.14 The minimum period for notifying GrainCorp for road outloading Services, is prior to 3pm on the business day (in the state of Queensland from where GrainCorp manages its company wide logistics operations) before the date that the Client requires the outloading Services.
- (a) The Client must ensure that its road transport provider advises GrainCorp of vehicle registration details in writing, by 5pm on the business day prior to the date when the outloading services are to be performed. If the Client uses the GrainCorp web truck booking program (available at [www.graincorp.com.au](http://www.graincorp.com.au)) this notice period will be extended to 6:00am on the day of outloading.
- (b) The Client must use best endeavours to provide destination details for all road orders to ensure load security.
- 3.15 The outloading of Wheat is subject to local operating arrangements, legislative and regulatory requirements and compliance, availability of rail and road transport, fumigation requirements and periods of non access and prevailing weather conditions.
- 3.16 If a Client wishes to remove a tonnage of its Wheat from a Port Terminal by loading to a vessel, the Client and GrainCorp must follow and are bound by the protocols and procedures as outlined in Annexure B of this Agreement.
- 3.17 Once Wheat is removed from a Port Terminal (ordinarily determined as the point where the Wheat passes over the rail of the vessel/ vehicle/rail carriage):
- (a) As per **Clauses 6.1-6.9**, the Wheat no longer forms part of the Stored Wheat and the Client becomes the full owner of that Wheat bearing all risk and responsibility; and
- (b) the GrainCorp Stock Management System will be updated either manually or automatically to reflect the remaining Interest (if any) of the Client.

#### **Preconditions to Any Outturning or Outloading Services**

- 3.18 Without limiting any other provision in this Agreement, the following preconditions apply before any outloading or outturning Services are to be provided:
- (a) GrainCorp relies on the Client to have in place, and in turn, the Client warrants that it shall have in place and maintain at all times during the Term, an appropriate and unconditional wheat export licence and any accreditation or similar as required under any law or by any government body ("Accreditation Requirements"). The Client undertakes not to request any outturning or outloading Services, or if requested, to cancel such request, unless and until the Accreditation Requirements are complied with. If GrainCorp reasonably suspects or is

otherwise notified of the Client's non compliance with the Accreditation Requirements then the Client is in breach of warranty and GrainCorp may at the Client's sole risk and cost, refuse to provide any Services in connection with this Agreement, until the Client proves compliance with these requirements. The Client indemnifies GrainCorp from and against any Loss or Claim arising in connection with any failure to comply, in whole or in part, with any Accreditation Requirements.

- (b) GrainCorp is not responsible for the cleanliness, fitness for loading or carriage of Wheat, of any mode of transportation nominated by the Client. If AQIS determines or if acting reasonably, GrainCorp in consultation with the Client determines that the Client's selected mode of transportation is not clean, fit for loading or carriage then it may suspend or refuse to provide any outturning or outloading Services and in no circumstances will GrainCorp be liable for any delay, Loss or Claim and the Client shall meet all of GrainCorp's costs, expenses or losses associated with the rejection, suspension or cancellation of the scheduled outturning or outloading services. To avoid doubt, this clause will apply where GrainCorp engages labour or is required to cancel the provision of services to other clients directly as a result of the Client's mode of transport failing to meet the statutory or regulatory requirements for the transport of Wheat (for example, failing regulatory surveys). The Client will be advised, in writing, of any Claim to be made by GrainCorp, within a reasonable time of the determination that the mode of transport has been declared not clean or unfit for loading or carriage of Wheat.
- (c) Prior to physically outturning or outloading any Wheat, GrainCorp reserves the right to invoice the Client and receive payment in full for any related outturning or outloading services, failing which GrainCorp is not required to commence any such outturning or outloading services. On completion of any outturning or outloading services, the Client must within 21 days pay for any additional costs, services and Fees for Wheat outturned or loaded additional to the quantity invoiced. If the quantity outturned or outloaded is less, then GrainCorp will within 21 days refund to the Client the difference.

#### **4. CONDITIONS OF SERVICES PROVIDED BY GRAINCORP UNDER THIS AGREEMENT**

##### **New Season Agreement and Holding Over**

- 4.1 The parties will be bound by the terms and conditions of the Bulk Wheat Port Terminal Services Agreement (or equivalent agreement) issued for the grain season or seasons commencing on 1 October 2011 (**New Season Agreement**) from the earlier of:
  - (i) the date of execution by the Client of the New Season Agreement; or



- (ii) the date that GrainCorp stores and handles Wheat on behalf of the Client during the grain season commencing on 1 October 2011.

In the event that such agreement is not published prior to 1 October 2011 or is otherwise delayed, then GrainCorp and the Client continue to be bound by the terms of this Agreement subject to agreed variations and any revised Fees that apply for the new season, as will be notified to the Client before 1 October.

### **Hours of Operation**

- 4.2 GrainCorp is only required to provide a single day shift operation at a Port Terminal on any one normal business day, being a day which is a Monday to Friday where banks are open in the state where such Port Terminal is located. GrainCorp and the Client may agree that additional (overtime) shifts will be provided for the handling of the Client's Wheat and GrainCorp will use reasonable endeavours to procure the additional labour. This applies to both shipping services and the unloading of road and rail transport. If GrainCorp provides additional overtime shifts the Client must pay:
  - (a) the overtime fees (if applicable) as set out in Annexure A;
  - (b) any stevedoring charges or charges required to be paid to the Department of Agriculture Fisheries and Forestry or AQIS and other charges, paid, incurred or required to be paid by GrainCorp in connection with providing the additional overtime shifts.
- 4.3 Where overtime labour has been engaged by GrainCorp to load a vessel or unload road and rail transport in accordance with the Client's request and the vessel is unable to load for any reason, or the transport fails to arrive at the Port Terminal, cancellation or related Fees as set out in Annexure A must still be paid by the Client in full.
- 4.4 Notification of a request to load a vessel requiring overtime or weekend shifts must be provided to GrainCorp prior to cut off times as specified from time to time by the Port Terminal. GrainCorp cannot guarantee and does not represent that it will accept any such requests.

### **Rail Transport Providers**

- 4.5 Where the Client procures rail services from GrainCorp then the following terms and conditions will be superseded by the terms of that agreement.

Where the Client has procured its own rail services, the following conditions will apply:

If GrainCorp receives the Client's Wheat by rail transport or is required to outturn the Client's Wheat to rail the Client must:

- (a) Ensure that the Client's rail service provider:
  - (1) has all approvals, licences and authorisations required to operate rail and related services, and has adequate systems to provide the necessary rail and related services to the Client in a timely, safe and professional manner;

- (2) provides rail wagons and other related equipment utilised in the transport of Wheat that are clean and empty of any grain residue and/or contaminants, free from defects, well maintained, rail and carriage worthy, and that avoid risk of any damage to property or injury to any persons including GrainCorp employees, agents and contractors;
- (3) where the train crosses certified rail weighbridges, issues actual weights of tonnage carted for the purpose of determining actual stock outloaded. This information must be forwarded direct to GrainCorp from the rail service provider;
- (4) provides a system for the notification of defects in rail wagons. Any defect reported by GrainCorp will be recorded and the Client must ensure that remedial action taken by the Client's rail service provider or alternative transportation must then be arranged by other means or a different rail service provider. GrainCorp will be advised when corrective action has been completed on the defective rail wagon. The rail service provider will not allow the defective rail wagons to be loaded until the defect has been remedied and confirmed to GrainCorp;
- (5) minimises and avoids all risk of damage or injury to all persons, and protection of same, including the protection of GrainCorp employees, agents and contractors by providing wagons with top door opening/closing mechanisms which do not require GrainCorp employees to climb onto the wagon to open or close the rail wagon doors; and
- (6) participates in safety audits conducted at or near GrainCorp Storages so that risks of injury to any persons including GrainCorp employees are identified, and addresses and remedies any risks related to rail wagons identified in the course of such safety audit.

The Client shall bear all risk and responsibility for the actions and / or omissions of its rail service provider, including any Loss or Claim howsoever connected to their engagement of the rail service provider or the performance of the rail or related services.

- (b) The Client acknowledges that, unless advised otherwise by GrainCorp, the loading of Wheat into rail wagons by GrainCorp does not include:
- (1) the movement or shunting of rail wagons by any means; or
  - (2) the opening and closing of wagon lids and discharge hatches on rail wagons.

- 4.6 GrainCorp will use reasonable endeavours to ensure that the tonnage loaded into rail transport provided by or on behalf of the Client from a Port Terminal will be loaded to the Nominated Capacity.

#### **Road Transport Providers**

- 4.7 If the Client requires GrainCorp to receive or outturn Wheat by road transport, the Client must:
- (1) ensure that vehicle operators engaged by the Client for the purposes of delivering or outturning Wheat by road to/from the Port Terminal comply with all laws and regulations, including those in respect of safety, the environment, carriage of goods and chain of responsibility, are conversant with site safety procedures and have undergone a site induction program prior to entering the Port Terminal;
  - (2) ensure that vehicle operators are advised that they must not, and thereafter do not, require or request GrainCorp staff to climb on vehicles for any purpose or assist with securing of loads;
  - (3) engage road transport providers and ensure that they provide associated equipment that is registered, insured, operated by licensed and physically capable operators, is clean, safe, and fit for purpose prior to entering the Port Terminal;
  - (4) provide the prescribed minimum business day's notice to outturn to road as set out in **Clause 3.14** above. Subject to clause 2.5 and 3.15, where the Client has provided the minimum business days notice GrainCorp will make available outloading operations. GrainCorp may levy additional charges as described in Annexure A where this minimum notice period is not observed; and
  - (5) provide the vehicle registration number of all road transport allocated to load Wheat from the Port Terminal for the purpose of transporting Wheat from the Port Terminal for or on behalf of the Client.
- 4.8 If the Client requires GrainCorp to outturn Wheat by road transport, GrainCorp will not permit loading beyond the legal mass prescribed by the relevant legislation in each state for that road transport configuration, and the Client will have no Claim against GrainCorp for any Loss connected to such directions or restrictions.

