

A guide to taking out contracts to supply grain



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National Agricultural Commodities Marketing Association Limited (NACMA) was formed in 1991 with the aim to standardise grain standards and trade rules/contracts across the Australian grain industry. Over 95% of the Australian grain crop is stored in facilities operated by NACMA members, with 90% of the grain contracts executed in Australia each year referring to NACMA grain standards and/or trade rules. NACMA has over 300 member organisations from grain producers to domestic end users and grain exporters.

**NACMA 02 9402 9402 admin@nacma.com.au
www.nacma.com.au**

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Introduction

The following is a guide to aid grain producers in taking out contracts to supply grain.

The purpose of this guide is to provide Australian grain producers with a practical 'checklist' for the sale of grain under contract. It is not a substitute for specific terms and conditions contained in contracts, but general guidelines, put together by grower, trade and marketing representatives, as an aid to understand grain contracts.

There is now a range of marketing tools designed to meet growers' business needs. Different growers have different risk/reward and cash flow requirements. So it's important to determine the range and combination of marketing products that best meet your individual business needs.

In recent years there has been a significant increase in the use of contracts by growers. Successful contracting of grain is a two-way street – a balance between buyer and seller. The key to a successful contracting relationship is accurate, timely communication between buyer and seller, especially if a problem arises.

Keep this guide in an accessible place so you can consult it next time you sell grain on a forward or cash basis.

1.0 Before beginning negotiations

- 1.1** Check the Buyer. Be confident with the company you intend to have dealings with.
- 1.2** Record the details of the contract. Have a pen and paper ready.
- 1.3** Understand your commitment. From a commercial perspective, a contract is a productive marketing tool that can be used to minimise price fluctuation risk. From a legal perspective, a contract is a legally binding document that must be fulfilled.

When your crop suffers adverse seasonal conditions such as frost and drought, these are considered production risks and are not covered by 'Act of God' or 'Force Majeure' clauses.

It is important therefore, that caution be taken when committing to supplying grain, because there are likely to be financial consequences of failing to fulfil a contract.

- 1.4** Understand the process of contracting. At this point it is worth looking at a simple legal definition of a contract:

A contract may be defined as an agreement between two or more persons, which is legally enforceable. Two or more minds will have come together and agreed upon the doing of prescribed acts by each of them. In its unexecuted form, the contract is known as an executory contract. If partially or wholly performed, it is described as being partly or wholly prescribed.

A contract can be made wholly in writing or wholly verbally. It can also be a mixture of oral and written terms, or even made as a gesture. The acceptance of a contract must be communicated to be effective. This communication may be expressed verbally. That is, by agreeing to the contract over the phone, in writing, or by the conduct of the parties to the contract.

The role of contract law is to vest legally enforceable rights in each party against the other. Corresponding liabilities are created. The contract can ultimately impact upon other people's legal rights. For example, by functioning to transfer ownership of property from one party to another so that the latter can assign proprietary rights to a third.

2.0 Negotiating the contract

2.1 Record the time, name and title of the person you are speaking to.

2.2 Record the details of the contract, so you have a record of what was agreed. The details that should be recorded are:

- ✓ Price. Confirm the price and whether it is GST inclusive or exclusive.
- ✓ Price terms. Confirm if the price is free-on-board (FOB), delivered port, local depot, silo or ex-farm. This confirms whether the Buyer or Seller is responsible for the transport, storage, and handling charges.
- ✓ Delivery date or period. Confirm the delivery date and where the delivery point is.
- ✓ Details of grain quality (grade) required: grain type, variety, protein, moisture, screenings, and any premiums or discounts applicable. Make sure you check buyer-receival standards.
- ✓ Tonnage and tolerances. Confirm the tonnage required to fill the contract, and any tolerances in place in regards to that tonnage.
- ✓ Fees and or charges applicable. For example, State and Federal research and development levies and who pays.
- ✓ Delivery Period. This is the period in which delivery and or the contract must be executed (ie. delivered, transferred from warehousing or washouts negotiated).

