

Standard terms and conditions for berthing at Common User Wharves or Dedicated Facilities

1 Background

1.1 Formation of agreement

- (a) This document sets out the standard terms and conditions of the agreement that is formed between the Customer and:
- (1) Port Botany Operations Pty Limited (ACN 161 204 342) as trustee of the Port Botany Unit Trust (ABN 25 855 834 182) (**Port Botany Operations**); or
 - (2) Port Kembla Operations Pty Limited (ACN 161 246 582) as trustee of the Port Kembla Unit Trust (ABN 50 132 250 580) (**Port Kembla Operations**),
- as applicable, when a Vessel of the Customer accesses a Common User Wharf or Dedicated Facility at Port Botany or Port Kembla respectively.
- (b) By entering and accessing a Common User Wharf or Dedicated Facility at Port Botany or Port Kembla (as applicable) the Customer agrees to be bound by this agreement without limitation or qualification. If the Customer does not agree to be bound by this agreement, the Customer must not allow any Vessel of the Customer to access or use the Common User Wharf or Dedicated Facility at Port Botany or Port Kembla.

1.2 Definitions and interpretation

- (a) Capitalised terms in this agreement have the meaning given in Schedule 2.
- (b) The rules for the interpretation of this agreement are set out in Schedule 2.

1.3 Joint and several obligations of the entities comprised in the Customer

- (a) Any obligation imposed on the Customer in this agreement must be construed as imposing joint and several liability on the entities comprised in the Customer.
- (b) A reference to the Customer is, unless expressly stated otherwise, a reference to each of the entities

comprised in the Customer separately (so that, for example, a representation or warranty by the Customer is given by each entity comprised in the Customer separately).

2 Term

This agreement commences when a Vessel of the Customer accesses a Port and ends at the conclusion of the Access Period.

3 Customer's obligations

The Customer must:

- (a) comply with, and ensure that its Personnel comply with, the obligations imposed on the Customer in this agreement;
- (b) ensure that its Personnel:
- (1) are subject to and bound by:
 - (A) the limitations, exclusions and qualifications of NSW Ports' liability under this agreement; and
 - (B) the releases given by the Customer in favour of NSW Ports under this agreement,

(Limiting Provisions) to the same extent that the Customer is subject to and bound by the Limiting Provisions under this agreement; and
 - (2) do not bring any claim against NSW Ports that is inconsistent with any of the Limiting Provisions;
- (c) pay to NSW Ports, or ensure that its Personnel pays to NSW Ports, all relevant disbursements, fees and charges payable in connection with the access, occupation or use of a Common User Wharf or Dedicated Facility by any entity comprised in the Customer, including the Port Charges;
- (d) comply with, and ensure that its Personnel comply with, all Legislative Requirements including the requirements in the Regulations with respect to the provision of information to NSW Ports;

- (e) co-operate with, and ensure that its Personnel co-operate with, NSW Ports and all other users of the Port Facilities to ensure compliance with all Legislative Requirements;
- (f) at least 24 hours prior to the expected commencement of the Access Period for a Vessel, provide to NSW Ports a copy of a current Certificate of Entry for the Vessel;
- (g) ensure that the Certificate of Entry referred to in clause 3(f) and the insurances specified in the Certificate of Entry remain in effect for the duration of the Access Period; and
- (h) use best endeavours to ensure that all its Personnel understand and comply with:
 - (1) the security requirements of the Port with respect to the protection of people and property, including the relevant Port Security Plan; and
 - (2) their obligations under MTOFSA.

4 Use of Common User Wharves or Dedicated Facilities

4.1 Permitted Uses

- (a) Subject to clause 12.7(b)(4), the Customer is permitted to use a Common User Wharf or Dedicated Facility (as applicable) for the Permitted Uses for the duration of the Access Period.
- (b) The Customer must not use a Common User Wharf or Dedicated Facility for any purpose during the Access Period other than the Permitted Uses.

4.2 Use subject to this agreement

The Customer acknowledges and agrees that its access to, and occupation and use of, a Common User Wharf or Dedicated Facility for a Permitted Use during the Access Period is subject to, and must be in accordance with, this agreement.

4.3 No warranty as to suitability

The Customer agrees that NSW Ports has made no representation and gives no warranty concerning the adequacy or suitability of any Common User Wharf or Dedicated Facility for the Vessel or the use intended by the Customer.

