

MemberUpdate

UPDATE 10 of 17 • 23 August 2017

TOPIC: GTA Contract No.2 – Track Contract – Changes to Notice Clause (Cl 15)

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

Changes are being proposed to Notices Clause in the GTA Track Contract.

Member Submissions close 8th September 2017

1. Purpose:

The Purpose of this Member Update is to advise Members of proposed changes to the Notice Clause (cl 15) of the GTA Contract No.2 – Track Contract, and to seek Member feedback on the proposed changes.

2. Background

- The GTA Commerce Committee has reviewed the scenario of a contract String ¹ where a Seller must receive a title transfer before being able to on-transfer title to its Buyer which may prevent title transfer prior to 1600 hours on the last business day of the Delivery Period.
- It had been brought to the Committee's attention that currently there is no requirement for the Seller to give the Buyer proper notice of a 'String' before 1600 hours and to advise that the title transfer will be made after 1600 hours on the last business day of the Delivery Period.
- The Committee's view was the Seller should provide notice (including documentary or satisfactory evidence) to the Buyer that they are in a 'String', prior to 1600 hours and that title transfer will occur after 1600 hours.

3. Proposed Change

- Therefore, the Commerce Committee has resolved to propose changes to the GTA Contract No2 – Track Contract that would have the following effect:
 1. Seller is to provide a Buyer notice with satisfactory evidence by email before 1600 hours on the last business day of the Delivery Period they are in a String.
 2. If the Seller does not give notice prior to 1600 hours the Buyer will be entitled to call the Seller in default after 1600 hours.
 3. If a trader holds sufficient inventory to meet contractual commitments prior to 1600h hours then that inventory should be transferred, and that the seller could not claim extension due to being in a String.
 4. Buyers can ask for satisfactory evidence of the String, but Buyers can not ask for evidence of inventory positions
 5. "Satisfactory documentation" could include email trail of communications or documents of contracts.

¹ A "String" is defined in the GTA Trade Rules is "a series of contracts where subsequent Buyers and Sellers buy and sell the Same Goods"

- The following is proposed wording for the new Notice Clause (15):

15. NOTICES:

15.1 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 (return receipt acknowledging the message has been received is required) or by other method of rapid written communication. All notices shall be under reserve for errors in transmission. Any notices received after 1600 hours Sydney/Melbourne time on a business day shall be deemed to have been received at 0900 hours on the business day following. A notice to a party's Brokers or Agent shall be deemed a valid notice under this contract. In case of resale, all notices shall be passed on without delay by Buyers to their respective Sellers or vice versa.

15.2 Notice of title transfer may only be given after 1600hrs on the last business day of the Delivery Period where;

15.2.1 Sellers are in a String and cannot transfer title prior to 1600hrs on the last business day; and

15.2.2 Sellers have provided Buyers with documentary evidence of said String prior to 1600 hours on the last business day of the Delivery Period.

15.3 If Sellers do not provide satisfactory documentary evidence to the Buyers prior to 1600 hours on the last business day of the Delivery Period then the Buyer may call the Seller in Default. Subject to Sellers providing satisfactory notice of a String the Sellers' notice of title transfer shall be given as soon as is practical, but no later than 1600 hours Sydney/Melbourne time on the next business day following the last day of the Delivery Period. Upon request, the Sellers shall provide the Buyers with documentary evidence of Sellers' receipt of notice and any intermediate notices.

- Attached is a draft of the entire GTA Contract No 2 (Track) with amendments to the Notice Clause (cl.15).

4. Process for Industry Feedback

- The Committee is seeking industry comments on the issues outlined in this document and the proposed amendments to Notices clause (cl 15) in the GTA Contract No 2 –Track Contract
- Submissions should be received by **COB Friday 8th September 2017**.
- Industry is encouraged to provide supporting evidence in their submission for any change proposed in this Member Update.
- All submissions should be lodged using the [Technical Committee Submission Form](http://www.graintrade.org.au/committees), 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.
- Please lodge your submissions by sending to submissions@graintrade.org.au and title your email – “**Track Contract – Changes to Notices Clause**”



GTA Contract No 2

**CONTRACT FOR GRAIN AND OILSEEDS IN BULK
DELIVERED PRICE BASING POINT OR PORT TERMS
(BASIS TRACK)**

Date: _____

SELLERS: _____

BUYERS: _____

BROKERS:: _____

Have this day entered into a contract on the following terms and conditions:
Sellers have agreed to sell and Buyers have agreed to buy.