### **5. OBLIGATIONS OF THE CLIENT UNDER THIS AGREEMENT FOR PORT TERMINAL OPERATIONS**

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#### **Shipping Information**

- 5.1 The parties are bound by the protocols and procedures attached to and forming part of this Agreement as Annexure B, or as varied from time to time.
- 5.2 The Client acknowledges that AQIS may disallow the loading of some portion of the Client's Wheat at the Port Terminal for reasons of non conformance to AQIS export conditions as outlined in the *Export Control*

*Act 1982* (such as, but not limited to, detection of live insects, rodents and rattlepod). GrainCorp is not liable for any Loss incurred by the Client in relation to the failure to load that portion of the Wheat or the replacement of that stock for the completion of loading, due to a decision by AQIS to disallow the loading of that portion of the Wheat, including vessel discharge or other post loading mitigation.

- 5.3 GrainCorp is not liable for any quality issues not caused by GrainCorp derived from Wheat rejected from shipping at the Port Terminal that has been delivered from any site, not being a GrainCorp Storage. The Client remains the owner of this Wheat at all times until the Wheat is sold or removed from the Port Terminal. Applicable fees to apply to this Wheat are detailed in Annexure A.
- 5.4 Where contaminated Wheat is received from or on behalf of the Client from any site, not being a GrainCorp Storage, and this Wheat contaminates other stock at the Port Terminal, the Client is the owner of the contaminated Wheat and is liable for all Loss incurred by GrainCorp (including from Claims by other clients) caused by and all costs associated with the contaminated stock,.
- 5.5 GrainCorp will load Wheat from the Port Terminal storage in accordance with:
- (a) the standard, notwithstanding Annexure B, advised to GrainCorp by the Client (provided that these are no more rigid than the Receival Standards for the receival of the Wheat); and
  - (b) the "Authority to Load Advice" form provided to GrainCorp by the Client and endorsed by GrainCorp; and
- any other market or blending requirements as agreed in writing by the parties.
- 5.6 The Client acknowledges that GrainCorp has the right to mitigate dust emissions at the Port Terminal. Such mitigation may include moisture conditioning of grain paths.
- 5.7 Notwithstanding any other provision in this Agreement, the Client understands and accepts that matters and events beyond GrainCorp's control may occur (including but not limited to changes in vessel scheduling and arrival or departure times, failure of vessels to pass any quarantine requirements or other inspections, Wheat quality issues, vessel congestion, lack of performance and delays due to freight or other service providers) which means GrainCorp cannot guarantee all cargos will be ready for loading, or that they can or will be loaded as scheduled. GrainCorp will try to avoid any changes or delays where possible and will keep the Client informed. GrainCorp will use reasonable endeavours to accumulate cargo and load vessels as scheduled.
- 5.8 For the avoidance of doubt, no mode of transportation can be cleaned at a Port Terminal without GrainCorp's prior written consent. If a vessel cannot be loaded for any reason including for failing to pass any inspection or survey, then GrainCorp is entitled to instruct a vessel to be removed from the berth, including to make way for another vessel to be loaded. GrainCorp will not be liable for any Loss or Claim howsoever suffered or incurred by any party connected to such a direction.

## Port Charges

- 5.9 GrainCorp is not liable for any port or related charges in relation to receipt, storage and loading of Wheat at Port Terminals (including vessel, demurrage, stevedoring, Port fees or AQIS fees), and such charges will be borne by the Client. In addition, any charges that GrainCorp may incur under the Maritime Transport Security Act (2003) or any other applicable act or regulation, shall be passed onto either the vessel agent or Client after consultation.
- 5.10 The Client will be responsible for paying all costs associated with conducting the export inspection of Wheat by AQIS and/or its agent(s) as well as the cost of employing all labour connected with loading, storing, treating and transporting the Wheat for any such inspection.
- 5.11 For vessels at Geelong, upon completion of loading, the vessel must sail within two hours of completing cargo operations (at the Geelong Number Three berth). If the vessel does not sail the following hourly charges will apply after the expiration of the two hours:
- \$325.00 per hour for the first hour or part thereof and  
\$650.00 per hour for each subsequent hour or part thereof.
- This additional fee will be charged to the shipper's agent.

## **6. TITLE TO GRAIN AND GRAIN ACCOUNTING OBLIGATIONS**

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### Co-ownership

- 6.1 Notwithstanding any other provision of this Agreement (but subject to **Clause 6.25 and 6.26**), the Client acknowledges that when GrainCorp receives the Client's Wheat and both of the following occur:
- (i) the weighbridge documentation notates the tare weight and the final net mass of the load is known, and
  - (ii) the Client (or the Client's agent) has signed the Receival Docket,
- then the Client's Wheat becomes Stored Wheat. At this time, full ownership in the Wheat automatically transfers from the Client to the Co-owners, and in return, an Interest transfers from the Co-Owners to the Client. As a result, the Client becomes a Co-owner of all the Stored Wheat.
- 6.2 For the purposes of this Agreement, the percentage of the Stored Wheat which the Client makes up, and which therefore constitutes the Client's Interest in the Stored Wheat, will be determined by GrainCorp, using the records GrainCorp is required to keep pursuant to **Clauses 6.39 to 6.41**. For the avoidance of doubt the Client's Interest represents an ownership right to Wheat of the same type and grade of the Wheat that was classified by GrainCorp and delivered by the Client (and not the same physical Wheat that is delivered by the Client).
- 6.3 Each Co-owner holds its Interest as a tenant in common.
- 6.4 If GrainCorp becomes insolvent, each Co-owner will assert its right to retain ownership commensurate to its Interest.
- 6.5 A Co-owner may, subject to the terms and conditions of this Agreement, deal with its Interest as an owner, including:

- (a) transferring all or part of its Interest to another Co-owner;
  - (b) removing Wheat with GrainCorp's approval from the Stored Wheat;
  - (c) transferring all or part of its Interest to a third party;
  - (d) mortgaging or assigning all or part of its Interest by way of security; and
  - (e) granting a fixed or floating charge over all or part of its Interest.
- 6.6 In respect of each Co-owner, provided that the Co-Owner complies with all its obligations under this Agreement, GrainCorp has possession of the Co-owner's Stored Wheat but no legal or equitable title to any part of it, except to the extent that GrainCorp is a Co-owner.
- 6.7 GrainCorp may become a Co-owner by adding Wheat to the Stored Wheat. In accordance with **Clause 6.1**, full ownership in any Wheat added to the Stored Wheat by GrainCorp is transferred to the Co-owners. In return, the Co-owners transfer to GrainCorp an Interest.
- 6.8 GrainCorp must maintain records in respect of its Interest in accordance with **Clauses 6.39 to 6.41**.
- 6.9 Except as set out in **Clause 7.13**, in respect of each Co-owner, provided that the Co-Owner complies with all its obligations under this Agreement, GrainCorp may only deal with Stored Grain as owner of its own Interest and not as the owner of the Interest of the Co-owner. This applies in particular, to the removal of Wheat from the Stored Wheat.

#### **Transfer of Title**

- 6.10 If a Client (as seller) wishes to transfer a tonnage of Wheat (being all or part of its Accounting Stock Tonnage) to another GrainCorp client (or swap a tonnage of Wheat between the Client and another GrainCorp client), the Client must either:
- (a) complete and execute a Buyer to Buyer Title Transfer Form (or Stock Swap Form) and follow the procedures set out in the instructions on that form. Wheat is not transferred until the Buyer to Buyer Title Transfer Form (or Stock Swap Form) is also executed by both the GrainCorp client receiving the transfer and GrainCorp has processed the transfer into the GrainCorp Stock Management System. Using reasonable endeavours, the GrainCorp Stock Management System will be updated manually to reflect the revised Interests of the Client and the transferee within 2 business days of receiving the buyers acknowledgement. The transfer (swap) is effective, after execution by all parties, on the date on which the seller (initiator) signs the Buyer to Buyer Title Transfer Form (Stock Swap Form); or
  - (b) complete and execute the Buyer to Buyer Title Transfer Form on the GrainCorp web page using the GrainCorp Buyer to Buyer Software as per **Clauses 6.10 to 6.22** and follow the procedures as agreed to between the Client and GrainCorp from time to time. Title will transfer in the GrainCorp Stock Management System upon the Client clicking on the 'Confirm' button. The

transfer (swap) is effective on the date on which the seller (initiator) processes the transfer of title on the GrainCorp web page.

Wheat may be transferred in accordance with this provision only to another GrainCorp client who has signed a current Bulk Wheat Port Terminal Services Agreement or Country Storage and Handling Agreement.

- 6.11 GrainCorp provides this service to the Client to facilitate the transfer of all or a part of the Interest, as recorded in the GrainCorp Stock Management System, to another GrainCorp client. This service provided by GrainCorp does not constitute or represent the agreement or terms and conditions for the sale of Wheat from the Client to another GrainCorp client.
- 6.12 The Client must regularly update and keep secure the password created by the Client to access the GrainCorp Buyer to Buyer Software. To limit the Client's liability, the Client must notify GrainCorp immediately by telephone on (02) 9325 9191 during business hours in the state of New South Wales (9:00am to 5:00pmAEST, excluding bank and public holidays) if the Client believes that a user's password has become known to anyone other than the intended user.
- 6.13 The Client must provide a minimum of two (2) email addresses for the transmission of confirmation of transfer and it is the Client's responsibility to maintain the email addresses to be used for confirmation of transfers and these email addresses must be kept current. GrainCorp is not liable for any Claim or Loss incurred by the Client or any other person arising out of or in connection with the Client's failure to advise GrainCorp of the changes to email addresses.
- 6.14 GrainCorp may allow any employee of the Client, authorised by the Client in writing, access to this software. More than one user from the Client can have access to the application and password sharing is not required, nor recommended.
- 6.15 The Client must advise GrainCorp of all persons whom the Client no longer requires or authorises to have access to the software on behalf of the Client. GrainCorp is not liable for any Loss incurred by the Client or any other person arising out of or in connection with the unauthorised use of this software by a former staff member of the Client where the Client has failed to advise GrainCorp of changes to staff with access to this software.
- 6.16 The Client must not attempt to transfer to another party more than the Client's Accounting Stock Tonnage at the time of the transfer, as recorded in the GrainCorp Stock Management System. Any attempt to do so will result in the revocation of access rights to the software.
- 6.17 All or a part of an Accounting Stock Tonnage will transfer in the GrainCorp Stock Management System upon the seller clicking on the 'Confirm' button.
- 6.18 All or a part of an Accounting Stock Tonnage may be transferred in accordance with this **Clause 6** only to another GrainCorp client. The transfer is effective, upon the seller clicking on the 'Confirm' button.

