

# Member Update

UPDATE 14 of 17 • 08 September 2017

**TOPIC: Free on Rail Contract**

**DISTRIBUTION: GTA Members – primary contact list. Please circulate to all appropriate internal parties.**

## 1. Purpose:

- a) To advise Members GTA intends to release a Free on Rail Standard Form Contract.
- b) Submissions from Members are sought on the proposed terms and conditions of the GTA Contract No 7 – Free on Rail.

## 2. Background

- Following request from GTA Members, GTA Commerce Committee formed a Sub-committee to evaluate the potential application for a standard form Free on Rail Contract and to develop a draft version.
- The purpose of a Free on Rail (FOR) standard form contract is to assist GTA Members and Industry in managing risk and logistical exposures with regard to rail movements of grain.

## 3. Proposed Contract

- The FOR Sub-committee has met several times and developed a draft contract (refer below). The Sub-committee is seeking Member feedback on the draft version of the contract and in addition to the general feedback, is seeking further views and advice from Industry on:
  - a) *Option to Load by Road - Whether an option to load by road should be included in the contract (refer clause 6). The possible scenarios for this to be utilised may include (but not limited to) if the Seller is unable to load rail, and for residual tonnes remaining in the storage site following loading of rail. The Committee is seeking feedback as to whether such an option should be noted on the standard contract form as an “opt in/opt out” format (such as a check box).*
  - b) *Notice Period - Whether 72 or 96 hours (or other) should be the required default notice period to load noted in Clause 10(d).*

## 4. Process for Industry Feedback

- The Committee is seeking industry comments on the issues outlined in this document and the proposed **GTA Contract No 7 – Free on Rail contract**.
- Submissions should be received by **COB Friday 22<sup>nd</sup> September 2017**.
- Please lodge your submissions by sending to [submissions@graintrade.org.au](mailto:submissions@graintrade.org.au) and title your email – “**GTA Contract No 7 – Free on Rail contract.**”
- Industry is encouraged to provide supporting evidence for any change proposed in this Member Update.
- Preference is for industry to use the proforma for lodging submissions located on the GTA website at <http://www.graintrade.org.au/committees>.
- Unless marked “**confidential**” and appropriate supporting reasons are provided, all submissions will be placed on the GTA website for industry review.

## 5. Further Details

- Visit the GTA website for full details.



GTA Free on Rail (FOR) Contract No 7  
CONTRACT FOR GRAIN AND OILSEEDS IN BULK FREE ON RAIL TERMS

**DATE:**

**SELLERS:**

**BUYERS:**

**BROKERS:**

Have this day entered into a Contract on the following terms and conditions:

1. **QUANTITY:** Sellers have agreed to sell and Buyers have agreed to buy \_\_\_\_\_ tonnes of 1,000 kilos. Buyers to specify if this is in one or multiple loads.

2. **PRODUCT:**

\_\_\_\_\_

3. **GRADE AND SPECIFICATIONS:**

\_\_\_\_\_

4. **PACKAGING:** In Bulk.

5. **WEIGHTS:** Weights to be final at Loading/Destination\* (delete as applicable)

6. **TOLERANCE:** ( )% more or less at Buyers' option, at contract price.

- (check box) If Sellers are unable to load Quantity via Rail or if residual Quantity remain after loading by Rail (excluding Tolerance) Buyers shall have the option to outturn the residual Quantity (excluding Tolerance) by Road, at no additional expense to Buyers.

7. **PRICE:** Priced at \_\_\_\_\_ per metric tonne.

8. **LOADING FACILITY:** Delivered FREE ON RAIL, at \_\_\_\_\_ operated by \_\_\_\_\_ (**BHC**) subject to existence of a valid rail interface agreement between the BHC and rail operator.

9. **INTERFACE AGREEMENT(S):** \_\_\_\_\_ To be nominated by the Sellers and shall apply to this contract.