GTA Contract No.2 - Grain and Oilseeds in Bulk – Basis Track

1. **COMMODITY GRADE AND SPECIFICATIONS:** _____
(including the GTA "Commodity Standards" [CS] reference number).
2. **QUANTITY:** _____ metric tonnes.
3. **PACKAGING:** In Bulk.
4. **WEIGHTS:** Final as per applicable Bulk Handling Company Warehouse Receipt(s), Warehouse Warrant(s) or Title Transfer(s).
5. **PRICE:**
 - 5.1. _____ Australian Dollars per metric tonne, "Delivered" _____ (a price basing point) less the prevailing GTA gazetted location differential at the time of delivery to a tributary up country location of a Bulk Handling Company named in clause 10 Sellers shall have the option to declare _____ as the alternative price basing point(s).
 - 5.2. Where multiple price basing points are named, the first named price basing point shall be deemed to the primary price basing point and the remainder shall be deemed to be alternative price basing points.
 - 5.3. If the initial contract consists of multiple price basing points, any alternative price basing point(s) must be nominated and notice give by the Sellers not later than 30 consecutive days prior to the first day of the Delivery Period as per the Notices Clause.
6. **QUALITY:** Quality to be final as per the relevant Bulk Handling Company's warehouse receipt(s), warehouse warrant(s) or title transfer(s).
7. **ANALYSIS:** Analysis to be as per the relevant Bulk Handling Company.
8. **DELIVERY AND TITLE TRANSFER**
 - 8.1. **PERIOD:** Delivery shall be between _____,
("Delivery Period") both dates inclusive unless extended under clause 15.2, on a "Delivered Silo" basis, at Sellers' option. Where the Delivery Period spans more than one calendar month, the Delivery Period is to be the latest named calendar month with the Sellers' option to deliver in an earlier named period of one calendar month. Notice of earlier delivery is to be not less than 30 consecutive days prior to the first day of the full Delivery Period named above.
 - 8.2. The delivery location shall be at Sellers' option at any up-country location of a Bulk Handling Company referred to in Clause 5.1, excluding the price basing point(s) or port location(s), with rail or road at seller's option. Parties may agree rail only or road only if expressly agreed. _____ only.

All Bulk Handling Company receival charges and any other in-bound charges (including shrinkage) are for Buyers' account, payable to Sellers with the purchase price and calculated at the Bulk Handling Company's Public Tariff rates current at the time of transfer. Any transfer fees by the relevant Bulk Handling Company are to be for Seller's account.
 - 8.3. Sellers warrant that they will give Buyers a minimum of 1 business day's notice of intention to transfer.
 - 8.4. Goods shall be deemed delivered and title transferred to Buyers when the Sellers provide the Buyers with notice of title transfer which Sellers may provide at their option at any time within the Delivery Period. The notice shall be by way of warehouse receipt(s), warehouse warrant(s) or title transfer(s) "In-Store" an applicable Bulk Handling Company facility.