- 6.19 GrainCorp may reverse any transfer if:
- (a) the user is in default of payment of any Fees that are not the subject of a dispute to GrainCorp; or
  - (b) the user has attempted to transfer more than their Accounting Stock Tonnage at the time of the transfer, as recorded in the GrainCorp Stock Management System; or
  - (c) in GrainCorp's opinion, the security of the Client has been breached and the Client confirms that breach; or
  - (d) the user is in breach of any term of this Agreement; or
  - (e) if the user has selected a Buyer who is not a GrainCorp client, in which case GrainCorp has no liability for any Claim or Loss in connection with the reversal.
- 6.20 GrainCorp may at any time add, remove, change or impose restrictions on the functionality of the software without limitation and without recourse by the Client. GrainCorp will notify the Client in advance of any changes to the service provided by the software.
- 6.21 The Client acknowledges that GrainCorp will not be liable for any Claim or Loss incurred by the Client or any other person arising directly or indirectly by the use of the Buyer to Buyer Software due to:
- (a) any breakdown or interruption to the service that related to circumstances beyond GrainCorp's direct and immediate control; or
  - (b) the buyer of all or part of the Client's Accounting Stock Tonnage failing to honour the transfer or any contractual agreement between the two parties.
- 6.22 If a tonnage of Wheat is transferred to the Client (as buyer) from another GrainCorp client (as seller) using the Buyer to Buyer Software as set out in this Clause 6, then:
- (a) if the Client rejects all or a part of the Wheat that is transferred by the seller, the Client must transfer that Wheat back to the seller within 5 days of the original transfer. If the Client fails to do so, it will be deemed to have accepted the transfer; and
  - (b) the Client acknowledges that the Wheat accepted from the seller may not be at the location agreed on the transfer at the time of outturn.

### **Stock Swaps**

- 6.23 The Client acknowledges that GrainCorp can swap a grade of Wheat with the same grade of Wheat between GrainCorp Storages, including Port Terminals (and in the Natural Port Zone) by entering into this Agreement. Any proposed stock swap will require the Clients prior written authorisation. GrainCorp will affect these swaps by filling out a Stock Swap Form, forwarding this form to the Client and amending the location of the Client's Accounting Stocks in the GrainCorp Stock System.
- 6.24 For each stock swap effected under **Clause 6.23**, GrainCorp will advise the Client of the price differential in the applicable GTA location differential to the relevant Port Terminal. Where a payment is to be



made by GrainCorp a Recipient Created Tax Invoice (as required under the relevant GST legislation) and a payment by electronic funds transfer will be sent to the Client within 21 days of the transaction. The Client has the option of providing GrainCorp an invoice in lieu of a GrainCorp produced Recipient Created Tax Invoice. Where an invoice is to be sent to the Client the invoice will form a part of the Client's normal GrainCorp monthly invoice as per **Clauses 7.1 and 7.2**.

### **Shrinkage**

- 6.25 GrainCorp will not reduce the recorded tonnage of Wheat by a shrinkage allowance for road and rail deliveries to port terminals from GrainCorp storages and Third Part Storages including each of the following Wheat handling actions:
- (a) Receival by road;
  - (b) Receival by rail and,
  - (c) Wheat sold between Clients by Title Transfer.
- 6.26 A shrinkage allowance of 0.25% will be deducted from all wheat that is outloaded from a Port Terminal by any of the following wheat handling actions:
- (a) Elevation to a vessel; and
  - (b) Loading of all road and rail transport, regardless of destination.
- 6.27 The Client may claim the dust extracted from the Port Terminal during the export of the Client's Wheat. If the Client waives the right to claim the dust, GrainCorp will dispose of the dust in accordance with local environmental guidelines.
- 6.28 These deductions will be applied such that the quantity of Wheat available to the Client for Outloading or Title Transfer will be the reduced quantity. Where a shrinkage allowance is deducted under **Clause 6.26** title in the shrinkage residue (being a volume of Wheat representing the amount deducted) will transfer to GrainCorp (and not the Co-Owners pursuant to **Clause 6.1**). After the Client's Accounting Stock Tonnage (which for the purpose of this **Clause 6.28** is taken to represent the Interest of the Client) as recorded in the GrainCorp Stock Management System has been outloaded, any shrinkage residue will be available for sale by GrainCorp as it sees fits. GrainCorp will retain all proceeds from the sale of any shrinkage residue.
- 6.29 All fees will be levied against the Accounting Stock Tonnage. Any dust and damaged Wheat disposed of by GrainCorp will be to the account of GrainCorp and will not be considered to be outloaded on behalf of the Client.
- 6.30 Further to **Clause 2.1(d)**, if the actual outloading (after the deduction of shrink) of a particular type and grade of Wheat is less than the Accounting Stock Tonnage, GrainCorp will in its discretion either:
- (a) provide sufficient additional Wheat of the same type and grade at the Port Terminal to ensure that the net outloading of Wheat to the Client is equivalent to the Accounting Stock Tonnage for the Client; or

- (b) provide financial compensation to the Client for the shortfall in the net outloading. The financial compensation will be based on the fair market price for Wheat of the relevant type and grade for the applicable season at the time of the last outloading.
- 6.31 If the actual outloading (after the deduction of shrink) of a particular type and grade of Wheat is more than the Accounting Stock Tonnage, GrainCorp will at its discretion either:
  - (a) provide sufficient additional Wheat of the same type and grade the Port Terminal to ensure that the net outloading of Wheat to the Client is equivalent to the Accounting Stock Tonnage for the Client; or
  - (b) receive financial compensation from the Client for the excess in the net outloading. The financial compensation will be based on the fair market price for Wheat of the relevant type and grade for the applicable season.
- 6.32 Where the Accounting Stock Tonnage of a particular type and grade of Wheat at the Port Terminal is between the values  $-1.00$  and  $+1.00$  tonne, the Accounting Stock Tonnage of that particular type and grade of Wheat at the Port Terminal will be deemed to have no value and will be removed from the GrainCorp Stock Management System and neither party will have any liability to the other for that amount of Wheat.

#### **Documentation and Weights**

- 6.33 For receipt from and loading to road transport, GrainCorp weighbridges at the Port Terminal will be used to determine the Receipt and Outloading Tonnage.
- 6.34 For receipt from and loading to rail transport, the following will apply:
  - (a) for rail movements from GrainCorp Storages to the Port Terminal, and for the receipt, by rail, at the Port Terminals of rail movements originating from a source other than a GrainCorp facility, GrainCorp's certified weighers at the unloading destination will be used to determine the final Receipt and Outloading Tonnage;
  - (b) the Client must ensure the currency of certification and compliance with the various state Trade Measurement Acts and Regulations of all end-user rail weighbridges providing final Outloading Weights;
  - (c) GrainCorp must ensure the currency of certification of the Port Terminal and compliance with the various state Trade Measurement Acts and Regulations; and
  - (d) the Client acknowledges that GrainCorp acting reasonably has the right to refuse to either load Wheat to rail or receive Wheat by rail if it believes that if in doing so there is not a certified weighing mechanism in operation. GrainCorp and the Client will use reasonable endeavours to determine a mutually acceptable alternative.
- 6.35 If GrainCorp determines that the Client or the domestic end-user has not declared detailed weights in a timely manner GrainCorp may use

appropriate GrainCorp average weights to determine the Outloading Tonnage until the Client provides details of weights or agreement is reached between GrainCorp and the Client. GrainCorp is to act reasonably if disputing timeliness of declared weights

- 6.36 GrainCorp may dispute at any time any weights declared to GrainCorp by the Client or the domestic end-user. If there is a dispute about declared weights, GrainCorp may substitute appropriate State-wide average weights in place of any weight declared by the Client or the domestic end-user or agreement is reached between GrainCorp and the Client. GrainCorp is to act reasonably if disputing the declared weights.
- 6.37 The Client acknowledges that as a result of variances between weighing devices, the actual Outloading Tonnage for a GrainCorp Storage or Port Terminal may be more or less than the tonnage received at that GrainCorp Storage or Port Terminal. Subject to Clause 6.31 and 6.38, the resulting negative or positive stock-on-hand at that GrainCorp Storage or Port Terminal, will still form a part of the Accounting Stock Tonnages for invoicing purposes and will still be subject to the shrinkage outloading adjustment provisions in **Clauses 6.30 to 6.31**.
- 6.38 If a variance occurs between Port Terminals and GrainCorp Storages as per **Clause 6.37**, GrainCorp may adjust Accounting Stock Tonnages to resolve the variances provided that the Client's total Accounting Stock Tonnages is unchanged and any GrainCorp fees pertinent to the transaction are reconciled. At all times this Clause 6.38 shall not operate to the disadvantage of the Client.

#### **Record-keeping**

- 6.39 GrainCorp will keep separate records for the Client, of the Receival Tonnage and Outloading Tonnage determined pursuant to **Clauses 6.33 to 6.38** for each type and grade of Wheat received or outloaded.
- 6.40 GrainCorp will keep daily records of the total amount of Stored Wheat in its possession and where the Stored Wheat is stored.
- 6.41 The Client warrants that all and any information or documentation it provides to, or arranges to be provided to GrainCorp including all shipping or other documents which contain details of grade, origin, location, treatment and type of Wheat ("Client Documents"), will contain accurate and truthful statements and descriptions. The Client indemnifies GrainCorp from and against any Loss or Claim suffered, threatened, or commenced in connection with any misrepresentation or error.