4.4 No estate or interest

The Customer's rights to access, occupy or use a Common User Wharf or the Dedicated Facility (as applicable) for a Permitted Use for the duration of the Access Period rest in contract only and this agreement does not create or confer upon the Customer any tenancy, estate or other interest in any Common User Wharf or Dedicated Facility.

4.5 No right of exclusive occupation

- (a) The Customer has no right of exclusive occupation or use of a Common User Wharf or Dedicated Facility during the Access Period.
- (b) Without limiting the generality of this clause 4.5, NSW Ports may at any time exercise its rights to, enter, use, possess and enjoy the whole or any part of a Common User Wharf or a Dedicated Facility.

4.6 Access to be exercised in accordance with directions

The Customer's right to occupy, access or use a Common User Wharf or Dedicated Facility for the Permitted Uses is subject to the directions of NSW Ports, the Harbour Master and the Port Authority, which directions may specify the Common User Wharf or Dedicated Facility to which access is permitted, the method of control and the dates and time of control.

4.7 Common User Wharves and Dedicated Facilities may change

The Customer acknowledges that the Common User Wharves and Dedicated Facilities available for access by the Customer may change from time to time in NSW Ports' absolute discretion. If there is a change to access arrangements or the status of the Common User Wharves or Dedicated Facilities (as applicable), NSW Ports will give notice of such change to the Customer or any entity comprised in the Customer.

5 Withdrawal of permission to access, occupy or use

5.1 Withdrawal of permission before Access Period commences

NSW Ports may, acting reasonably, refuse or withdraw permission for a Vessel to access, occupy or use a Common User Wharf (or any part of it) or a Dedicated Facility (or any part of it) respectively if NSW Ports becomes aware of any of the following before the Access Period commences:

- (a) the Customer, any entity comprised in the Customer, or a Related Entity of any entity comprised in the Customer, has committed a default under an agreement with NSW Ports or the Port Authority or failed to pay an amount owed to NSW Ports or the Port Authority by the due date and, as at the date NSW Ports makes a determination under this clause 5.1, the default or failure to pay has not been remedied;
- (b) the Common User Wharf (or any part it) or the Dedicated Facility (or any part of it) is unsuitable for use;
- (c) a relevant direction is given by the Harbour Master or the Port Authority;
- (d) the Vessel is unable to be loaded or unloaded; or
- (e) the Customer does not comply with clause 3(f) or clause 3(g).

5.2 Withdrawal for the purposes of Lay-up

The Customer acknowledges that NSW Ports may:

- (a) with respect to the access, occupation or use of a Common User Wharf or Dedicated Facility, give priority to any Vessel carrying cargo over a Vessel that is Laying-up during an Access Period; and
- (b) refuse or withdraw permission for Laying-up at any time.

5.3 Approved immobilisation

If a Vessel is temporarily immobilised at a Common User Wharf or Dedicated Facility with prior approval of NSW Ports, NSW Ports will provide the Customer with reasonable notice of its requirement that the Vessel vacate the Common User Wharf or Dedicated Facility (as applicable).

5.4 No compensation

- (a) If NSW Ports withdraws permission for use or occupation of, or access to, a Common User Wharf or Dedicated Facility, other than for breach by the Customer of this agreement, NSW Ports will refund to the Customer any monies paid in advance by the Customer in respect of applicable Port Charges for any proposed Access Period that does not proceed, or for the use of the Common User Wharf or Dedicated Facility for which permission for access or use is withdrawn.

- (b) NSW Ports is not liable to pay, and neither the Customer nor the Customer's Personnel are entitled to, any other remedy, compensation or damages for any withdrawal of permission referred to in clause 5.4(a).

6 Port Charges

6.1 Acknowledgment of liability

The Customer must pay, or ensure that its Personnel pays, to NSW Ports the Port Charges in accordance with this agreement.

6.2 Invoices

NSW Ports will give the Customer, an entity comprised in the Customer or the Customer's Personnel, an invoice setting out NSW Ports' calculation of:

- (a) the Port Charges and any other amounts payable by the Customer or the Customer's Personnel in connection with this agreement; and
- (b) the GST Amount applicable to the Port Charges and other amounts specified in the invoice.