9. **RETENTION OF TITLE:** Risk in any goods supplied by the Seller to the Buyer shall pass to the Buyer when they leave the possession of the Seller however title shall not pass until payment in full has been received by the Seller. Until full payment is received the Buyer and/or its agents and 3rd parties hold the goods as bailees only. On breach of any payment terms, the Buyer on its own behalf and on behalf of its agents and 3rd parties authorises the Seller to enter any premises and retake possession of the goods without notice to the Buyer, its agents and 3rd parties. Where the goods have been comingled with other goods, the Buyer becomes an owner in common of the bulk goods and the undivided share of the Seller shall be such share as the quantity of Seller's goods bears to the quantity of the goods in the bulk. Until such time as the Seller has received payment in full, any on-sale by the Buyer is made as the Seller's agent and the Buyer holds the proceeds of any on-sale of the Goods as trustee for and on behalf of the Seller and must account to the Seller for those proceeds, on demand. Where at the time of default in any payment terms to the Seller the Buyer has not received proceeds of any onsale the Seller is expressly authorised to receive proceeds of on-sale direct from the Buyer's customer.
10. **BULK HANDLING COMPANIES:** Application(s) to this contract shall be accepted from _____, such named bulk handling company to have tariff rates for storage and handling at time of delivery.
11. **UNASCERTAINED GOODS:** In every instance where a parcel of goods sold by this contract forms an unidentified part of a larger identified quantity of goods of the same description, whether in packages or in bulk, no separation or distinction shall be necessary and, until separation and identification of the parcel sold hereby from the larger quantity has taken place, the Buyers of the parcel are pro rata owners of the whole of the larger quantity in common with Sellers and Buyers of other parts of the larger quantity.
12. **PAYMENT:**
- 12.1. Payment is to be 100% of value, with the value to include any adjustments for freight, relevant Bulk Handling Company handling charges and/or shrinkage, and/or levies and taxes, or other applicable adjustments.
- 12.2. Payment is to be remitted to the Sellers by 1600 hours Sydney/Melbourne time on the same business day that title is transferred to the Buyers. For documents presented after 1200 hours Sydney/ Melbourne time, payment must be effected by 1600 hours Sydney/Melbourne time on the next business day following the day of conveyance.
- 12.3. Payment to be by telegraphic or bank transfer to Sellers' nominated bank, free of expense to the Sellers.
13. **LEVIES AND TAXES:**
- 13.1. Any industry, statutory or government levies which are not included in the contract price shall be adjusted for in any related payments.
- 13.2. Where a Goods and Services Tax (GST) has application to a supply made under this contract, the Sellers may, subject to the issuing a valid tax invoice, recover from the Buyers an amount on account of GST, such amount to be calculated by multiplying the price for the supply by the prevailing GST rate.
14. **INTEREST:** If any payment is not made on or before the due date for payment, interest shall be payable at the rate selected. If there is no due date for payment, interest shall be payable if there has been an unreasonable delay in payment. Interest payable shall be appropriate to the currency involved. If the amount of interest is not mutually agreed, interest will be payable at a rate of 1.5% per calendar month, calculated daily.

15. NOTICES:

15.1. 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 (return receipt acknowledging the message has been received is required) or by other method of rapid written communication. All notices shall be under reserve for errors in transmission. Any notices received after 1600 hours Sydney/Melbourne time on a business day shall be deemed to have been received at 0900 hours on the business day following. A notice to a party's Brokers or Agent shall be deemed a valid notice under this contract. In case of resale, all notices shall be passed on without delay by Buyers to their respective Sellers or vice versa.

15.2. Notice of title transfer may only be given after 1600 hours on the last business day of the Delivery Period where:

15.2.1. Sellers are in a String and cannot transfer title prior to 1600 hours on the last business day; and

15.2.2. Sellers have provided Buyers with documentary evidence of said String prior to 1600 hours on the last business day of the Delivery Period.

~~15.2.~~15.3. If Sellers do not provide satisfactory documentary evidence to the Buyers prior to 1600 hours on the last business day of the Delivery Period then the Buyer may call the Seller in Default. Subject to Sellers providing satisfactory notice of a String Where Sellers receive a notice of title transfer, Sellers may transfer title to all or part of the grain so transferred after 1600 hours on the last business day of the Delivery Period, so long as the Sellers' notice of title transfer shall be given as soon as is practical, but no later than 1600 hours Sydney/Melbourne time on the next business day following the last day of the Delivery Period. Upon request, the Sellers shall provide the Buyers with documentary evidence of Sellers' receipt of notice and any intermediate notices.

