

# **VOLUNTARY ACCESS UNDERTAKING**

---

2 DECEMBER 2016

## Table of Contents

<b>Objectives</b> .....	<b>3</b>
<b>Policy Statement</b> .....	<b>3</b>
<b>Definitions</b> .....	<b>3</b>
<b>Interpretation</b> .....	<b>3</b>
<b>1. Person Giving Undertaking</b> .....	<b>4</b>
<b>2. Definitions and Interpretation</b> .....	<b>4</b>
<b>3. Access Undertaking</b> .....	<b>4</b>
3.1 Undertaking.....	4
3.2 Principles of Access.....	4
3.3 Meaning of “Feasible”.....	4
<b>4. Procedure For Standard Services</b> .....	<b>5</b>
<b>5. General Procedure</b> .....	<b>5</b>
5.1 Initial Request.....	5
5.2 Feasibility Review.....	5
5.3 Feasibility Study.....	6
5.4 Results of Feasibility Study.....	7
5.5 Further Negotiation.....	7
<b>6. Framework For Access Agreements</b> .....	<b>7</b>
6.1 Issues for Access Agreement.....	7
6.2 Pricing Principles.....	8
6.3 Exclusivity Principles.....	8
6.4 Priority Principles.....	8
6.5 Timing Principles.....	9
<b>7. New Services</b> .....	<b>9</b>
<b>8. Review</b> .....	<b>9</b>
<b>9. Dispute Resolution</b> .....	<b>9</b>
9.1 Treatment of Disputes.....	9
9.2 Initial Negotiations.....	9
9.3 Mediation.....	9
9.4 Referral to Arbitrator.....	10
9.5 Appointment of Arbitrator.....	10
9.6 Conduct of Arbitration.....	10
9.7 Decision of Arbitrator.....	10
9.8 No jurisdiction to determine dispute in relation to Access Agreement.....	11
<b>10. Annual Reporting</b> .....	<b>11</b>
<b>Schedule 1 - Services</b> .....	<b>12</b>

## Objectives

To outline the terms and conditions that must be adhered to when granting access to access seekers for the services provided or coordinated by Port of Brisbane Pty Ltd (“the Company”).

## Policy Statement

The Company undertakes to provide access seekers with access to the services on the terms and conditions of this undertaking.

## Definitions

**Access agreement** is an agreement between the Company and an access seeker under which the Company provides the access seeker with access to one or more services.

**Access seeker** means a person who wants access, or increased access, to a service.

**Business day** means a day on which trading banks are open for general business in Brisbane, excluding a Saturday, Sunday or public holiday.

**Dispute** means any claim, complaint, disagreement or allegation of breach, but does not include: disagreement on the interpretation of clause 9 (*Dispute Resolution*); or any duly executed *access agreement* that contains a mechanism for dispute resolution.

**Facilities** means all facilities required to provide a service.

**Feasible** has the meaning given by clause 3.3 (*Meaning of “Feasible”*).

**Feasibility review** means the review described in clause 5.2 (*Feasibility Review*).

**Feasibility study** means the study described in clause 5.3 (*Feasibility Study*).

**Request** means the initial request described in clause 5.1 (*Initial Request*).

**Services** means the services described in Schedule 1 (*Services*) and provided or coordinated by the Company.

**Standard service** has the meaning given by clause 4 (*Procedure for Standard Services*).

**Standard terms** means standard terms and conditions on which a service is available to access seekers generally under clause 4 (*Procedure for Standard Services*).

## Interpretation

- a. In this undertaking, unless the context otherwise requires:
  - i. words importing the singular include the plural and vice versa
  - ii. words which are gender neutral or gender specific include each gender
  - iii. other parts of speech and grammatical forms of a word or phrase defined in this undertaking have a corresponding meaning
  - iv. an expression importing a natural person includes a company, partnership, joint venture, association, corporation or other body corporate and a government agency
  - v. a reference to this undertaking includes this dictionary
  - vi. a reference to a law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law judgment, rule of common law or equity or a rule of an applicable stock exchange and is a reference to that law as amended, consolidated or replaced
  - vii. a reference to a document includes all amendments or supplements to that document, or replacements or novations of it
  - viii. a reference to a party to a document includes that party's successors and permitted assigns

- ix. an agreement on the part of two or more persons binds them jointly and severally, and
  - x. a reference to an agreement, other than this undertaking, includes an undertaking, deed, agreement or legally enforceable arrangement or understanding, whether or not in writing.
- b. Where the day on or by which something must be done is not a business day, that thing must be done on or by the following business day.
- c. Headings are for convenience only and do not affect the interpretation of this undertaking.