6.3 Payment of Port Charges

The Customer must pay, or must ensure that its Personnel pays, the amount of an invoice issued by NSW Ports under this agreement by the due date for payment specified on the invoice or, if a due date for payment is not specified on the invoice:

- (a) for an invoice in relation to Port Botany, within twenty-eight (28) days after the Service Date; and
- (b) for an invoice in relation to Port Kembla, within fourteen (14) days after the date of the relevant invoice.

6.4 Payments

The Customer must ensure that all payments required to be made under this agreement are made by:

- (a) direct transfer of immediately available funds to the bank account nominated in writing by NSW Ports by the due date for payment; or
- (b) any other method approved by NSW Ports in writing no later than five (5) Business Days before the due date for payment.

6.5 Costs of compliance with certain Legislative Requirements

If NSW Ports reasonably incurs costs as a result of complying with any Legislative Requirement in relation to a Vessel, including costs incurred in connection with the provision of security for the protection of people and property or other services related to the protection of people and property, then the Customer is liable to reimburse NSW Ports such costs and those costs are recoverable by NSW Ports as a debt due and payable by the Customer:

- (a) for an invoice in relation to Port Botany, within twenty-eight (28) days after the Service Date; and
- (b) for an invoice in relation to Port Kembla, within fourteen (14) days after the date of the relevant invoice.

6.6 Interest

- (a) NSW Ports may charge the Customer interest on any amount payable by the Customer under this agreement that is not paid by the due date. Such interest will accrue daily at the Default Rate from (and including) the due date until that amount is paid in full.
- (b) If the Customer or any entity comprised in the Customer disputes an invoice and has given NSW Ports a Dispute Notice then the Customer is still liable to pay any undisputed amount in the invoice in accordance with clause 6.3. The dispute must be determined in accordance with the dispute resolution procedures in clause 27.
- (c) NSW Ports may charge the Customer or any entity comprised in the Customer interest in accordance with clause 6.6(a) on any disputed amount that is determined or agreed as owing by the Customer to NSW Ports. Any agreed or determined amount and applicable interest must be paid within five (5) Business Days after the date of the resolution of the relevant dispute.
- (d) If an amount paid by the Customer or the Customer's Personnel to NSW Ports under this agreement is determined or agreed not to have been owed to NSW Ports, such amount and any interest paid by the Customer in respect thereof must be repaid by NSW Ports to an entity comprised in the Customer within five (5) Business Days after the date of such determination or agreement.

7 Security Deposit

7.1 Requirement to provide Security Deposit

- (a) The Customer acknowledges NSW Ports' right to require the Customer or any entity comprised in the Customer to provide the Security Deposit to NSW Ports.
- (b) The Customer acknowledges and agrees that NSW Ports may, at any time, issue a notice to the Customer or any entity comprised in the Customer requesting the Customer or an entity comprised in the Customer provide:
 - (1) a Security Deposit;
 - (2) a replacement Security Deposit in a greater amount than the amount of the Security Deposit held by NSW Ports at the relevant time, having regard to the matters contemplated in clause 7.2(b); or
 - (3) a replacement Security Deposit,

(a Security Deposit Notice).

Following the delivery of a Security Deposit Notice, the Customer or an entity comprised in the Customer must provide the Security Deposit referred to in the Security Deposit Notice to NSW Ports on or before the date that is ten (10) Business Days after the delivery of the Security Deposit Notice.

- (c) For the avoidance of doubt, and without limiting clause 7.1(b), NSW Ports may issue a Security Deposit Notice up to thirty (30) days in advance of the expiry date of an existing Security Deposit.
- (d) If the Customer or an entity comprised in the Customer does not provide a replacement Security Deposit within the time required under clause 7.1(b), NSW Ports may draw down on the existing Security Deposit in full and NSW Ports will hold the proceeds as a Security Deposit for the Customer and pay the amount remaining at the relevant time to the Customer or an entity comprised in the Customer:
 - (1) when the Customer or an entity comprised in the Customer provides a replacement Security Deposit to NSW Ports for the amount stated in the Security Deposit

- Notice referred to in clause 7.1(b); or
- (2) otherwise in accordance with clause 7.4(a).
- (e) For the avoidance of doubt, if NSW Ports holds an amount under clause 7.1(d), that amount will be deemed to be the Security Deposit and NSW Ports will be entitled to draw on it in accordance with clause 7.3.