- ✓ Default procedures. Clarify the default procedures applicable if you are unable to deliver the grain as per the specifications of the contract (i.e. any damages such as wash-out fees)
- ✓ Dispute resolution. You should also clarify dispute resolution mechanisms in place to deal with any contract conflict. This should be stated on your contract confirmation advice.

2.3 Crop liens. Remember it is your responsibility to advise the Buyer of any registered crop lien(s).

2.4 Contracts are open to negotiation. You have the right to negotiate on any points of the contract. For example, you may wish to negotiate payment terms.

However, you must always bear in mind that any alterations to the contract must be agreed to by both parties. Variations are usually noted in a Special Conditions Section.

2.5 Ensure that you are conversant with the terms and conditions. If you do not understand something within the terms and conditions of the contract, do not agree to the contract until the point(s) in question is (are) clarified.

3.0 Receiving and confirming the contract confirmation

3.1 Read and check the contract details against the notes you recorded during your conversation with the buyer.

3.2 If you notice any discrepancies, contact the buyer IMMEDIATELY to resolve it.

3.3 If you are unsure about a term or condition, contact the buyer and have it explained.

3.4 If you are still unsure, seek advice.

3.5 Upon receiving and confirming the contract confirmation note all changes made in subsequent conversations with the buyer. Ensure that you and the Buyer agree on:

- * Price
- * Price terms
- * Delivery date or period
- * Details of grain quality (grade) required
- * Tonnage and tolerances
- * Fees and or charges applicable
- * Payment terms
- * Default procedures
- * Dispute resolution procedures

4.0 Returning the contract confirmation

Even though you are bound without signing the contract confirmation, you are more likely to be able to resolve a dispute if it is signed and returned. When you are satisfied with the contract confirmation, sign it and return it to the Buyer. This should be done within 24 hours of receiving the contract confirmation.

Remember, a verbal contract is legally binding. Not signing the contract confirmation does not alter its legal status. However, it's good practice to sign it.

5.0 Contract Issues

As soon as you suspect that you might have issues fulfilling any condition within the contract, it is recommended that you discuss the issue with the Buyer prior to delivery or as soon as you are aware of the possible issue. Buyers may be more amenable if they are warned as soon as you suspect an issue.

6.0 Payments

Confirm payment has been made on previously agreed terms.

7.0 Resolving Disputes

You can minimise disputes if care is taken in reading and understanding the contract details. However, if you have any disputes regarding the contract, it is recommended that you:

- 7.1** Check internal and external dispute resolution terms specified in your contract.
- 7.2** Seek resolution from the person you originally negotiated with. Failing that;
- 7.3** Seek a resolution with their superiors. Failing that;
- 7.4** Use the structured arbitration process of NACMA and seek resolution. Failing that;
- 7.5** Seek legal advice and resolution through the court system.

It's important that you understand what your dispute resolution options are before you sign the contract.

NOTE: This document is only intended to be a guide. The aim of this document is to suggest procedures that should be followed when entering a contract. It is not a legally binding document and legal advice should be sought for specific clarification.

8.0 Grain contracts & dispute resolution

8.1 Introduction Over 95% of all grain contracts written in Australia rely on the NACMA Trade Rules. NACMA contracts and Trade Rules contain agreements to refer disputes to the NACMA Dispute Resolution Service. Parties to contracts that incorporate NACMA Trade Rules are obliged to refer any dispute to NACMA for settlement under the NACMA Dispute Resolution Service.

8.2 The following publications are available from the NACMA website (www.nacma.com.au):

- A Guide to taking out contracts to supply grain – a grain producers guide
- NACMA Trade Rules
- NACMA Dispute Resolution Service Rules

8.3 Is NACMA neutral/independent ... will I get a fair go? NACMA is a non political organisation established to ensure that commercial transactions across the supply chain (be they a grain producer, merchant, end user or an exporter) occur in an efficient and fair manner to both parties to the contract. NACMA members include the Grains Council of Australia and Grain Growers Association with grain producers sitting on NACMA's panel of arbitrators.