**10. DELIVERY PERIOD AND NOMINATION**

- (a) DELIVERY PERIOD: Train to arrive in all respects clean and ready to load at the Loading Facility between \_\_\_\_\_, ("Delivery Period") both dates inclusive.
- (b) EXTENSION OF DELIVERY PERIOD: For the avoidance of doubt, any extension to or variation of the Delivery Period must be agreed by the parties and confirmed in writing.
- (c) NOMINATION: Buyers to give Sellers notice of train configuration within the time specified in any applicable storage and handling agreement but no fewer than 7 consecutive days before the first day of the Delivery Period, nomination to include estimated arrival time and configuration of rail car type and loading specifications.
- (d) LOAD REQUEST: Buyers to provide Sellers with at least **72 or 96 hours (delete or amend)** notice of commencement of loading specifying
  - a. Number of wagons;
  - b. Wagon type and capacity;
  - c. Required loaded tonnage per wagon;
  - d. Estimated arrival time;
  - e. Estimated departure time;
  - f. Requirement for independent survey (at Buyer's cost).

**11. QUALITY, SAMPLING AND ANALYSIS:**

- (a) Quality and condition to be final at Loading Facility/Destination\* (delete as applicable) as per Independent Superintendent Company/BHC certificates\* (delete as applicable), at Sellers' option and expense. Buyers' right to appoint their own superintendent at load at their cost.
- (b) Representative samples of the Product shall be drawn during loading or discharge (as appropriate) by the relevant storage provider in accordance with standard protocols to obtain a representative sample of the entire contract/load.
- (c) Final determination of quality shall be established on the composite sample drawn on loading by the nominated surveyor/laboratory.

12. **FREIGHT:** Buyers undertake to provide the train to permit loading in accordance with this contract. Buyers are to ensure that all rail cars are clean, easily accessible and if necessary cargo duly protected.

**13. NOTICE OF READINESS TO LOAD:**

After arrival at the Loading Facility the Rail Operator will give valid written notice of readiness (in all respects) to commence loading to Buyers, Sellers and BHC (**Notice of Readiness**).

The Product shall be loaded within \_\_\_\_\_ hours of Notice of Readiness (**Loading Window**).

If no Notice of Readiness is given within the Delivery Period, the Sellers may at their option declare the Buyers in default and claim damages for costs directly incurred as a result of the Buyer's default or in their absolute discretion affirm this contract or the Sellers may carry the goods for the Buyers' account at the rate for storage, interest and insurance current at the time of the train's presentation pursuant to the relevant BHC Storage and Handling Agreement. Such carrying charges shall accrue from the day following the expiration of the Delivery Period until the day that goods are loaded and must be paid by the Buyers upon the Sellers' invoice.

- 14. LOADING:** The Product shall be loaded within the Loading Window at a loading rate of \_\_\_\_\_ , or if no rate is stated, **250 mt** per hour. All weather working days of 24 consecutive hours. Any time lost on a working day owing to weather conditions shall not count provided work is actually stopped or prevented thereby.

**15. DEMURRAGE:** If loading has not been completed at the end of the Loading Window demurrage will accrue at the rate of \_\_\_\_\_per running day, and pro-rata for any part of a day for the relevant cargo quantity. Demurrage to be settled within 30 days of the last day of loading.

**16. PAYMENT:**

(a) The Buyers shall pay 100pct of the invoice by electronic transfer within **1 working day** after presentation of following original shipping documents including faxed or electronic copies of shipping documents.

(b) Payment against:

- Commercial Invoice for the Cargo
- Weight Certificate (as per clause 5)
- Quality Certificate (as per clause 11)
- Load Report stating
- Train Arrival
- Readiness to load
- Commencement of loading
- Finish Loading
- Rail Departure

**17. NOTICES:** Notices given under this contract are to be dispatched by written letter delivered by hand on the day of writing, or by facsimile, or by email or by other method of rapid written communication, subject to the burden of proof of successful transmission to be with the sender. All notices shall be under reserve for errors in transmission. Any notices received after 1600 hours EST on a business day shall be deemed to have been received on the business day following. A notice to a party's Brokers or Agent shall be deemed a valid notice under this contract.