7.2 Security Deposit

- (a) The amount of the Security Deposit will be determined by NSW Ports, in its sole discretion.
- (b) In determining the amount of the Security Deposit, NSW Ports may have regard to such matters as it deems relevant in its sole discretion, including:
 - (1) the creditworthiness of the entities comprised in the Customer and their Related Entities;
 - (2) the amount that is three (3) times the average monthly Port Charges billed by NSW Ports to the Customer or the Customer's Personnel over the twelve (12) months comprising NSW Ports' most recent financial year;
 - (3) any incident that NSW Ports considers may give rise to a liability on the part of the Customer, an entity comprised in the Customer or the Customer's Personnel to NSW Ports; and
 - (4) the potential liabilities of the Customer or any entity comprised in the Customer to NSW Ports under this agreement or Part 5 of the Act.
- (c) NSW Ports may review the amount of the Security Deposit at any time, in its sole discretion.

7.3 Entitlement to Security Deposit

- (a) NSW Ports will be entitled to draw down on the Security Deposit and retain the proceeds to such extent as NSW Ports considers (acting reasonably) will compensate NSW Ports for any Loss that is or will be suffered by NSW Ports as a result of the Customer failing to:

- (1) pay the Port Charges, GST Amounts or any other sums actually or contingently owing under this agreement when due; or
- (2) pay any interest calculated in accordance with clause 6.6 owing on overdue amounts.

Any such draw down is without prejudice to any other rights NSW Ports may have against the Customer or any entity comprised in the Customer at law.

- (b) For the avoidance of doubt, the amount NSW Ports is entitled to draw down includes such amount as is required to satisfy any GST gross-up required to be paid to NSW Ports under clause 24 in respect of the draw down of the Security Deposit.
- (c) The parties acknowledge that the amount of the Security Deposit is a genuine pre-estimate of the costs and losses NSW Ports will suffer if an event contemplated by clause 7.3(a) occurs.
- (d) If NSW Ports draws down on a Security Deposit, NSW Ports must promptly notify the entity comprised in the Customer that provided the Security Deposit that it has drawn down on the Security Deposit.

7.4 Return of Security Deposit

NSW Ports must return to the entity comprised in the Customer that provided a Security Deposit:

- (a) the Security Deposit if this agreement has expired or otherwise been terminated and:
 - (1) the Customer has performed all of the obligations required to be performed or procured by it under this agreement or such obligations have been waived by NSW Ports; and
 - (2) any and all disputes between the parties (or between NSW Ports and an entity comprised in the Customer) arising out of or in connection with this agreement have been fully and finally resolved; or
- (b) a replacement Security Deposit if the Customer or an entity comprised in the Customer has provided a replacement Security Deposit or a Security Deposit in a greater amount in accordance with clause 7.1(b).

8 Events of Default

8.1 Events of Default

- (a) On the occurrence of any of the events listed in clauses 8.1(b) to 8.1(e) (each an **Event of Default**) (whether or not it is continuing), in addition to any other rights of NSW Ports provided by law:
- (1) all unpaid invoices issued by NSW Ports to the Customer or an entity comprised in the Customer;
 - (2) all Ports Charges and related GST Amounts in respect of which an invoice has not yet been issued by NSW Ports; and
 - (3) any other sums actually or contingently owing under this agreement,
- (Total Amounts Outstanding)** will be deemed immediately due and payable and the Customer must pay the Total Amounts Outstanding within five (5) Business Days of:
- (4) in respect of the amount referred to in clause 8.1(a)(1), the Event of Default; or
 - (5) in respect of an amount referred to in clauses 8.1(a)(2) or 8.1(a)(3), NSW Ports giving notice to the Customer or an entity comprised in the Customer of the amount, including by, if applicable, issuing an invoice.
- (b) Any entity comprised in the Customer or a Related Entity of any entity comprised in the Customer:
- (1) ceases, suspends or threatens to cease or suspend the conduct of all or a substantial part of its business or disposes of or threatens to dispose of a substantial part of its assets;
 - (2) stops or suspends or threatens to stop or suspend payment of all or a class of its debts;
 - (3) is insolvent within the meaning of section 95A of the Corporations Act;
 - (4) must be presumed by a court to be insolvent by reason of an event set out in section 459C(2) of the Corporations Act;
 - (5) fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act);
 - (6) has an administrator appointed or any step preliminary to the appointment of an administrator is taken;
 - (7) has a liquidator, professional liquidator, controller (within the meaning of section 9 of the Corporations Act) or similar officer appointed to all or any of its property;
 - (8) has proceedings commenced, a resolution passed or proposed in a notice of meeting, an application to, or order of, a court made or other steps taken against or in respect of it for its winding up, administration, deregistration or dissolution or for it to enter an arrangement, compromise or composition with or assignment for the benefit of its creditors, a class of them or any of them;
 - (9) proposes or effects a reorganisation, moratorium, deed of company arrangement or other administration involving one or more of its creditors;
 - (10) is the subject of the levy or enforcement of a Security or a distress, attachment or other execution over all or any of the assets and undertaking; or
 - (11) is the subject of any action taken by the Australian Securities and Investments Commission (**ASIC**) with a view to deregistration or dissolution of the relevant entity, or is the subject of an application to ASIC that any such action be taken.
- (c) Anything analogous to anything referred to in clause 8.1(b), or which has substantially similar effect, occurs with respect to an entity comprised in the Customer or a Related Entity of an entity comprised in the Customer under any overseas law or any law which commences or is amended after this agreement commences.
- (d) The Customer or any entity comprised in the Customer commits a material breach of this agreement.