## 1. Person Giving Undertaking

This undertaking is given by Port of Brisbane Pty Ltd (“the Company”), with its registered office at Port Office, 3 Port Central Avenue, Port of Brisbane, Queensland 4178.

## 2. Definitions and Interpretation

The definitions and interpretation provisions on pages 1 and 2 of this undertaking:

- a. define the terms used in this undertaking
- b. set out the rules of interpretation which apply to this undertaking.

## 3. Access Undertaking

### 3.1 Undertaking

The Company undertakes to provide access seekers with access to the services on the terms and conditions of this undertaking.

### 3.2 Principles of Access

- c. The Company must provide access wherever it is feasible to do so.
- d. The Company must provide access on a basis that does not discriminate between access seekers who are not relevantly different.

### 3.3 Meaning of “Feasible”

It is feasible to provide access or do any other thing if:

- a. it is technically feasible to do so according to recognised engineering and construction principles
- b. the Company is legally entitled to do so
- c. to do so would be consistent with the corporate objectives of the Company, including without limitation the Company’s objectives to:
  - i. grow trade through the Port of Brisbane in a sustainable manner
  - ii. maximise shareholder returns
  - iii. optimise port efficiency
  - iv. allocate and use land in accordance with the Land Use Plan
  - v. ensure that any facilities constructed or commissioned by the Company for a specific purpose or use are efficiently and optimally utilised by access seekers seeking access for that purpose or use
- d. to do so would not endanger the safety of any users of the services or persons working on or with the facilities and would be consistent with the obligations of the Company under occupational health and safety legislation and all other legislation dealing with human safety
- e. to do so would be consistent with all existing contractual or other obligations of the Company to any other person

- f. it would be possible to do so at a reasonable price, taking into account the pricing principles set out in clause 6.2 (Pricing Principles)
- g. to do so would not endanger any aspect of the natural or built environment surrounding the Port of Brisbane in any way
- h. to do so would be consistent with the Company's obligations under the *Sustainable Planning Act 2009*, the *Planning Act 2016*, and all other planning legislation and all environmental legislation, and
- i. to do so would be consistent with the Company's obligations under the *Competition and Consumer Act 2010* and all other legislation dealing with competition or economic regulation.

#### 4. Procedure For Standard Services

- a. The Company may (but is in no case obliged to) prepare standard terms on which certain services are offered by the Company or by other parties. A service to which standard terms apply is a standard service.
- b. Without limiting paragraph (a), the Company may also (but is in no case obliged to) prepare any other general commercial terms as may be required in relation to any service.
- c. The Company may alter or withdraw standard terms at any time without prior notice.
- d. An access seeker may request access to a standard service on standard terms at any time.
- e. Upon such a request, the Company will grant access to the standard service on standard terms whenever it is feasible to grant this access using presently available facilities and in accordance with the conditions determined by the feasibility study.
- f. If it is not feasible to grant this access using presently available facilities, then the access seeker may request access to the standard service in accordance with clause 5.
- g. An access agreement between the Company and an access seeker in relation to a standard service overrides any standard terms.

#### 5. General Procedure

##### 5.1 Initial Request

If an access seeker wants access to:

- a. a service that is not a standard service
- b. a standard service on terms other than standard terms, or
- c. a standard service, but it is not feasible to grant access using presently available facilities,

then the access seeker must make a written request to the Company setting out:

- a. the nature of the service to which access is sought
- b. the purpose for which access is sought
- c. the nature of all facilities required for the service
- d. the capacity required of those facilities
- e. the time or times at which access to the services is required,

and the Company undertakes not disclose that information except as required by this undertaking (including by giving the information to an expert or arbitrator) or to comply with a law.

##### 5.2 Feasibility Review

- a. The Company must prepare an initial feasibility review based on the request to consider whether, in the opinion of the Company:
  - i. the access sought in the request is prima facie feasible

- ii. the access seeker is creditworthy
  - iii. the access seeker has the skills or experience likely to be needed to be able to make effective use of the service to which access is sought
  - iv. the access seeker meets all prudential standards required by the Company.
- b. The feasibility review must consider whether the request is likely to be feasible based on the information then known to the Company.
- c. If the Company considers that the request is unlikely to be feasible, the Company shall notify the access seeker in writing accordingly. The access seeker may then amend and resubmit its request according to the results of the feasibility review.
- d. If the Company considers that the request is likely to be feasible, the Company shall notify the access seeker in writing (the decision notice) stating:
  - i. that the Company considers the request is likely to be feasible on the information then known to the Company;
  - ii. the steps which the Company proposes to undertake to determine if the request is feasible (including whether the Company proposes to engage an expert to determine if the request is feasible); and
  - iii. the estimated costs to the Company of determining whether the request is feasible (the estimated costs).
- e. Upon receiving the decision notice, if the access seeker wishes the Company to undertake a feasibility study, the access seeker shall within 30 days of the date of the decision notice:
  - i. notify the Company in writing that it wishes the Company to undertake a feasibility study; and
  - ii. pay the estimated costs to the Company on account of the anticipated costs of the feasibility study,
 failing which the *access seeker* shall be deemed to have withdrawn the *request*.