8.4 I haven't signed anything; can I still have a contract? If you're in doubt, you should consult your lawyer. That said, the fact that you haven't signed anything doesn't necessarily mean that you don't have a binding contract. The word "contract" refers to a legally enforceable agreement between 2 or more parties, rather than a piece of paper with signatures on it. A contract is and may be in writing, but may also be oral (or partly in writing and partly oral).

A binding contract can (for example) be created over the telephone. In this case it is customary for the Buyer to send a document (sometimes called "Confirmation of Purchase") to the Seller and/or for the Seller to send a document (sometimes called a "Confirmation of Sale") to the Buyer, intending to confirm the details of the agreement reached by phone.

The fact that such a document is not signed does not mean that a contract has not come into existence.

Any party who receives a Contract Confirmation should, as a matter of priority, check the details to ensure that they reflect the telephone conversation. Where you detect a difference, immediately contact the counterparty to resolve the difference. In the absence of notification from the other party a party is entitled to assume the contract is as written in the Confirmation. Reference NACMA Trade Rule I.

8.5 Where / to whom do I turn for independent advice about NACMA Trade Rules etc? Grain contracts are legal agreements, therefore professional legal advice should be sought where clarification on an issue is required. Independent grain marketing advisers may also be of assistance for issues not requiring legal advice. Please note that the NACMA Secretariat and Directors are NOT able to give you advice in relation to disputes or the operation of the Trade Rules.

8.6 I have looked up the Rules and I can't find any reference to "washout"? The term "Washout" is not defined in the NACMA Trade Rules. The industry uses the term to describe the financial settlement of a contract when one of the parties cannot fulfil its obligations. Where parties are unable to agree on the values used to determine the "washout" then either party to the contract is able to refer the issue to NACMA for determination under the Dispute Resolution Service (fees apply). Reference NACMA Trade Rule 17.10

8.7 Do I have to "wash out" a contract? A "washout" is a way of settling your obligations under a contract, without reference to a Court or arbitration, and usually before the time for performance of your obligation falls due. A washout will usually involve a payment from one party to the other. While you cannot be forced to "wash out" a contract, you should carefully consider such an offer as it may be in your interests to accept a "wash out" before the time for performance falls due. Generally speaking, if you don't think you will be able to perform your obligations under a contract by the due date, and you know this ahead of time, it might be worth washing-out to protect yourself against any further fluctuations in the contract price.

Please note that NACMA IS NOT equipped to provide independent advice on whether you should accept an offer to wash-out.

8.8 Is force majeure a "get out" clause? NO. Force majeure only extends the delivery period that an organisation has to meet their contractual obligations be they the seller or the buyer. Crop production failure is specifically excluded. A contract is not able to be cancelled due to the invocation of force majeure. Reference NACMA Trade Rule 23

8.9 What is the legal standing of the NACMA dispute resolution process? Is a NACMA award recognised by the Courts NACMA arbitrations are subject to the provisions of the NACMA Dispute Resolution Rules and the Commercial Arbitration Acts in all states of Australia and can be appealed at court. Arbitration awards are no less enforceable than judgments of the courts. To date the courts have upheld all NACMA arbitrations.

8.10 Do I have to go to arbitration if I haven't signed anything? Once again, this is really something you should discuss with your solicitor. An agreement to arbitrate disputes is binding and enforceable in a Court. As detailed above, the contract may stand even without the provision of signatures on the Contract Confirmation from one or both of the parties.

If the Contract references the NACMA Trade Rules then disputes must be referred to NACMA in the first instance. By not participating in arbitration your argument is not able to be heard by the arbitrators.