**18. NON-BUSINESS DAYS:** Should the time limit for doing any act or giving any notice expire on a Saturday, Sunday or any public holiday the time so limited shall be extended until the first business day thereafter. The contract delivery period is not affected by this clause.

**19. PREVENTION OF DELIVERY**

“Event of Force Majeure” means:

- (a) flooding or wash-away of any **below** rail related infrastructure; or
- (b) derailment of the train, or
- (c) blockade, or
- (d) acts of terrorism, or
- (e) hostilities, or
- (f) strike, lockout or combination of workmen, or
- (g) riot or civil commotion, or
- (h) breakdown of machinery, or
- (i) fire, or
- (j) ice, or
- (k) other extreme weather events**
- (l) act of God.

Should a party's performance of this contract be prohibited or prevented, whether partially or otherwise, by an Event of Force Majeure, the performance of this contract shall be suspended for the duration of the Event of Force Majeure, provided that affected party shall have served a notice on the other party within 7 consecutive days of the occurrence or not later than 21 consecutive days before commencement of the period of delivery, whichever is later, with the reasons therefor.

If the Event of Force Majeure continues for 21 consecutive days after the end of the period of delivery, then the a party has the option to cancel the unfulfilled part of the contract by serving a notice on the other party not later than the first business day after expiry of the 21 day period.

If this option to cancel is not exercised then the contract shall remain in force for an additional period of 14 consecutive days, after which, if the Event of Force Majeure has not ceased, any unfulfilled part of the contract shall be automatically cancelled.

If the Event of Force Majeure ceases before the contract or any unfulfilled part thereof can be cancelled, the affected party shall notify other party without delay that the Event of Force Majeure has ceased. The period of delivery shall be extended, from the cessation, to as much time as was left for delivery under the contract prior to the occurrence of the Event of Force Majeure. If the time that was left for delivery under the contract is 14 days

or less, a period of 14 consecutive days shall be allowed.

The burden of proof lies upon affected party and the parties shall have no liability to each other for delay and/or non-fulfilment under this clause, provided that affected party shall have provided to the other, if required, satisfactory evidence justifying the delay or non-fulfilment.

- 20. INSURANCE:** Product to be at Buyers' risk upon delivery into rail cars, and the Buyers shall insure the Product loaded, from the commencement of loading until payment in accordance with this contract. Buyers to produce evidence of insurance cover at Seller's request.
- 21. BANKRUPTCY/INSOLVENCY:** If before the fulfilment of this contract the Buyers or the Sellers suspend payment of debts, notifies any of their creditors that they are unable to meet debts, or convenes or holds a meeting of creditors, or commits an act of bankruptcy, or being a company shall be made subject to external administration or shall have a receiver appointed, or hold a meeting for the purpose of considering a resolution that the company be wound up or go into liquidation, such Buyers or Sellers shall forthwith notify by means of rapid written communication the other party within two business days of the occurrence and shall be deemed to be in Default hereunder.
- (a) Such contract shall be closed out at market price on the business day following the giving of the notice. If notice is not given as aforesaid, the other party, on learning of the occurrence of the act of insolvency, shall have the option of declaring this contract closed out at either the market price on the first business day after the date when such party first learnt of the occurrence of the act of insolvency or at market price ruling on the first business day after the date of the act of insolvency occurred.
- (b) In all cases the party in Default shall have the option to ascertain the settlement price on the closing out of this contract by repurchase or resale, and the difference between the contract price and the repurchase or resale price shall be the amount payable or receivable under this Clause.

Should either party be dissatisfied with the price ascertained by re-purchase or re-sale, then the matter shall be referred to GTA for arbitration. If no re-purchase or re-sale takes place and if the parties cannot agree to a closing-out price, then on application of either party, the closing-out price shall be fixed by a sole arbitrator appointed by GTA.

- 22. CIRCLE:** Where Sellers re-purchase from their Buyers or from any subsequent Buyer the same goods or part thereof, a circle shall be considered to exist as regards the particular goods so re-purchased, and the provisions of the Default Clause shall not apply. (For the purpose of this clause the same goods shall mean goods of the same description, from the same country of origin, of the same quality, and, where applicable, of the same analysis warranty, for delivery from the same port(s) of loading during the same period of delivery). Different currencies shall not invalidate the circle.