### **5.3 Feasibility Study**

- a. If the access seeker gives the Company written notice in accordance with clause 5.2(e) and pays the estimated costs to the Company, the Company shall undertake a feasibility study.
- b. The feasibility study must determine whether the request is feasible, and in particular must determine:
  - i. whether it is feasible to provide the access sought using existing facilities
  - ii. if it is not feasible to provide the access sought using existing facilities, whether it is feasible to develop the new facilities required
  - iii. if it is feasible to develop the new facilities required, the nature of those facilities and an estimate of the cost and time required to develop them; and
  - iv. if it is not feasible for the Company to provide the access sought, whether the Company knows of any third party who might be able to provide the access sought.
- c. The Company may require the access seeker to provide any additional information necessary to complete the feasibility study.
- d. The Company may engage an expert to assist in the Company determining whether the request is feasible.
- e. The determination of the feasibility of a request by the Company may be conditional on the occurrence of a specified action, omission or event including without limitation:
  - i. the approval by the Board of the Company of the determination including the approval of the determination in amended form; or

- ii. the provision of an environmental impact statement or report by any specified person; or
  - iii. the obtaining of any licence or approval required under any law; or
  - iv. the undertaking of consultation with a third party or the obtaining of consent of a third party.
- f. Subject to paragraph (g), the Company must prepare its feasibility study and notify the access seeker of the results of the feasibility study within 60 business days of the request.
- g. The time period set out in paragraph (f) is extended by the length of time taken for an access seeker to respond to a request under paragraph (c).
- h. If the actual costs to the Company of undertaking the feasibility study exceed the estimated costs, the access seeker shall pay the difference to the Company. If the actual costs to the Company of undertaking the feasibility study are less than the estimated costs, the Company shall refund the difference to the access seeker.

#### **5.4 Results of Feasibility Study**

- a. If the feasibility study concludes that the access sought by the request is not feasible:
- i. the access seeker may amend and resubmit its request according to the results of the feasibility study
  - ii. if the feasibility study considers that access sought by the request may be provided by a third party, the Company must use its reasonable endeavours at the access seeker's cost to facilitate that access.
- b. If the access seeker disagrees with the results of the feasibility study, this disagreement constitutes a dispute for the purposes of clause 9 (Dispute Resolution).

#### **5.5 Further Negotiation**

- a. If the feasibility study concludes that it is feasible to provide the access sought by the request, the parties must negotiate in good faith to conclude an access agreement that is consistent with:
- i. the request
  - ii. the feasibility study; including any condition specified in accordance with clause 5.2 (d) of this undertaking; and
  - iii. the terms of this undertaking, including without limitation clause 6 (Framework for Access Agreements).
- b. If the parties are unable to conclude such an access agreement within three (3) months of the commencement of negotiation, a dispute is constituted for the purposes of clause 9 (Dispute Resolution).

## **6. Framework For Access Agreements**

### **6.1 Issues for Access Agreement**

An access agreement must address the following issues:

- a. the cost of access to the services
- b. the responsibility of each party to develop, or pay for, any facilities that need to be developed in order to provide access to the services
- c. the timing and term of access to the services
- d. a policy for queuing and ordering priority for access to the services
- e. the degree of exclusivity or non-exclusivity of access to the services
- f. the obligation of each party to maintain any facilities used in providing the services
- g. a detailed mechanism for resolving disputes between the parties

- h. the purpose or purposes for which the services can be used
- i. the performance criteria to apply to the access seeker's use of the services, whether based on volume, timing, efficiency of use or enhancing the competitive position of the port
- j. the environmental and safety obligations applicable to the access seeker, including any necessity to obtain any accreditation
- k. the parties' responsibility for planning approvals in relation to the services
- l. the circumstances in which the Company may relocate the facilities used in providing the services.