#### **Provision of Stock Information**

- 6.42 Upon request by the Client, GrainCorp will supply the Client with particulars of Wheat received, held in storage and outturned on behalf of the Client (**Stock Information**) in the manner agreed between the parties from time to time. GrainCorp will act with best endeavours and in the interest of the Client in providing the Stock Information in as timely and accurate manner as the available technology allows. The Client acknowledges that the Stock Information may be subject to further update upon the availability of additional Stock Information that may affect the Accounting Stock Tonnage of the Client. GrainCorp is not liable to the Client or any other person for any Claim or Loss arising out

of or in connection with the supply of Stock Information unless the result of gross negligence by GrainCorp. The Client expressly indemnifies and releases GrainCorp and its employees, agents and contractors for any Loss suffered or incurred by them in connection with any Claims.

- 6.43 If any documents issued to the Client contain incorrect information as to the quantity or other particulars of Wheat, then GrainCorp must promptly notify the Client by sending a new or amended version of the document.
- 6.44 If an error is not ascertained until after the complete outturn of the Client's Wheat, and it results in the Client receiving Wheat in excess of the Accounting Stock Tonnage, then the Client must either:
- (a) pay to GrainCorp an amount equal to the market value of the excess quantity of Wheat at the date of outturn, within 21 days of the date of invoice; or
  - (b) replace the Wheat with wheat of the same commodity and grade and in the quantity exactly equal to the surplus volume provided in excess to the Client's Accounting Stock Tonnage, as, when and where so requested by GrainCorp, acting reasonably.

## **7. PAYMENT OF FEES, CHARGES AND OTHER MONEYS**

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### **Invoices**

- 7.1 The Client agrees to pay all Fees to GrainCorp in accordance with the terms of this Agreement and all other amounts claimed by GrainCorp.
- 7.2 Unless otherwise specified in Annexures A and B, Fees payable under this Agreement will be invoiced (other than amounts payable on demand by GrainCorp under this Agreement) after the end of the month or other period during which or in respect of which the Fees were incurred. Fees for the receipt of Wheat during the period September 2009 (August 2009 for Queensland sites) to January 2010 inclusive may be invoiced every 7 days during this period at the discretion of GrainCorp.

The Outloading to Vessel Fee, Minimum Cargo Lift Fee (if applicable), Shipping Overtime Fee (if applicable), the Geelong Wharf Facility Hire Fee (if applicable) Wheat Blending Fee and any other applicable vessel loading charges will be invoiced on the completion of loading each vessel.

Subject to **Clause 7.10**, all Fees, charges and other moneys payable which are invoiced must be paid within 21 days of the date of receipt of the invoice. GrainCorp may amend these credit terms at any time if the Client does not strictly adhere to these payment terms, and may reject Wheat from any party where they have outstanding accounts under this Agreement or any other agreement the Client has with GrainCorp or its Related Bodies Corporate which breach the terms of credit of the relevant agreement. GrainCorp reserves the right to make adjustments for any error in the calculation of Fees in one invoice in any subsequently issued claim for payment, and the Client must pay the adjustment amount as and when claimed by GrainCorp.

The Client is entitled to dispute invoices. Where there is a dispute, GrainCorp will continue to provide the Services in accordance with this Agreement. The Client cannot unreasonably withhold payment on any part of an invoice that is not in dispute.

### **Goods and Services Tax**

- 7.3 If GST applies to any supply made under this Agreement, GrainCorp will, in addition to the Fees or any other consideration expressed as payable in this Agreement, subject to issuing a valid tax invoice, recover from the Client an additional amount on account of GST, such amount to be calculated by multiplying the fee or any other amount or consideration payable by the Client for the supply by the prevailing GST rate.
- 7.4 If it is determined on reasonable grounds that the amount of GST paid or payable on any supply made under this Agreement differs for any reason from the amount of GST recovered from the Client including by reason of:
- (a) an alteration in the GST law;
  - (b) the issue of or an alteration in a ruling or advice of the Commissioner of Taxation;
  - (c) the allowance to the Client of a refund of GST in respect of any supply made under this Agreement; or
  - (d) a decision of the Administrative Appeals Tribunal (or its equivalent) or a court,

then the amount of GST recovered or recoverable from the Client shall be adjusted accordingly.

### **Information**

- 7.5 GrainCorp does not represent, warrant or guarantee, whether expressly or impliedly, that the information provided by third parties (e.g. NGR) under or in connection with this Agreement, is complete, sufficient or accurate. To the fullest extent permitted by law, GrainCorp accepts no responsibility for any inaccuracies, errors, false and misleading content or omissions contained in any such information, or any other information or matter arising or coming to its notice which may affect this information, or any party's reliance on same.

### **Payment**

- 7.6 If a tonnage of Wheat is transferred to the Client (as buyer) from another GrainCorp client (as seller) where the transferred Wheat was the subject of a Grower Warehouse Agreement, then:
- (a) the Client must pay to GrainCorp under this Agreement all Country Receival Fees or Direct to Port Receival Fees in respect of the transferred Wheat relating to the period before and on the date of transfer as shown on the Grower Warehouse Grain Title Transfer Form. The Client acknowledges that these fees, shown on that Grower Warehouse Grain Title Transfer Form, are payable by the Client as Fees under this Agreement.
  - (b) If the warehoused Wheat has been moved by rail as part of an overflow movement during the harvest period, the Client must

pay GrainCorp the country outloading fee as prescribed in Annexure A of the GrainCorp Country Storage and Handling Agreement of the current season and the net difference in the location differentials as published by GTA between the GrainCorp Storage at which the warehoused Wheat was received and the Port Terminal.

7.7 Under a Buyer to Buyer Title Transfer form or Grower Warehouse Grain Title Transfer form, if Wheat which is stored by GrainCorp is transferred to the Client (as buyer) by another GrainCorp client or Grower (as seller), the Client must pay under this Agreement:

- (a) Storage Fees; and
- (b) Outloading Fees; and
- (c) all other fees, charges and other moneys payable to GrainCorp, in respect of the transferred Wheat relating to the period after the date of transfer.

7.8 Under a Buyer to Buyer Title Transfer form, if Wheat which is stored by GrainCorp is transferred by the Client (as seller) to another GrainCorp client (as buyer), the Client must pay under this Agreement and before the Wheat is transferred:

- (a) all unpaid Receival Fees; and
- (b) Storage Fees; and
- (c) all other unpaid fees, charges and other moneys payable to GrainCorp,

in respect of the transferred Wheat relating to the period up to and including the date of transfer.

#### **Interest on Overdue Accounts**

7.9 Subject to **Clause 7.10**, the Client will be liable for interest on overdue amounts due and payable under this Agreement from the date on which payment was due to the date on which payment is made. The interest rate applicable under this **Clause 7.9** is the rate which is 6% above the bank bill buying rate for bills with a tenor of 90 days quoted from time to time by National Australia Bank. The initial interest rate will be based on the average of the relevant bank bill rates quoted by National Australia Bank on the second last business day of the month before the date interest begins to accrue. The interest rate will be adjusted on the first day of every calendar month based on the average of the relevant bank bill rates quoted by National Australia Bank on the second last business day of the immediately preceding month. Interest will be calculated on a daily basis on the outstanding amount, until paid in full.

#### **Credit Facilities and Requirements**

7.10 In order to receive the Services from GrainCorp under this Agreement, the Client must comply with one or more of the following requirements, at GrainCorp's discretion, namely

- (a) the Client will have the benefit of the 21-day payment terms for the payment of Fees in **Clause 7.2**, provided that the Client otherwise complies with all of its obligations pursuant to this

Agreement and any other agreement with GrainCorp or its Related Bodies Corporate and makes payment to GrainCorp in respect of any service charges or any other moneys which may from time to time be due and payable by the Client to GrainCorp under this or any other Agreement with GrainCorp or its Related Bodies Corporate. It is further agreed and acknowledged that the Client shall make immediate payment of all moneys owing by the Client at any time upon written demand from GrainCorp in accordance with **Clause 7.10(b)**.

- (b) GrainCorp may require the Client to pay the Fees prior to providing the Services in which event notification of the amount to be paid shall be provided to the Client and paid by the Client, prior to provision of the Services.
- (c) Notwithstanding **Clause 7.10(a)** and **(b)**, GrainCorp may require the Client to pay in advance for Services in those circumstances where, taking into account the quantity to be loaded, the loading of the vessel would reduce the total Accounting Stock Tonnage of the Client in GrainCorp facilities of all Wheat to less than 1,000 tonnes.

#### **Costs**

- 7.11 The Client indemnifies, releases and holds harmless GrainCorp from and against all Claims and any Loss incurred by GrainCorp which may result from or be connected to the Client's failure to pay any Fees, charges and other moneys properly due and payable in accordance with this agreement.

#### **Set-off**

- 7.12 With the agreement of the Client GrainCorp may apply any amounts whatsoever then due and payable by it to the Client in satisfaction of any amounts whatsoever then due and payable by the Client to GrainCorp under this or any other agreement between the Client and GrainCorp or its Related Bodies Corporate.

#### **Amounts Owing**

- 7.13 Without limiting **Clause 7.10**, if any amount is owed to GrainCorp by the Client for any reason and on any account whatsoever (whether or not directly in connection with this Agreement or the Wheat) then GrainCorp may:
  - (a) execute a Grain Stock Order Form or load Wheat under **Clause 3.12**; or
  - (b) execute a Buyer to Buyer Title Transfer Form (or Stock Swap Form) or transfer Wheat under **Clause 6.10**,

in which case GrainCorp will instead retain possession of the Wheat that the Client would otherwise be entitled to and, on 30 days notice to the Client, may sell the Wheat (in a manner determined at the sole discretion of GrainCorp) and apply the sale proceeds to the amount owed by the Client to GrainCorp with any surplus to be paid to the Client. The rights of lien granted to GrainCorp under this **Clause** are in addition to any other rights of lien it has under statute or common law.