- (e) The Customer or any entity comprised in the Customer fails to provide a Security Deposit or a replacement Security Deposit in accordance with clause 7.1(b).

8.2 Right to withhold Services

- (a) The Customer acknowledges NSW Ports' right to withhold or withdraw the provision of services or facilities under section 72 of the Act.
- (b) If the Customer:
 - (1) fails to pay any Port Charges, GST Amounts, any other amount payable by the Customer to NSW Ports or any interest calculated in accordance with clause 6.6 owing on overdue amounts to NSW Ports when due and either:
 - (A) the Security Deposit held by NSW Ports is insufficient to cover the amount unpaid; or
 - (B) NSW Ports does not hold a Security Deposit at the relevant time under this agreement; or
 - (2) fails to provide:
 - (A) a replacement Security Deposit; or
 - (B) a Security Deposit in a greater amount,
 - when requested by NSW Ports under clause 7.1,

NSW Ports may give the Customer or any entity comprised in the Customer a notice (**Default Notice**) specifying the non-compliance and that some or all of the services will be withheld or withdrawn if the Customer has not remedied the failure to NSW Ports' reasonable satisfaction by the date that is twenty-one (21) days after the date of the Default Notice (**Cure Date**).

- (c) If the Customer has not remedied the non-compliance set out in the Default Notice by the Cure Date, NSW Ports may withhold or withdraw the provision of services to the Customer and the Customer's Personnel until such time as the Event of Default is remedied to NSW Ports' reasonable satisfaction.

9 Cargo manifests and documentation

9.1 Inward Manifest

The Customer must, or must ensure that its Personnel:

- (a) with respect to a Vessel that enters Port Botany, by the third working day after the Vessel enters Port Botany;
- (b) with respect to a Vessel that leaves Port Kembla, by the first working day after the Vessel leaves Port Kembla; or
- (c) if, at the relevant time the timeframe specified in the Regulations for submitting a manifest in respect of goods discharged from a Vessel at Port Botany of Port Kembla differs from the timeframe specified in clause 9.1(a) or 9.1(b), the timeframe specified in the Regulations,

submit electronically to NSW Ports an accurate, complete and correctly formatted manifest in the form of an Approved Manifest for all cargo discharged or intended to be discharged (as applicable) at the Port which must include:

- (d) the details required under any Legislative Requirements including under section 16(5) of the Regulations;
- (e) without limiting clause 9.1(d), accurate and complete particulars of the cargo (including empty containers) which are intended to be discharged or which have been discharged (as applicable) at the Port; and
- (f) all other information prescribed by NSW Ports from time to time.

9.2 Outward Manifest

The Customer must, or must ensure that its Personnel:

- (a) with respect to a Vessel that leaves Port Botany, by the end of the eighth working day after the Vessel leaves Port Botany;
- (b) with respect to a Vessel that leaves Port Kembla, by the end of the first working day after the Vessel leaves Port Kembla; or
- (c) if, at the relevant time the timeframe specified in the Regulations for submitting a manifest in respect of goods loaded onto a Vessel in respect of Port Botany of Port Kembla differs from the timeframe specified in clause 9.2(a) or 9.2(b),

the timeframe specified in the Regulations,

submit electronically to NSW Ports, an accurate, complete and correctly formatted manifest in the form of an Approved Manifest for all cargo on the Vessel which must include:

- (d) the details required under any Legislative Requirements including under section 17(5) of the Regulations;
- (e) without limiting clause 9.2(d), accurate and complete particulars of the cargo loaded onto the Vessel; and
- (f) all other information prescribed by NSW Ports from time to time.