## **6.2 Pricing Principles**

The cost of access to each *service* must at all times be based on:

- a. the Company's investment in the facilities
- b. the interests of all persons who have rights to use any service provided by the Company
- c. the Company's actual cost of providing the service, including the following elements to be ascertained solely by the Company based on accepted accounting and economic principles:
  - i. the costs of capital invested by the Company in any facilities
  - ii. a reasonable rate of after-tax return on investment, taking into account the risk of the investment
  - iii. the operational and maintenance costs and expenses and all other costs (including depreciation) in relation to any components of the Port of Brisbane used to provide the service, allocated among all services that share that component
  - iv. actual and anticipated changes to cost over the period during which the services are to be provided
  - v. actual costs paid to third parties.
- d. the operational and technical requirements necessary for the safe and reliable provision of all services provided by the Company
- e. the efficient and profitable operation of the Port of Brisbane
- f. the legitimate business interests of the Company
- g. reference to the standard terms of any comparable service that is a standard service, or the terms of any comparable service offered by a person other than the Company.

## **6.3 Exclusivity Principles**

- a. The Company will not grant exclusive access to a service that uses a particular facility unless the access seeker can demonstrate to the Company's reasonable satisfaction that such access would optimise the use and efficiency of that facility and enhance both the competitive position of the Port and competition in relevant markets generally.
- b. Paragraph (a) applies equally to facilities developed, owned or paid for by an access seeker as to facilities developed, owned or paid for by the Company. However, the access seeker must be reasonably compensated for any use of its facilities by a third party.

## **6.4 Priority Principles**

- a. The Company may grant:
  - i. priority access to a service that uses a particular facility
  - ii. lower-priority access to a service that uses a particular facility and to which another access seeker has been granted access of higher priority; or
  - iii. any combination of (i) and (ii) in relation to various facilities.

- b. Priority of access will be determined taking into account:
  - i. the time at which access is sought
  - ii. the availability of other access to equivalent services
  - iii. the requirements and legitimate business interests of each access seeker
  - iv. the financial or other contribution of each access seeker to the development of the relevant facility
  - v. the effect of granting the priority of access sought upon competition in the relevant markets.

### **6.5 Timing Principles**

The term of access must be flexible and subject to periodic review. In no case will any term of access exceed 10 years without the opportunity for the Company to review the access.

## **7. New Services**

The Company may, at any time, develop or introduce a new type of service to be considered a service under this undertaking.

## **8. Review**

The Company will review this undertaking every three years and may, following each review, amend or withdraw this undertaking.

## **9. Dispute Resolution**

### **9.1 Treatment of Disputes**

- a. Any dispute between an access seeker and the Company concerning or arising out of this undertaking will be dealt with according to this clause 9 (Dispute Resolution).
- b. No party may institute any legal proceedings whatsoever in relation to a dispute, unless these proceedings relate to a failure to comply with the provisions of this clause 9 (Dispute Resolution) or with the decision of an arbitrator.

### **9.2 Initial Negotiations**

If a dispute arises, the parties must negotiate in good faith for a period of 20 business days to resolve the dispute.

### **9.3 Mediation**

- a. At any time prior to the expiry of the negotiation period, either party may refer the dispute to mediation by giving written notice, including a statement of the nature of the dispute, to the other party (the mediation notice).
- b. Mediation of the dispute shall:
  - i. be conducted by the person or body agreed to by the parties or, failing agreement, within five business days after receipt of the mediation notice as nominated by the President for the time being of the Queensland Law Society
  - ii. be conducted in accordance with such rules as may be agreed to by the parties or, failing agreement, within five business days after receipt of the mediation notice as nominated by the person or body agreed or nominated to conduct the mediation
  - iii. be at the cost and expense of the parties equally (except that each party shall pay its own advisers, consultants and legal and other fees and expenses) unless the parties otherwise agree

- iv. if not earlier resolved, be continued for a period expiring on the day being 10 business days after the expiry of the negotiation period (or such other period as the parties may agree).
- c. For the avoidance of doubt, this clause 9.3 will not operate unless a mediation notice is delivered strictly in accordance with clause 9.3(a).

#### **9.4 Referral to Arbitrator**

- a. Subject to clause 9.8, if the negotiations referred to in clause 9.2 (Initial Negotiations) and any mediation conducted under clause 9.3 (Mediation) are unsuccessful, the only further action which the parties may take is to refer the dispute to an arbitrator.
- b. Either party may refer the dispute to an arbitrator by giving written notice, including a statement of the nature of the dispute, to the other party. This referral must take place within 10 business days of the failure of negotiations under clause 9.2 (Initial Negotiations) or the failure of any mediation under clause 9.3 (Mediation).