This **Clause 7.13** applies irrespective of the capacity in which the Client owes any amount to GrainCorp, whether or not the Client is liable as principal or surety, and whether or not the Client is liable alone, or jointly or jointly and severally with another person.

## **8. DAMAGES**

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- 8.1 Unless otherwise agreed in writing with the Client, GrainCorp will not be liable to the Client for any Claims or Loss in relation to any alleged or actual reduction in standard or quality of Wheat where:
- (a) the reduction in quality or standard of Wheat (as determined by the values for protein, moisture and screenings) has not resulted in the downgrading of the Wheat from the grade to which the Wheat was classified on receipt by GrainCorp; and/or
  - (b) GrainCorp has received and loaded the Wheat in accordance with the Receival Standards or other minimum receival specifications and sampling methodology agreed in writing between GrainCorp and the Client under this Agreement; and/or
  - (c) the Client has requested GrainCorp to blend two or more grades of Wheat into one grade of Wheat and the blended Wheat is at least the same quality of the lower Grade; and/or
  - (d) the moisture content of the representative sample for all grades loaded to road, rail, or vessel is within 0.3% of the maximum allowable under the Receival Standards; and/or
  - (e) the Client has not provided notification of the road outloading destination.
- 8.2 If the Receival Standards or the minimum receival specifications and sampling methodology as the case may be referred to in **Clause 8.1** are not met, any Claims made by the Client against GrainCorp in respect of Downgraded Wheat will be limited to:  $T \times (P - V)$  where: T is the quantity in tonnes of Wheat downgraded from one grade to a lower grade; and P is the fair market value of the non Downgraded Wheat on the date at which the Claim was made by the client; and V is the fair market value of the Downgraded Wheat on the date at which the Claim was made by the Client.
- 8.3 Where a Claim is recognised by GrainCorp to be valid and GrainCorp agrees to compensate the Client or, in any other event where GrainCorp is liable to compensate or indemnify the Client, then GrainCorp's maximum liability in respect of any Claim shall not exceed \$500,000 for Wheat outloaded on any shipping vessel and \$25,000 for Wheat outloaded on to rail or road trucks on any one day for the Port Terminal, capped at 7 days.
- 8.4 GrainCorp's liability for a Claim under this **Clause 8** is subject to the Client:
- (a) advising GrainCorp promptly of suspecting Downgraded Wheat, ceasing discharging suspected loads, and allowing GrainCorp to inspect suspected Downgraded Wheat .;



- (b) allowing GrainCorp every possible opportunity to mitigate all actual or potential losses.
  - (c) informing GrainCorp of any potential Claim which it has against GrainCorp in respect of Downgraded Wheat received by the Client within 25 business days of receiving the Wheat; and
  - (d) providing GrainCorp with a sample of the Downgraded Wheat subject to the Claim; and
  - (e) allowing GrainCorp to test this sample and compare this sample with sample of Wheat retained by GrainCorp on the outloading of Wheat from the GrainCorp Storage or the Port Terminal.
- 8.5 GrainCorp may, in its discretion, mitigate or satisfy any Claim in respect of Downgraded Wheat by:
- (a) blending a sufficient quantity of other Wheat so as to upgrade the Client's Wheat; and/or
  - (b) substituting (at GrainCorp's expense) other Wheat of the same type of the required grade and quantity; and/or
  - (c) retaining the Downgraded Wheat and providing for the Claim as part of the outload adjustment under **Clauses 6.29 and 6.30**.
- 8.6 GrainCorp is not liable for any Consequential Loss relating to Downgraded Wheat made by or through the Client.
- 8.7 The Client acknowledges that GrainCorp cannot guarantee complete freedom from Wheat defects and contaminants listed with a nil tolerance in the Receival Standards, and is not liable for any quality Claims resulting from the detection of defects and contaminants whenever detected at levels of 0.01% by weight or less.
- 8.8 GrainCorp does not take responsibility for chemical residues in Wheat detected at levels below 0.1mg/kg. This is regardless of whether the chemicals were applied as part of GrainCorp's pest control program, or any fumigation process, or were received from grower deliveries or any other source.
- 8.9 The Client acknowledges that GrainCorp, while using best endeavours to outturn Wheat in accordance with the Receival Standards, is not liable for any non conformance to the specification where the attribute does not form part of the original testing procedure or cannot be comprehensively determined by GrainCorp at the time of receival at GrainCorp Storages. This includes, but is not limited to varietal purity, falling number, vitreous kernel in Durum Wheat, and the presence of objectionable, toxic and chemical residues.

## **9. EXCLUSION OF LIABILITY**

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- 9.1 Unless specifically provided otherwise in this Agreement, GrainCorp is not liable for any Loss or Claim including damage, destruction, contamination or loss of Wheat unless and then only to the extent such is caused directly by the negligence, wilful default or fraud of GrainCorp or its employees, officers, contractors or agents.

- 9.2 The Client acknowledges that GrainCorp is unable to test Wheat on receipt (whether received from the Client or from another person) for toxic or other chemical residues, genetically modified seed or other contamination. GrainCorp is not liable for any direct or Consequential Loss suffered or incurred by the Client caused by or otherwise relating to the storage or handling of contaminated Wheat at the Port Terminal. From time to time, GrainCorp may agree with the Client to provide additional testing of Wheat received at the Port Terminal and may agree to provide additional guarantees as to the freedom of Wheat from defects and contaminants. GrainCorp and the Client will agree additional fees and charges for this service.
- 9.3 The Client acknowledges that any transportation of Wheat is at the Client's risk, including transportation of Wheat arranged by or on behalf of or at the request of either the Client or GrainCorp. To the fullest extent permitted by law, GrainCorp is not liable for any Loss incurred by the Client caused by or otherwise relating to the transportation of Wheat. Where the Client acquires rail services from GrainCorp under a separate agreement, nothing in this Agreement affects the obligations and liabilities of GrainCorp under that agreement.
- 9.4 The Client acknowledges that GrainCorp can remove and dispose of dust or Downgraded Wheat generated from the Client's Wheat.
- 9.5 Without limitation, GrainCorp is not liable to the Client or any third party, or any person claiming through or on behalf of the Client, for any costs, losses or delays, whether direct or indirect, that may arise if wheat is not accumulated at the Port Terminal before the **Assigned Load Date** for any reason.

### **Insurance**

- 9.6 GrainCorp will take out and keep in force an insurance policy, and may only by prior written agreement jointly insure with the Client, in respect of loss or damage to the Wheat whilst it is held in the Port Terminal.
- 9.7 If GrainCorp makes a claim under the insurance policy then in relation to determining the fair market price for the purposes of any shortfall liability under **Clause 6.31**, the Client:
- (a) authorises GrainCorp to:
    - (1) receive and give good discharge for all monies payable under the insurance policy;
    - (2) settle, adjust and compromise all claims under the insurance policy; and
    - (3) determine, by agreement with the insurer, the time of loss; and
  - (b) will not make any claim against GrainCorp, nor contest or dispute any GrainCorp decision, in relation to any action by GrainCorp in accordance with this **Clause 9.7** unless GrainCorp acts fraudulently and in bad faith.

### **Force Majeure**

- 9.8 In this Agreement 'Force Majeure Event' means any event which is beyond the reasonable control of GrainCorp, including:

- (a) acts of God, fire, storm, lightning, floods, earthquakes, pandemic, epidemic;
  - (b) acts of the public enemy, war, rebellion, insurrection, terrorist act, sabotage;
  - (c) materials shortages, utility failures, adverse effects of weather or weather related events;
  - (d) changes in any laws, regulations or schemes; and
  - (e) blockade, embargo, strikes, lockouts, labour disputes or disturbances.
- 9.9 Subject to clause 9.10, neither party will be liable to the other or any other person for any delay in performance or inability to perform any of its obligations under this Agreement to the extent that such failure is caused or contributed to by a Force Majeure Event. If GrainCorp's performance is delayed by a Force Majeure Event, the time for performance will be extended for at least the time and to the extent that such performance is prevented by the Force Majeure Event.
- 9.10 The occurrence of a Force Majeure Event does not affect the Client's liability to pay the Fees to GrainCorp in accordance with the terms of this Agreement.

## **10. TERMINATION**

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- 10.1 GrainCorp may terminate this Agreement:
- (a) immediately upon written notice to the Client if the Client:
    - (i) has a liquidator or administrator appointed, or is no longer Solvent as defined in the Access Undertaking,
    - (ii) fails to pay any amount that is due and payable under this Agreement or any other agreement between the Client and GrainCorp or its Related Bodies Corporate;
    - (iii) breaches a material term, representation, obligation or warranty as set out in this Agreement or any other agreement between the Client and GrainCorp or its Related Bodies Corporate;
    - (iv) fails to follow a direction of GrainCorp made reasonably and lawfully and material adverse consequences arise from the failure to follow that direction;
    - (v) commits an act or omission which compromises the safety of any person or brings GrainCorp in to disrepute; or
    - (vi) fails to have in place or accurately declare the status of an Accreditation Requirements as set out in this Agreement.
  - (b) upon 14 days written notice to the Client if the Client breaches any other material provision of this Agreement or any other agreement between the Client and GrainCorp or its Related Bodies Corporate, and does not remedy the breach to

GrainCorp's satisfaction within GrainCorp's reasonably stipulated time frame.

10.2 The Client may terminate this Agreement:

- (a) immediately in the event that GrainCorp has a liquidator or administrator appointed;
- (b) upon 14 days prior written notice where GrainCorp breaches any material provision of this Agreement or any other agreement between the Client and GrainCorp or its Related Bodies Corporate, and does not remedy the breach to the Client's satisfaction within the Client's reasonably stipulated time frame.

The Client must pay all Fees and other amounts due and payable in connection with this Agreement not later than 5 days following the termination date.

10.3 Notwithstanding expiry of the Term, or termination of this Agreement as set out in this **Clause 10**, the Client must ensure that prior arrangements are made to outturn and / or outload any Wheat held by GrainCorp prior to termination; otherwise the Client shall be bound by the terms of this Agreement or the new season Bulk Wheat Port Terminal Services Agreement (as applicable).