If the circle is established before the goods are shipped, or if the goods are not shipped, invoices based on the mean contract quantity, or if the goods have been shipped invoices based on the shipped quantity, shall be settled by all Buyers and their Sellers in the circle by payment by all Buyers to their Sellers of the excess of the Sellers' invoice amount over the lowest invoice amount in the circle. Payment shall be due not later than 15 consecutive days after the last date for shipment, or should the circle not be ascertained before the expiry of

this time, then payment shall be due not later than 15 consecutive days after the circle is ascertained.

Where the circle includes contracts expressed in different currencies the lowest invoice amount shall be replaced by the market price on the first day for contractual delivery and invoices shall be settled between each Buyer and his Seller in the circle by payment of the differences between the market price and the relative contract price in the currency of the contract.

All Sellers and Buyers shall give every assistance to ascertain the circle and when a circle shall have been ascertained in accordance with this clause same shall be binding on all parties to the circle. As between Buyers and Sellers in the circle, the non-presentation of documents by Sellers to their Buyers shall not be considered a breach of contract.

Should any party in the circle prior to the due date of payment commit any act comprehended in the Insolvency Clause of this contract, settlement by all parties in the circle shall be calculated at the closing out price as provided for in the Insolvency Clause, which shall be taken as a basis for settlement, instead of the lowest invoice amount in the circle. In this event respective Buyers shall make payment to their Sellers or respective Sellers shall make payment to their Buyers of the difference between the closing out price and the contract price.

- 23. DEFAULT:** If a party defaults on any of its obligations under this contract the party not in default may at its discretion and upon giving the defaulter notice of default elect to either cancel this contract, or to sell or purchase, as the case may be, against the defaulter who shall on demand make good the loss, if any, on such sale or purchase. If the party liable to pay shall be dissatisfied with the price of such sale or purchase or if neither of the above rights is exercised the damages if any shall be determined by arbitration, failing amicable settlement. The damages awarded against the defaulter shall be limited to the difference between the contract price and the actual or estimated market price on the day of default. Damages are to be calculated on the mean contract quantity. The arbitrators may at their absolute discretion award damages on different quantity and/or award additional damages if they consider it justified by the circumstances of the default.

Prior to the last day of the contract delivery period either party may notify the other party of its inability to deliver or take delivery but the date of such notice shall not become the default date without the agreement of the other party. If, for any other reason, either party fails to fulfil this contract and is declared to be in default by the other party and default is either agreed between the parties or subsequently found by arbitrators to have occurred, then the day of the default shall, failing amicable settlement, be decided by arbitration. Except as otherwise specifically provided for in this contract, no party to this contract shall be liable in an event of default for the other party's indirect, consequential or special losses, loss of profits or other general damages.



24. **CHOICE OF LAW:** This contract shall be interpreted according to and governed by the laws in force in New South Wales with specific reference to the Sale of Goods Act 1923 and the Warehouseman's Liens Act 1935. Performance of this contract is subject to orders, rules, and regulations of all government agencies.
25. **RULES OF TRADE:** This contract is subject to and operates in accordance with GTA Trade Rules.  
Time is of the essence in relation to the performance of this contract.

**ARBITRATION:** Any dispute arising out of this contract, including any question of law arising in connection therewith shall be referred to arbitration in accordance with the GTA Dispute Resolution Rules in force at the commencement of the arbitration and of which both parties hereto shall be deemed to be cognizant except that this contract prevails to the extent of any inconsistency but no further. Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitration in accordance with the Dispute Resolution Rules of GTA, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute. Notice of appointment of an arbitrator must be given in writing by the party commencing arbitration within 6 months of the Train's departure from the first Loading Facility named in this contract, otherwise all claims shall be deemed to be waived and no proceedings whatsoever whether by way of arbitration or litigation shall be commenced.

**-End-**