It is also possible to go to arbitration without admitting that you have a contract. It is possible to ask the arbitrators to dismiss any claim on the basis that you didn't enter into a contract in the first place.

8.11 Is arbitration expensive? There are fees associated with NACMA Arbitration. NACMA tries to ensure that overall cost of NACMA arbitration is no more expensive than going through the Courts. We also try to make NACMA arbitration reasonably quick, which can be a distinct advantage over the Court process. NACMA arbitration is "peer" arbitration conducted by participants in the grain trade.

8.12 Can I recover my arbitration costs if I'm successful in an arbitration?

YES Most parties in their submission to the arbitration panel claim recovery of legal and arbitration costs.

8.13 Is NACMA arbitration compulsory? Is it binding? If you are party to an arbitration agreement referring disputes to NACMA arbitration, then yes, it is binding. This will be the case if your contract incorporates the NACMA Trade Rules. If you change your mind and you don't want to arbitrate, you have to get the agreement of the other side, first.

Similarly, even if there is no arbitration agreement in your contract, you may still decide to ask NACMA to conduct arbitration but you will need the consent of the other party, first. A NACMA arbitration award is binding and enforceable. It is as enforceable as a judgment by the Court. NACMA arbitration awards have been upheld and enforced by the Courts.

8.14 Can NACMA give me advice about my rights and obligations under the NACMA Trade and Dispute Resolution Rules? NACMA isn't equipped to give advice about how the Trade Rules will be applied and what your rights might be under a NACMA contract or arbitration. As the administrator, NACMA must remain impartial. Because the Trade and Dispute Resolution Rules become part of your contract, your solicitor should be able to advise you.

Common Contract Glossary

The following is a 'guide' to the Standard Terms and Conditions commonly applicable to contracts created to purchase grain.

Chemical and pesticide residues: The Seller warrants, to the best of their knowledge, that the grain complies with the current receival standards stipulated by the Buyer, and all state and federal laws and requirements relating to chemical and pesticide residues, and government specified maximum residue levels. Any loss, cost or expense, whether directly or indirectly caused by a failure of the Seller to comply with these, shall be borne by the Seller.

The same terms and conditions apply to compliance with all quality standards and not just excess pesticide levels.

Conveyance and delivery instructions: Unless otherwise agreed, the Seller shall have the right of delivery.

Default: In the event of any default in the performance of the contract by either party, the other at their discretion shall have the right, after giving written notice, to sell or purchase, as the case may be, against the defaulter, and the defaulter shall make good the loss, if any, on such purchase or sale as per the contract.

If the Buyer or Seller suspends payment of its debts, or convenes or holds a meeting of creditors, or commits an act of bankruptcy, or being a company 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 a Buyer or Seller shall be deemed to be in default.

Delivery:

- a) Where delivery is either ex-farm or ex-store, delivery shall be on a free-on-vehicle basis (subject to quality and tonnage being verified).
- b) Where delivery is specified at a particular destination, delivery is made, and therefore title changes to the buyer, when it is received at that destination.

Failure to perform: Failure to keep in accordance with the Terms and Conditions of a contract shall be grounds for the refusal of further delivery(ies), and can be grounds for rescinding the entire contract.

Finality: All adjustments or compensation claimed, based on defect of quality or condition of weights, which shall be apparent upon reasonable inspection, must be advised within five (5) business days after unloading or presentation of appropriate documents, and must be formally confirmed by written notice, letter or facsimile within thirty (30) consecutive days of delivery of the consignment.

Force Majeure: Subject to the following sentence, neither the Buyer nor the Seller shall be responsible for any delay in delivery of grain or any part thereof caused by fire, flood, wind, explosion, power failure, war, embargo, act of government, strike (including dock or shipping strike), lock-out, combination of workers, or civil commotion which is not due to the party's own acts or negligence.

The loss of grain due to production risks or crop failure, including Acts of God, frost or drought, do not constitute a condition of Force Majeure.