9.3 AHECC

- (a) The Customer must, if requested to do so by NSW Ports, in respect a Vessel that uses a Common User Wharf or Dedicated Facility at Port Botany, submit electronically to NSW Ports an Inward Manifest or Outward Manifest (as applicable) which complies with clause 9.1 or clause 9.2 (as applicable) and the following requirements:
 - (1) the description of the goods on the Vessel is consistent with the Harmonized System;
 - (2) Acceptable Code Values are specified in the 'Australian Harmonized Export Commodity Classification' (or 'AHECC') field of the 'Additional Product ID' (or 'PIA') segment for all full containers; and
 - (3) the 'Additional Product ID' (or 'PIA') segment is specified at least once for each 'Goods Item Details' (or 'GID') group specified in the Inward Manifest or Outward Manifest (as applicable).
- (b) The Customer acknowledges that if it, or its Personnel, includes multiple 'Additional Product ID' (or 'PIA') segments for a 'Goods Item Details' (or 'GID') group specified in an Approved Manifest, then NSW Ports will only use the first 'Additional Product ID' (or 'PIA') value in the 'Goods Item Details' (or 'GID') group loop.

9.4 Additional information

The Customer must lodge with NSW Ports any additional information reasonably requested by NSW Ports concerning any cargo referred to in an Inward Manifest or an Outward Manifest within forty-eight (48) hours of a written request to do so.

9.5 New EDIs

- (a) The Customer must, and must ensure that its Personnel, comply with NSW Ports' requirements in relation to the development and configuration of any new EDI between any entity comprised in the Customer or its Personnel and NSW Ports.
- (b) The Customer acknowledges, and will ensure that its Personnel acknowledge, that all new EDIs between the any entity comprised in the Customer or its Personnel and NSW Ports must be tested by NSW Ports before being sent into its production environment or used in a live system.

9.6 No cargo discharged or loaded

If a Vessel does not discharge or load any cargo whilst at a Port, the Customer must, within forty-eight (48) hours after the Vessel departs the Port, give NSW Ports written notice that no cargo was discharged or loaded (as applicable).

10 Acknowledgements by the Customer

10.1 Rights to access, occupy and use a Common User Wharf or Dedicated Facility are personal

The Customer acknowledges and agrees that the rights conferred upon it by this agreement to access, occupy and use a Common User Wharf or Dedicated Facility may not be transferred or assigned by the Customer or any entity comprised in the Customer to any other party.

10.2 Acknowledgment of responsibility

The Customer acknowledges and agrees that it is responsible for the acts and omissions of its Personnel concerning the access to and occupation and use of a Common User Wharf or Dedicated Facility.

10.3 General indemnities by the Customer

The Customer indemnifies NSW Ports against any Loss that may be incurred or

sustained by NSW Ports arising out of, or as a consequence of:

- (a) any access, occupation or use of a Common User Wharf or Dedicated Facility by the Customer, any entity comprised in the Customer or the Customer's Personnel;
- (b) the carriage of cargo by the Customer or an entity comprised in the Customer;
- (c) any breach of, or default under, this agreement by the Customer or an entity comprised in the Customer; or
- (d) any negligence or wilful misconduct of the Customer, an entity comprised in the Customer or the Customer's Personnel,

including any:

- (e) loss of, or damage to, the property of NSW Ports;
- (f) claims by any person against NSW Ports in respect of personal injury or death or loss of, or damage to, any property; and
- (g) Loss (other than, subject to clause 10.4, Consequential Loss) incurred by NSW Ports due to disturbance to, or interference with, NSW Ports' use of a Port or the carrying on of its business at a Port.

The Customer's liability to indemnify NSW Ports is reduced proportionately to the extent that an act or omission of NSW Ports contributed to the Loss.

10.4 Indemnity by the Customer for claims by Customer's Personnel

The Customer indemnifies NSW Ports against any Loss that may be incurred or sustained by NSW Ports arising out of, or as a consequence of any claim by the Customer's Personnel against NSW Ports to the extent that the claim is inconsistent with any of the Limiting Provisions.