16. NON-BUSINESS DAYS: Should the time limit for doing any act or giving any notice expire on a Saturday, Sunday or any public holiday in the state or country where the party required to do the act or give the notice resides or carries on business or in the state or country where the act has to be done or the notice has to be received or on any day which GTA shall declare to be a non-business day the time so limited shall be extended until the first business day thereafter. All business days shall be deemed to end at 1700 hours Mondays to Fridays inclusive. The contract shipment period not to be affected by this clause.

17. FORCE MAJEURE:

17.1. Neither the Sellers nor the Buyers shall be liable for non-performance of their obligations herein, caused by an event of Force Majeure per GTA Trade Rule 23.0 [Force Majeure] which includes, but not limited to, action by any act of God, fire, flood, wind, explosion, power failure, labour disputes and disturbances, strike (including dock and/or shipping strike), civil commotion, accidents, delay or non-performance of carriers, war, embargo, act of government, or any other cause which is not due to said party's own acts or negligence.

17.2. The loss of a commodity due to production risks or crop failure does not constitute a condition of Force Majeure. The party invoking the Force Majeure Rule must dispatch written notice to the other party within five [5] business days of the occurrence, or not later than five [5] business days after the beginning of the contract Delivery or Shipment period, whichever is the later. Within five [5] business days of receiving such notice the latter party may request proof of the disability and evidence that the disabled party has exerted best efforts to meet the terms of the contract. The disabled party shall have five [5] business days to respond. In the case of resale such information shall be passed on without delay. Neither party shall have claim against the other for days or non-fulfilment under this Rule provided that the party invoking the Rule shall have supplied, if so requested by the other, satisfactory evidence justifying the delay of non-fulfilment.

18. TITLE AND INSURANCE:

18.1. Risk of loss and/or damage shall remain with the Sellers until the Seller has given notice of title transfer in accordance with clause 8.

18.2. Buyer's care upon receipt of title transfer.

19. CIRCLE:

19.1. Where Sellers re-purchase from their Buyers or from any subsequent Buyers the same goods or part thereof, a circle shall be considered to exist as regards to the particular goods so re-purchased, and the provisions of GTA Rule 17 [Default] shall not apply. For the purpose of this clause the term "the same goods" shall be construed as meaning goods of the same description, from the same country of origin, of the same quality, and, where applicable, the same analysis warranty, for delivery or shipment from the same port or ports of origin during the same period of delivery or shipment. Different currencies shall not invalidate the circle.

19.2. 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, the same shall be binding on all parties to the circle.

19.3. 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. Subject to the terms of the GTA Trade Rules, if the goods are not appropriated, or, having been appropriated documents are not presented, settlement by all parties in the circle shall be calculated on the mean contract quantity and shall be settled over the agreed market price on the first day for contractual shipment and invoices shall be settled between each Buyer and his Seller in the circle by payment of the differences between the agreed market price and the relative contract price.

19.4. Payment shall be as per contract terms as if the day for appropriation was on the mean date of the established delivery or shipment period, or, should the circle not be ascertained before the expiry of this time, then payment shall be as if day for appropriation was on the last date of the established delivery or shipment period, but not later than thirty [30] consecutive days after the circle is ascertained.

19.5. Should any party in the circle prior to the due date of payment commit any act comprehended in GTA Trade Rule 17.6 [Default Due To Insolvency], settlement by all parties in the circle shall be calculated at the closing out price as provided for in GTA Trade Rule 17.6 [Default Due To Insolvency] which shall be taken as a basis for settlement. 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.

20. 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, and to all causes, except as limited herein.

21. RULES OF TRADE: This contract is subject to the Trade Rules of Grain Trade Australia [GTA] currently in effect, and is subject to the rules of the market from which the grain is shipped, except to the extent the same are in conflict with the terms expressed herein. In the event of any conflict between this contract and the Trade Rules, this contract will prevail.

22. ARBITRATION: Any dispute arising out of this contract, including the existence of the contract and any question of law arising in connection therewith shall be referred to arbitration in accordance with the Dispute Resolution Rules of GTA in force at the commencement of the arbitration and of which both parties hereto shall be deemed to be cognizant. 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.

– End –

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