#### **9.5 Appointment of Arbitrator**

- a. The parties must appoint a single arbitrator by mutual agreement.
- b. If no such agreement is reached within 10 business days, the parties must request that the Queensland Chair of the Institute of Arbitrators and Mediators Australia (or similar body if that body ceases to exist) appoint an arbitrator with relevant commercial experience.
- c. No person who is a related person of the Company or the access seeker or who has an interest in the dispute may be appointed as an arbitrator.

#### **9.6 Conduct of Arbitration**

- a. The arbitration will be conducted in a manner agreed by the parties.
- b. If the parties are unable to agree the manner in which the arbitration is to be conducted within 10 business days, the arbitration is to be conducted in accordance with and subject to the *Commercial Arbitration Act 2013* of the State of Queensland.
- c. The parties will have the equal opportunity to make written and oral representations to the arbitrator regarding the dispute.
- d. The arbitrator must enter into a confidentiality undertaking acceptable to the parties in relation to information obtained in the course of the arbitration.

#### **9.7 Decision of Arbitrator**

- a. An arbitrator appointed under clause 9.4 (Appointment of Arbitrator) must hear and determine all matters in dispute.
- b. In determining any dispute, the arbitrator must have regard to the following matters, where relevant:
  - i. this undertaking
  - ii. the pricing principles set out in clause 6.2 (Pricing Principles)
  - iii. the exclusivity principles set out in clause 6.3 (Exclusivity Principles)
  - iv. the priority principles set out in clause 6.4 (Priority Principles)
  - v. the timing principles set out in clause 6.5 (Timing Principles)
  - vi. any request
  - vii. any feasibility review
  - viii. any feasibility study
  - ix. any other matter relevant to the dispute.

- c. The arbitrator may receive expert technical advice from a technical expert agreed by the parties, or if the parties cannot agree, from a person nominated by the president for the time being of the Queensland Law Society.
- d. In relation to a dispute concerning a feasibility review or feasibility study:
  - i. the arbitrator may determine only that the result of the feasibility review or feasibility study has or has not been determined by the Company in accordance with the terms of this undertaking
  - ii. if the arbitrator decides that the result of the feasibility review or feasibility study has not been determined in accordance with the terms of this undertaking he shall provide to the parties in writing details of the non-conformity and the Company shall reconsider the feasibility of the request
  - iii. the arbitrator shall have no power to himself to determine the feasibility of a request.
- e. The decision of the arbitrator regarding the dispute is final and binding on both parties, and must not be questioned in any proceedings whatsoever.
- f. The arbitrator must give reasons for the arbitrator's decision and must determine how the costs of the arbitration are to be paid.

### **9.8 No jurisdiction to determine dispute in relation to Access Agreement**

Notwithstanding any other clause of this Access Undertaking, an arbitrator shall not have power or jurisdiction to determine any *dispute* in relation to an *access agreement* or proposed *access agreement*, including without limitation, a *dispute* in relation to:

- a. the terms of access under, or the pricing of services pursuant to, an access agreement; or
- b. the interpretation, enforceability or validity of an access agreement

## **10. Annual Reporting**

The Company will publish a report on its website by 30 September each year detailing any material instance of an action taken, or a failure to take action, by the Company which is not consistent with this undertaking that occurred during the immediately preceding financial year (each a material non-compliance).

The annual report must include the following details of any material non-compliance with this undertaking that occurred during the financial year covered by the annual report, including:

- a. the date on which the material non-compliance occurred, or the dates on which the material non-compliance began and ended;
- b. the provision of this undertaking contravened
- c. a description of the conduct which constituted the material non-compliance
- d. a description of the outcome of the conduct including its impact on any affected third party
- e. actions taken or to be taken to ensure future compliance
- f. the number of occasions that the particular type of material non-compliance has occurred in the relevant year, and in all past years since this undertaking commenced

**Adopted as a voluntary undertaking by PBPL on 2 December 2016.**

### Harbour Services

- a. The use of shipping channels
- b. The use of breakwaters
- c. Dredging Services
- d. Hydrographic Surveying
- e. Engineering Consulting Services

### Loading Services

- a. The use of wharf infrastructure
- b. The use of wharf facilities including cranes, ramps and associated facilities
- c. The use of associated infrastructure such as roads, electricity, etc

### Backup Services

- a. The use of cargo terminals, container parks and bulk storage terminals
- b. The use of vehicular access and parking facilities
- c. The use of roads and drainage facilities
- d. The use of the Brisbane Multimodal Terminal
- e. The use of associated infrastructure such as roads, electricity, communications and fuel
- f. Building Facilities Management
- g. Land leasing
- h. Warehousing
- i. Environmental Services
- j. Building, leasing and construction