10.5 Specific environmental indemnity by the Customer

The Customer indemnifies NSW Ports for Losses (including Consequential Losses) incurred by NSW Ports arising from any Pollution Incident, Environmental Hazard or Contamination caused by the Customer, an entity comprised in the Customer or the Customer's Personnel without prejudice to any defences, exclusions from liability and rights of limitation provided by law.

10.6 Responsibility for damage to the Common User Wharves and Dedicated Facilities

The Customer is liable for any and all loss or damage to the Common User Wharves or Dedicated Facilities, arising from or in connection with any access to or occupation or use of, a Common User Wharf or Dedicated Facility by the Customer, an entity comprised in the Customer or the Customer's Personnel.

10.7 Cost of repairing damage

The cost of repairing, or procuring the repair of, any damage (excluding fair wear and tear) which, in the reasonable opinion of NSW Ports, arises from or is in connection with any access to, occupation or use of, a Common User Wharf or Dedicated Facility by the Customer, an entity comprised in the Customer or the Customer's Personnel must be borne by the Customer or, if such costs are incurred by NSW Ports, the Customer must reimburse NSW Ports such costs which are recoverable by NSW Ports as a debt due and payable by the Customer.

10.8 Payment for damage to the Common User Wharves or Dedicated Facilities

The Customer must pay to NSW Ports the reasonable cost of any repairs referred to in clause 10.7 carried out, or procured by, NSW Ports within twenty-eight (28) days after written demand is made by NSW Ports for such payment.

11 Compliance with Legislative Requirements and directions

11.1 Legislative Requirements

The Customer must, and must ensure that its Personnel:

- (a) comply with all Legislative Requirements; and
- (b) without limiting clause 11.1(a), pay any charges or other amounts payable to the Port Authority from time to time.

11.2 Compliance with directions

The Customer must comply with, and ensure its Personnel comply with, any directions given by:

- (a) the Harbour Master;
- (b) the Port Authority;
- (c) NSW Ports' Security Manager;
- (d) NSW Ports' Security Contractor;

- (e) NSW Ports; and
- (f) any officer authorised by statute to give directions including pursuant to the *Marine Safety Act 1998* (NSW),

in connection with this agreement or the access to or occupation or use of the Port Facilities, Common User Wharves or Dedicated Facilities by the Customer, any entity comprised in the Customer or the Customer's Personnel.

12 Environmental obligations

12.1 Obligation not to pollute

The Customer must not and must ensure that its Personnel do not:

- (a) cause a Pollution Incident;
- (b) cause an Environmental Hazard; or
- (c) disturb, exacerbate or facilitate the migration of any existing Contamination,

at, or in the vicinity of, the Port Facilities, Common User Wharves or Dedicated Facilities.

12.2 Environmental incident reporting

Without limiting the Customer's obligations under clause 15, any entity comprised in the Customer must immediately, and no later than one (1) hour after the entity or its Personnel becomes aware of any Pollution Incident, give NSW Ports and the Port Authority written notice of the occurrence of such a Pollution Incident.

12.3 Obligation to clean up

- (a) The Customer must, at its expense, clean up and otherwise address or rectify a Pollution Incident and the cause of a Pollution Incident in accordance with any direction issued by NSW Ports and within the timeframe specified in the direction.
- (b) NSW Ports may, at its discretion and at the Customer's cost, engage an environmental auditor in respect of a Pollution Incident.

12.4 Statutory notices and legal proceedings

Within forty-eight (48) hours after an entity comprised in the Customer or its Personnel receives any notices or legal proceedings in respect of the impact of the activities of any entity comprised in the Customer or their respective Personnel on the Environment over, under, on, in or in the vicinity of the Port Facilities, Common User Wharves, Dedicated Facilities or the Ports, including

notices or proceedings issued by the NSW Environment Protection Authority or any other statutory or governmental body, the Customer must give written notice to NSW Ports and the Port Authority of the issue of that notice or legal proceedings, together with a copy of such notice or proceedings.

12.5 Obligation to comply with statutory notice

The Customer must comply with any and all statutory notices referred to in clause 12.4 and is liable for any costs of compliance with such statutory notices.