10.4 Termination of this Agreement shall not prejudice any rights of either party that have accrued prior to the date of termination and the provisions set out in **Clauses 7, 8, 9, 12.5, 12.6, 12.7** shall survive termination of this Agreement.

## 11. DISPUTES

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11.1 Any dispute concerning the grade, quality, sampling, testing or classification of Wheat which GrainCorp and the Client cannot resolve themselves after using reasonable endeavours to do so within 10 business days may be referred to a mutually agreed accredited independent testing facility for resolution in accordance with the provisions of this Agreement. GrainCorp and the Client agree to be bound by the decision of the mutually agreed accredited independent testing facility. If an accredited independent testing facility cannot be agreed between GrainCorp and the Client, the CEO of Grain Trade Australia will determine the accredited independent testing facility. GrainCorp and the Client shall bear their own costs in determining the resolution to the dispute.

11.2 If any dispute between the parties relates to a decision by GrainCorp to reject a Cargo Nomination Application or change a vessel loading order under the Port Terminal Services Protocols set out in Annexure B, then the parties shall resolve such disputes in accordance with the dispute resolution provisions contained in Annexure B.

11.3 For any dispute not covered under **Clause 11.1** and **11.2**, a party raising a dispute under this Agreement ("**Initiating Party**") must give the other party ("**Recipient Party**") a notice setting out brief details of the dispute ("**Dispute Notice**"). Within five business days of service of a Dispute Notice, the Recipient Party must give the Initiating Party a notice setting

out brief details of the Recipient Party's position on the Dispute (“**Reply Notice**”).

- 11.4 Within a maximum of ten business days of service of a Reply Notice, senior representatives from each party, with authority to settle the dispute, will meet and use reasonable endeavours acting in good faith to resolve the dispute by joint discussions.
- 11.5 If the dispute is not resolved within ten business days after the date of the Reply Notice, the dispute must, unless the parties agree otherwise, be submitted to mediation in accordance with the following:
- (a) The dispute will be referred to formal mediation in New South Wales to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within three Business Days, a mediator appointed by either:
    - (i) the President of the New South Wales Chapter of the Institute of Arbitrators and Mediators of Australia (“**IAMA**”); or
    - (ii) the CEO of Grain Trade Australia (“**GTA**”).
- If the parties fail to agree on an organisation to appoint a mediator under **Clause 11.4(b)** within ~~three~~ business days, a mediator will be appointed by the President of the New South Wales Chapter of IAMA.
- (b) Unless the parties agree otherwise, a mediation conducted by a mediator appointed by IAMA will be conducted under the IAMA Mediation Rules and a mediation conducted by a mediator appointed by GTA will be conducted under the GTA Trade and Dispute Resolution Rules (whether or not the mediator is a legal practitioner).
  - (c) The parties may appoint a person, including a legally qualified person to represent it or assist it in the mediation.
  - (d) Each party will bear their own costs relating to the preparation for and attendance at the mediation.
  - (e) The costs of the mediator will be borne equally by the parties.
  - (f) The mediation process will terminate within 20 business days of the appointment of the mediator, upon which either party will be entitled to commence court proceedings in relation to the dispute.
- 11.6 A party must not start court proceedings in respect of the dispute unless it has complied with **Clauses 11.3 to 11.5**. Nothing in this clause prevents a party seeking urgent injunctive or similar interim relief from a court.
- 11.7 During any dispute resolution process, the pre-dispute status quo will continue. Accordingly:
- (a) each party will comply with its obligations, and may exercise its rights under this Agreement; and

- (b) the fact that a party ceases to do anything in dispute will not be taken to be an admission by that party that it had breached, or had been in breach of, this Agreement.

## **12. MISCELLANEOUS**

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### **Legal Operation**

- 12.1 Neither party is required to perform any obligation under this Agreement if, in its reasonable opinion, it would contravene or might contravene any Commonwealth, State, Territory or Local Government statute, code or other law, including any condition of accreditation or access or under any laws, government or endorsed scheme or arrangement.

### **Notices**

- 12.2 Any notice or other communication in connection with this Agreement (unless specifically permitted by e-mail):
- (a) is effectively signed by or on behalf of a party if it is executed by that party, any of that party's officers or that party's solicitor or attorney;
- (b) may be served on a party by being:
- (1) sent by post in a pre-paid envelope to;
  - (2) sent by facsimile transmission to; or
  - (3) personally delivered to or left at that party's registered office, address specified;

if the notice is served by GrainCorp on the Client, then the details for the purposes of **Clause 12.2(b)** will be specified on page 1 of this Agreement. If the notice is served by the Client on GrainCorp then that notice for the purposes of **Clause 12.2 (b)** will be served to the GrainCorp Company Secretary c/ the address for GrainCorp stated on page 1 of this Agreement.

- 12.3 Any notice or other communication in connection with this Agreement will:
- (a) if posted, be taken to be served two business days after the date of posting; and
- (b) if sent by facsimile transmission, be taken to be served on conclusion of successful transmission.
- 12.4 Service by any of the methods referred to in **Clause 12.2** will be valid and effective even though a party does not receive the document or if the document is returned to a party through the post unclaimed.

### **Exercise of Rights**

- 12.5 A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or an exercise of any other right, power or remedy. Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise. A party is not

liable for any loss caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising the right, power or remedy.

### **Remedies Cumulative**

- 12.6 The rights, powers and remedies provided in this Agreement are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this Agreement.

### **Governing Law**

- 12.7 This Agreement is governed by and shall be construed in accordance with the laws for the time being in force in the State of New South Wales and the parties agreed to submit to the non-exclusive jurisdiction of the courts of that State.

### **Assignment & Privacy**

- 12.8 This Agreement:
- (a) may be assigned by GrainCorp to any of its Related Bodies Corporate without the consent of the Client; and
  - (b) subject to **paragraph (a)**, must not be assigned by either party to this Agreement to any third party without the written consent of the other party, which may not unreasonably be withheld.
- 12.9 Both parties acknowledge the right of the other party to access information pursuant to this Agreement in line with the Privacy Act. Both parties agree that any information related to the performance of this Agreement may be collected, held and used by the other party as follows:
- (a) for any purpose required or permitted by any Governmental Department or regulator, or as required by any law;
  - (b) in order to maintain stock records and administer grower payments;
  - (c) used by GrainCorp for purposes connected with the provision of products or services by GrainCorp which the Client has agreed to obtain from GrainCorp;
  - (d) used by GrainCorp and disclosed to GrainCorp's Related Bodies Corporate to market other products and services to the Client (excluding GrainCorp Trading); and
  - (e) disclosed by either party to any party for the purpose of enforcing any rights that party may have in connection with the stated Wheat or commodity or variety.

### **Site Access**

- 12.10 GrainCorp regards the health and safety of all persons, and protection of property and the environment at or about all GrainCorp Storages as paramount. In order to protect people, property and the environment, the Client must, and must also ensure that the Client's employees, agents, contractors and invitees comply with all procedures, policies and instructions of GrainCorp representatives prior to entering, while visiting and while leaving any GrainCorp facility or site. The Client must also provide prior advance written notice to GrainCorp if they are to attend

any GrainCorp facility, stating the date they wish to attend, the identity of the Client's representative and the purpose of the visit.

GrainCorp may, in its absolute discretion, refuse or reject a visitation request or propose alternative times and/or places for the visit and the Client shall not attend at any GrainCorp site without receiving the prior consent of GrainCorp for each visit and shall not enter or stay on any GrainCorp site without appropriate GrainCorp supervision.

The Client is responsible for ensuring that it and the Client's employees, agents, contractors and invitees comply with this clause, any laws and regulations, and all GrainCorp's Port Terminal and access/ egress requirements and they that do not cause and risk of harm, damage, injury, hazard, or cause any contamination of any Wheat, on or about any GrainCorp Port Terminal.

#### **Confidentiality & Endorsement**

- 12.11 The parties agree not to disclose the contents of this Agreement to any other party except for the purposes of professional or financial advice or as required by law. Further the Client shall not unless it has received GrainCorp's express prior written approval, make any statements or authorise or publish any material in relation to any GrainCorp personnel, site, facility or any matter connected to the Services or this Agreement, and in no circumstance will the Client make any statements or authorise or publish any material which may be construed as having been approved by or endorsed by GrainCorp.

#### **Legal advice and costs**

- 12.12 Each party agrees that it has had an opportunity to obtain its own legal advice. Each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Agreement.

#### **Amendment**

- 12.13 Subject to **Clauses 12.14 to 12.17** and **13.3 to 13.5**, this document may only be varied or replaced by a document executed by the parties.
- 12.14 By no later than 31 August of each year occurring after the date of this Agreement, GrainCorp must notify the Client of the new Annexure A, the Wheat Port Terminal Services and Fees Schedule, to apply for the next season commencing 1 October of that year.
- (a) Subject to **Clause 12.16**, the new Annexure A will form part of the Agreement and shall apply from 1 October of that year.
- (b) Subject to **Clause 12.15**, the new Annexure A must apply for a period not ending before 30 September of the next year.
- 12.15 GrainCorp may unilaterally vary Annexure A, the Wheat Port Terminal Services and Fees Schedule, at any time by providing at least 30 days prior written notice to the Client if there is a Change in Regulations after the date of this Agreement which results in a direct or indirect increase in GrainCorp's costs in providing the Port Terminal Services under this Agreement. GrainCorp will be entitled to increase the fees payable by the Client for Port Terminal Services provided under this Agreement to recover the full amount of the increased direct or indirect costs



referable to the provision of the Port Terminal Services to the Client at the relevant Port Terminal. Subject to **Clause 12.16**, the revised Annexure A will form part of the Agreement and shall apply from the later of 30 days from the date of the notice or such later date as specified in the notice.