Unless otherwise mutually agreed, the party invoking the Force Majeure is entitled to an extension (the first extension) of a period equal to that of the delay caused by the Force Majeure event, but usually not more than 30 consecutive days from the end of the contract delivery period.

If delivery is still prevented at the end of the first extension period by the event of Force Majeure, the party not invoking Force Majeure shall have the option of cancelling or terminating the contract (as in default) or any unfulfilled part or mutually agreeing to one further extension period (the second extension) usually not more than 30 consecutive days.

If, at the conclusion of the second extension period, delivery is still prevented, the contract or any unfulfilled part thereof shall be considered in default.

Quality: Unless specifically agreed otherwise, quality shall be determined by qualified personnel according to established sampling and analysis procedures at destination.

Quantity: Unless otherwise stated, all quantities are expressed in metric tonnes.

Rejection: The Buyer reserves the right to reject any grain supplied under the contract that does not fit the description of the contract. Where the Buyer rejects the grain, expenses incurred by the Buyer shall be at the Seller's expense. A Buyer shall not be entitled to reject grain as not being in accordance with description or sample if the grain is a quality superior or equal to the quality as agreed in the contract. The Buyer's decision as to whether the grain fits the description in this contract shall be final and binding.

Time: Times referred to in contracts can be Western Standard Time, Central Standard Time, Central Summer Time, Eastern Standard Time or Eastern Summer Time.

Title and passing of title and insurance:

- a) Title of the grain tonnage shall remain with the Seller until delivered to the Buyer. Once the contract is agreed, the buyer has ownership of a contract with a committed seller, and the seller has ownership of a contract with a committed buyer. At this stage the title remains with the seller until delivery is made, when the title changes to the buyer. Refer to Delivery.
- b) The seller has the responsibility to insure the material up to the time the title changes.
- c) The grain tonnage shall be at the Seller's risk until delivered to, and accepted by, the Buyer and under Delivery.

Wash-outs: A wash-out can be offered in the event that a Seller cannot fulfil their contractual obligations in the event of crop failure or expected crop failure. In this event, Sellers have the option of covering their contractual commitments by seeking replacement grain against their contract (although most grain marketers can assist in this process).

If a Seller chooses to wash-out a contract, ie buy the grain back, the washout cost is the difference between the original contract price and the applicable market value at the time the wash-out takes place. 'Applicable market value' is usually based on where grain is actually being traded (bought and sold).

Sometimes administrative charges can also apply. Wash-out fees and administrative charges should be clarified before entering contracts.

Buyers may offer alternative options should the seller be unable to fulfil the terms of the contract. These options may include:

- a) Agree to extend the delivery period; or
- b) Re-purchase the defaulted portion of the delivery; or
- c) Cancel the defaulted portion of the delivery at fair market value based on the close of the market on the next business day;
- d) Roll forward to a subsequent year.

It's important to note that the Buyer is under no obligation to offer any options to the grower.

If the Seller fails to notify the Buyer of their inability to fulfil the terms of the contract, the contract remains in force until the Buyer can determine whether the Seller has defaulted. The Buyer shall notify the Seller within a reasonable time frame by telephone or facsimile, which options, if any, they elect to exercise.

If the Seller defaults on the Contract, s/he is liable for all losses, costs and expenses as shall have been incurred to and including the day the Buyer elects an option.

Weights: The weight of the grain tonnage shall, subject to the Buyer's approval, be the weight determined by either;

- a) an approved weighing facility at the destination authorised by the Buyer; or
- b) a registered public weigh-bridge facility.

Weight tolerance: This shall be agreed in the main contract document and may vary as agreed between the Buyer and Seller.

NOTE: This brief explanation of the Standards Terms and Conditions DOES NOT constitute, replace nor alter any legally created Standard Terms and Conditions of any contract between a Buyer and a Seller.

Disclaimer

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