- 12.16 Subject to **Clause 12.17**, GrainCorp acknowledges the Client's rights to negotiate (including to raise a dispute in respect of) and GrainCorp's obligation to negotiate any changes to fees under **Clauses 12.14 and 12.15** in accordance with the Access Undertaking.
- 12.17 The Client agrees that GrainCorp may vary the Fees to reflect changes in the Consumer Price Index in accordance with the formula contained in Annexure A. The Client's right to negotiate, and GrainCorp's obligation to negotiate, under the Access Undertaking does not apply to a variation under this **Clause 12.17**.
- 12.18 GrainCorp may unilaterally vary Annexure B, the Port Terminal Services Protocols, by providing at least 30 days prior written notice to the Client where permitted to do so under Clause 9.2 of the Access Undertaking. Following this notice period, the revised Annexure B will form part of the Agreement and shall apply from the date of such notice.

#### **Counterparts**

- 12.19 This document may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

#### **Entire understanding**

- 12.20 This Agreement contains the entire understanding between the parties as to the subject matter of this document. All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this document, including any interim access arrangements provided pursuant to the Access Undertaking, are merged in and superseded by this document and are of no effect. No party is liable to any other party in respect of those matters.

No oral explanation or information provided by any party to another affects the meaning or interpretation of this document; or constitutes any collateral agreement, warranty or understanding between any of the parties.

### **13. INTERACTION WITH ACCESS UNDERTAKING**

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- 13.1 To avoid doubt, not all Services provided under this Agreement constitute Port Terminal Services for the purpose of an Access Undertaking. Services which are not Port Terminal Services include:
- (a) services relating to Wheat which is not Bulk Wheat;
  - (b) loading Wheat to rail or road truck;
  - (c) services relating to Stock Swaps or the transfer of title of all or part of the Accounting Stock Tonnage of Stored Wheat between GrainCorp Clients, including the Client;

- (d) supply chain management from GrainCorp Storages to Port Terminals including liaison with the Client's transport provider.
- 13.2 The Client acknowledges that a new or varied Access Undertaking may be approved by the ACCC during the term of this Agreement.
- 13.3 The parties agree that any changes to the Port Terminal Services Protocols required by a new or varied Access Undertaking will be automatically incorporated into Annexure B of this Agreement.
- 13.4 The Client agrees that, if GrainCorp is required under an Access Undertaking to publish aggregated information on stock held at its Port Terminals, GrainCorp may include in the aggregated information, information relating to the Client's Stored Wheat. To avoid doubt, GrainCorp will not disclose information about the Client's Stored Wheat on an individual basis.

## **14. INTERPRETATION & DEFINITIONS**

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### **Interpretation**

- 14.1 In this Agreement unless the contrary intention appears:
  - (a) a reference to this Agreement or another instrument includes any variation or replacement of any of them;
  - (b) a reference to laws, any statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements;
  - (c) the singular includes the plural and vice versa;
  - (d) any reference to a GrainCorp client, and not the Client in this Agreement, shall be a reference to a party who has a relationship with GrainCorp that is governed by a current Bulk Wheat Port Terminal Services Agreement, a Bulk Grain Port Terminal Services Agreement (Non-Wheat) and / or a current Country Storage and Handling Agreement;
  - (e) the word "person" includes a firm, a body corporate, an unincorporated association or an authority;
  - (f) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns;
  - (g) the use of the words "including", "includes", "for example" or "such as" does not limit the meaning of the words to which the list relates, to those items or to items of a similar kind;
  - (h) headings are inserted for convenience and do not affect the interpretation of this Agreement.
  - (i) a reference to a Clause, schedule, annexure or appendix is a reference to a Clause, schedule, annexure or appendix to this Agreement and references to this Agreement include any recital, schedule, annexure or appendix, unless otherwise indicated.
  - (j) except as otherwise provided expressly in this Agreement, a reference to a business day or working day is any day on which

the Port Terminal is open for business in the relevant state or territory where the relevant services and activities in connection with this Agreement are occurring.

## **Definitions**

14.2 The following words have the corresponding following meanings in this Agreement unless a contrary intention appears.

**Access Undertaking** means any undertaking provided by GrainCorp and accepted by the ACCC from time to time under Division 6 of Part IIIA of the *Trade Practices Act 1974 (Cth)* that applies to access to Port Terminal Services at the Port Terminals.

**Accounting Stock Tonnage** means, in respect of a period, the quantity of each type and grade of Wheat in, or which was in, a GrainCorp Storage or Port Terminal Site in the GrainCorp System during that period as shown in GrainCorp's accounting records and is calculated as follows:

- (a) Receival Tonnage (including transfers from Grower Warehousing), less,
- (b) Shrinkage Allowance in accordance with **Clauses 6.25 and 6.26**, plus,
- (c) Tonnage title transferred to the Client, less,
- (d) Tonnage title transferred from the Client, plus,
- (e) The net of seasonal or grade reclassification in proportion to the Client's interest, plus,
- (f) The net of Wheat moved as site to site movements in proportion to the Client's interest, less,
- (g) Wheat outloaded from the GrainCorp System at any time during the period in proportion to the Client's interest.

**Accreditation Requirements** has the meaning set out in **Clause 3.18** of this Agreement, and includes any amendment or re-enactment of any legal or regulatory requirement which may apply to Client in connection with the Services.

**Agreement** means this document and all schedules and annexures attached to it, as may be amended from time to time.

**AQIS** means Australian Quarantine and Inspection Service (ABN 24 113 085 695) of **18 Marcus Clarke Street CANBERRA CITY ACT 2601**.

**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.

**Buyer to Buyer Title Transfer Form** means the form for the Title Transfer of Grain entitled "Buyer to Buyer Title Transfer Form" available from GrainCorp on its website (<http://www.graincorp.com.au/prodserv/SL/Pages/Brochures.aspx>).

**Carbon Scheme** means any law or regulation of any jurisdiction or any requirement or condition of a licence, permit, governmental consent or approval with respect to the production, or emission of, or, to reduce, limit, cease, prevent, offset or sequester greenhouse gas emissions,

including without limitation, any statutory emissions trading scheme or tax for the management or reduction of greenhouse gas emissions or concentrations.

**Change in Regulations** means the repeal, amendment, introduction or change in the judicial or administrative interpretation of any applicable Law (including a Carbon Scheme and tax but excluding income tax) of any jurisdiction or the change or introduction of any condition attaching to any Licence or the directive, regulations or rules of a Government Agency or Port Corporation.

**Claim** means any allegation, demand, claim, suit, action, proceeding, damage, Loss, cost, expense or liability incurred by or made or recovered by or against a person, however arising, whether present, immediate, actual, contingent or future.

**Commencement Date** has the meaning given in Clause 1.2.

**Consequential Loss** means any indirect, special, incidental or consequential loss, any loss of profits, loss of revenue, loss of opportunity, loss of anticipated savings and any increased operating costs suffered by or incurred by any person, whether arising in contract or tort (including negligence) or under any statute, arising out of or in connection with this Agreement.

**Co-owner** means, in respect of a particular type and grade of Wheat, each client of GrainCorp who has delivered wheat of that type and grade to GrainCorp and for whom GrainCorp has stored, handled or is storing or handling wheat of that type and grade at any particular time, pursuant to a Bulk Wheat Port Terminal Services Agreement or Storage and Handling Agreement. For the avoidance of doubt, GrainCorp may also be a Co-owner as contemplated in Clause 6.7 of this Agreement

**Downgraded Wheat** means Wheat that fails to meet the minimum/maximum of one or more quality specifications in a grade defined by Receival Standards. For clarity, “downgrading” hierarchy occurs through the Grade Cascade, where applicable, as defined in the GTA website, unless otherwise agreed between the Client and GrainCorp

**Dynamic Binning Strategy** means that a load delivered during harvest to any GrainCorp Storage may be graded and binned outside the grade Receival Standards, provided that the overall bin average is maintained above the minimum grade requirement.

**Feed Wheat** means Wheat specifically for the purpose of non-human animal stock feed consumption. For Wheat it means FED1 and other grades as advised by GrainCorp from time to time.

**Fees** means the fees and charges that are due and payable under this Agreement as consideration for the Services, as set out in Annexure A: *Port Terminal Services Fees Schedule* and may be amended from time to time.

**Government Agency** means a government or governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity whether foreign, federal, state, territorial or local.

**Grain Stock Order Form** means the form for the outloading of Wheat entitled "Grain Stock Order Form" available from or approved by GrainCorp which is found at <http://www.graincorp.com.au/prodserv/SL/Pages/Brochures.aspx>.

**GrainCorp** means GrainCorp Operations Limited (ABN 52 003 875 401) of Level 26, 175 Liverpool Street, Sydney, NSW, 2000.

**GrainCorp Stock Management System** means the computer based software operated by GrainCorp for the purposes of recording the transactions that affect the Client's Accounting Stock Tonnage.

**GrainCorp Storages** means the grain storage facilities operated from time to time by GrainCorp except the Port Terminals.

**GrainCorp System** means the grain receipt, storage and handling facilities operated from time to time by GrainCorp, including the GrainCorp Storages, and Port Terminals.

**GTA** means Grain Trade Australia Incorporated PO Box R1829 Royal Exchange NSW 1225.

**Grower** means any entity registered by AWB or NGR pursuant to a Grower Registration Form.

**Grower Warehouse Agreement** means an agreement entitled "Grower Warehouse Agreement" between GrainCorp and client being a Grower.

**Grower Warehouse Grain Title Transfer Form** means the form for Title Transfer of grain entitled "Grower Warehouse Grain Title Transfer Form" pursuant to which grain is transferred out of Grower Warehousing.

**Grower Warehousing** means storage of grain with GrainCorp pursuant to a Grower Warehouse Agreement.

**GST** means the tax imposed by the A New Tax System (Goods and Services Tax) Act 1999 (Cth) and the related imposition Acts of the Commonwealth.

**Interest** means, in respect of a Co-owner, the portion of the Stored Wheat to which legal title as Co-owner is held, and which is equivalent to the percentage the Wheat of the relevant type and grade received from that Co-owner makes up of the total Stored Wheat.

**Licence** means any licence, consent, approval, permit, accreditation or other authorisation which is required to be granted by any Government Agency or Port Corporation in connection with the operation of a Port Terminal, as varied, amended or substituted from time to time, which to avoid doubt, includes any such consent, licence, approval, permit, accreditation or other authorisation required to be held by GrainCorp solely because of its ownership a Port Terminal.

**Load Date** means the date assigned by GrainCorp to a vessel nominated by the Client and at which date GrainCorp reasonably expects that vessel to be placed on a shipping berth for the commencement of loading.

**Loss** means any loss (including Consequential Loss), liability, damage, cost (including full legal costs of recovery), charge, expense, diminution

in value or deficiency of any kind or character which a party pays, suffers or incurs or is liable for.

**Market risk** means the risk of Wheat being rejected or detained by the importing customer, where Wheat may contain defects, contaminants or residues that breach contract specifications. This risk may include testing methods or contract interpretation differences, non regulated chemical residues, toxins or organisms.

**Natural Port Zone** means GrainCorp Storages that lie in geographical area bounded by the normal movement of trains to GrainCorp Port Terminals.

**NGR** means National Grower Register (NGR Pty Ltd) of PO Box 3526, Toowoomba Village Fair, QLD, 4350.

**Nominated Capacity** means the total mass weight of Wheat of a particular type that can be loaded into a given rail wagon class that does not exceed the legal loading limits as set by the relevant authority. These nominated capacities may change from time to time as advised by GrainCorp. The Nominated Capacity as at August 1<sup>st</sup>, 2009 is as per the following table:

Wagon Type	CGD	NGD	NGH	NGIF	NGK	NGP	NGV	NGX	VGK	VHG	VHH	XGA
	Y	X	F		F	F	F	H		F	F	Y
Wheat Tonnes	54.47	54.01	48.96	53.05	59.38	58.80	48.00	48.35	49.55	52.44	53.30	52.58

**Notice of Readiness** means Client confirmation that the presented vessel at a Port Terminal can be loaded and, includes confirmation that the vessel has passed AQIS survey and that any required letters of credit are in place.

**Operational Reasons** means delays or Wheat unavailability due to weather problems, grain infestation or fumigation, grain quality problems, inaccessible Wheat, mechanical failure, rail availability or rail delays, last of grain in storage being outloaded and failure to accumulate cargo at a Port Terminal in a timely manner.

**Outloading Tonnage / Outloading** means tonnage of Wheat removed from a Port Terminal to the Client's rail, road or shipping transport.

**Port Corporation** means a port corporation or any body having ownership or control over the operations of the port at which a Port Terminal is located.

**Port Terminals** means GrainCorp's seaboard terminals at Gladstone, Mackay, Pinkenba, Fisherman Islands, Newcastle, Kooragang, Port Kembla, Geelong and Portland.

**Port Terminal Services** has the meaning given in the Access Undertaking.

**Port Terminal Services Agreement** means any prior agreement which applied prior to the Term for services similar to the Services, as between the Client and GrainCorp.

**Port Terminal Services Price Schedule** means the fees and charges for the loading of Wheat to the vessel's side as detailed in Annexure A, which may be varied with at least 30 days prior notice to the Client.

**Queuing Order** means the position assigned by GrainCorp to a cargo nominated by a client in relation to all other nominated cargos at the same port at and around the same time queuing for access to the port berth.

**Receival Docket** means grain receipts issued by GrainCorp on receipt of Grain by GrainCorp from or on behalf of the Client or pursuant to Grower Warehousing.

**Receival Standards** means those standards, including those published on the GTA, AOF, Pulse Australia and GrainCorp Websites. These standards may include harvest management tools utilised by GrainCorp such as commingling of grades and Dynamic Binning Strategy. The grade recorded on the Receipt Docket confirms the entitlement of the Buyer to the outturn of the tonnage of that grade. Additional Receival standards may be created by GrainCorp due to seasonal requirements or agreed between GrainCorp and the Client for specific requirements.

**Receival Tonnage** means tonnage of Wheat delivered to the Client from Growers on a Receival Docket, or transfers of Receival Dockets from Grower Warehousing or other deliveries from outside of the GrainCorp System.

**Regulatory Risk** means the Wheat presented for inspection fails to meet Australian regulations or importing country sanitary or phytosanitary regulations including;

- The presence or possible presence of live insects or other regulated pests.
- The presence or possible presence of quarantine objects like weed seeds, plant diseases, fungi.
- The presence or possible presence of chemical residues or toxins that fail to meet Australian regulatory requirements.
- The presence or possible presence of chemical residues or toxins that fail to meet importing country regulatory requirements.
- The omission of, or an incorrect action relating to completion of preshipment activities including regulated fumigation, testing or other certification requirements.

**Related Bodies Corporate** has the meaning given to it in the *Corporations Act 2001 (Cth)*

**Specification to Load Advice** means the form provided to GrainCorp by the Client specifying the Wheat to be loaded to the nominated vessel.

**Stock Swap** means where the Accounting Stock Tonnes, or parts thereof, of two Co-owners (which, for the purposes of this definition, are taken to represent the respective Interests of the two Co-owners) at two specific GrainCorp Storages or Port Terminals, as recorded in the GrainCorp Stock Management System, are transferred between the two Co-owners.

**Stock Swap Form** means the form for the Stock Swap of Grain entitled “Stock Swap Form” available from GrainCorp at <http://www.graincorp.com.au/prodserv/SL/Pages/Brochures.aspx>.

**Storage and Handling Agreement** means any agreement in the same or similar form to this Agreement between GrainCorp and another GrainCorp client but does not include a Grower Warehouse Agreement or Grower Storage and Handling Agreement.

**Stored Wheat** means, in respect of a particular type and grade of Wheat, all of the wheat of that type and grade received by GrainCorp for storage and/or handling at any particular time pursuant to a Bulk Wheat Port Terminal Services Agreement or Country Storage and Handling Agreement and which the Co-owners collectively own.

**Term** has the meaning given in **Clause 1.2**.

**Third Party Storages** means any grain storage facilities operated from time to time by any party other than GrainCorp including on farm storages.

**Title Transfer** means where the Accounting Stock Tonnage, or part thereof, of the Client (which, for the purposes of this definition, is taken to represent the Client’s Interest) at a specific GrainCorp Storage or Port Terminal, as recorded in GrainCorp Stock Management Systems, is transferred to another GrainCorp client.

**Vessel Loading Fee** means the fee as listed for the relevant GrainCorp Port Terminal in the **Bulk Wheat Port Terminal Services Price Schedule**

**Wheat** means *Triticumaestivum*, *Triticumduri*, (Durum)





(Delete whichever is inapplicable)

**SIGNED** for and on behalf )  
of..... )  
..... )  
by its duly authorised representative )  
in the presence of )

-----  
Signature of witness

Signature of signatory

-----  
Name of witness (print)

Name of signatory (print)

By executing this agreement the signatory warrants that the signatory is duly authorised to execute this agreement on behalf of.....

Signed by )  
in accordance with Sec 127 (1) of the )  
Corporations Act, 2001 )  
)

-----  
Signature of director

-----  
Signature of director/company secretary  
(Please delete as applicable)

-----  
Name of director (print)

-----  
Name of director/company secretary  
(print)

# Port Terminal Services Access Undertaking

## Schedule 6 – Independent Auditor

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### 1 Appointment of Auditor

#### 1.1 Appointment by GrainCorp

If, at any time during the term of this Undertaking, the ACCC issues a notice under clause 5.5(b) of the Undertaking, GrainCorp 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 GrainCorp. Without limitation, an auditor is not independent if he or she:

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

#### 1.3 Notification to ACCC

If, within five Business Days of receipt by the ACCC of the information or documents from GrainCorp referred to in clause 1.1 of this Schedule 6, or such further period as required by the ACCC and notified to GrainCorp:

- (a) the ACCC does not object to the proposed auditor, GrainCorp 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, GrainCorp 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 functions under this Undertaking.

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## **2 Scope of the audit**

### **2.1 Audit report**

GrainCorp must, within 30 Business Days of the date on which the auditor is appointed in accordance with clause 1.3 of this Schedule 6, provide to the ACCC a written report from the auditor in relation to GrainCorp's compliance with its obligations under clause 5.5(a) of the Undertaking.

### **2.2 Assistance**

- (a) GrainCorp 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 GrainCorp with its obligations under clause 5.5(a) of the Undertaking or for reporting to or otherwise advising the ACCC.
- (b) GrainCorp 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 this clause 2 of Schedule 6, GrainCorp 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 6 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 clause 2 of Schedule 6 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**

GrainCorp 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.

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### **3 Limits on the audit process**

3.1 The ACCC must not require GrainCorp to appoint an Auditor to undertake an audit in relation to GrainCorp's compliance with its obligations under clause 5.5(a) of the Undertaking more often than twice in each 12 month period during the term of the Undertaking.

3.2 If:

- (a) within the period of 3 months prior to the date on which the ACCC issues any notice under clause 5.5(b) of the Undertaking, GrainCorp has submitted an audit report to WEA (to comply with a requirement by WEA) ("**WEA Audit Report**");
- (b) the WEA Audit Report was prepared by a person that satisfies the criteria for independence set out in paragraph 1.2 of this Schedule 6; and
- (c) the WEA Audit Report addresses GrainCorp's compliance with its obligations under clause 5.5(a) of the Undertaking,

GrainCorp may provide the WEA Audit Report to the ACCC, and the ACCC may accept that report in satisfaction of the requirement for GrainCorp to provide an audit report to the ACCC in accordance with paragraph 2.1 of this Schedule 6.

3.3 For the avoidance of doubt, the ACCC will not be required to accept the WEA Audit Report in satisfaction of the requirement for GrainCorp to provide an audit report to the ACCC in accordance with paragraph 2.1 of this Schedule 6 if the ACCC (acting reasonably) considers that the matters set out in paragraphs 3.2(a)-(c) are not satisfied in respect of the WEA Audit Report.