12.6 Obligations regarding storage of dangerous goods

The Customer and the Customer's Personnel must not, without NSW Ports' prior written consent, use or allow the Port Facilities, Common User Wharves, Dedicated Facilities or Ports to be used for the storage (whether temporary or permanent) of Dangerous Goods or any other goods the storage of which is prohibited by the Insurance Council of Australia Ltd in non-hazardous stores, provided that the consent of the NSW Ports will not be required if the goods are stored and handled strictly in accordance with the provisions of all Legislative Requirements.

12.7 Rights of NSW Ports

- (a) Without limiting this clause 12, if NSW Ports reasonably believes that:
 - (1) a Pollution Incident has occurred (or is likely to occur); or
 - (2) a condition of Contamination or Environmental Hazard has arisen or is likely to arise,
 - as a result of, or in connection with, any act or omission of an entity comprised in the Customer or the Customer's Personnel, NSW Ports may issue a direction requiring that specified corrective action be undertaken by the Customer to the satisfaction of NSW Ports and within the timeframe specified by NSW Ports.
- (b) Without limiting this clause 12, if any entity comprised in the Customer fails to:
 - (1) comply with a direction under clause 12.7(a) to the satisfaction of NSW Ports; or

- (2) clean up and otherwise address or rectify a Pollution Incident, Contamination or Environmental Hazard or the cause of a Pollution Incident, Contamination or Environmental Hazard to the satisfaction of NSW Ports, then NSW Ports may either:
 - (3) itself undertake the corrective action and recover its costs of undertaking the corrective action as a debt due from the Customer to NSW Ports; or
 - (4) deny the Customer and its Personnel the continuance of any right it would otherwise have had under this agreement, including the right to remain at the Port.
- (c) The Customer must pay to NSW Ports the costs referred to in clause 12.7(b)(3) within twenty-eight (28) days after written demand is made by NSW Ports for such payment.

13 Safety

13.1 Work health and safety responsibility

The Customer acknowledges that work health and safety on a Vessel during the Access Period is the Customer's responsibility.

13.2 Work health and safety obligations

The Customer must:

- (a) use best endeavours to ensure that its Personnel are not exposed to conditions or practices that have the likely potential to cause personal injury or property damage;
- (b) fully comply with all WHS Laws;
- (c) use best endeavours to ensure that its Personnel comply with all work health and safety requirements, including the work health and safety management plan and induction training (if any) for the Common User Wharves or Dedicated Facilities as applicable; and
- (d) immediately notify NSW Ports of any incident or dangerous occurrence at the Port Facilities, Common User Wharves or Dedicated Facilities which is notifiable to the SafeWork NSW pursuant to the provisions of any WHS Law.

13.3 Statutory notices and legal proceedings

Within forty-eight (48) hours after any entity comprised in the Customer receives any notices or legal proceedings in respect of the impact of the activities of any entity comprised in the Customer on human health and safety, including notices or proceedings issued by a statutory or governmental body, the Customer must give written notice to NSW Ports and the Port Authority of the issue of that notice or legal proceedings, together with a copy of such notice or proceedings.

13.4 Obligation to comply with statutory notice

The Customer must comply with any and all statutory notices referred to in clause 13.3 and is liable for any costs of compliance with such statutory notices.

14 Emergencies

The Customer must, in the event of any emergency, accident or security situation, provide NSW Ports and any other relevant agencies, including NSW Police, the Australian Federal Police and medical services, with reasonable and prompt access to the Vessel.

15 Notification of damage or injury

15.1 Immediate notification to NSW Ports

As soon as practicable after any entity comprised in the Customer or its Personnel becomes aware of any:

- (a) damage to the Port Facilities, Common User Wharves or Dedicated Facilities;
- (b) injury to any person at, or in the vicinity of, the Port Facilities, Common User Wharves or Dedicated Facilities; or
- (c) circumstances likely to cause any such damage or injury,

the Customer must notify NSW Ports and the Port Authority of such damage, injury or circumstances.

15.2 Detailed incident report

Within seventy-two (72) hours after the Customer gives notice in accordance with clause 15.1 the Customer must lodge a detailed written report with NSW Ports and the Port Authority in respect of the accident, event or other circumstances referred to in clause 15.1.

16 Port security

16.1 Compliance with MTOFSA

The Customer must comply with, and must ensure that its Personnel comply with, the requirements of the MTOFSA.

16.2 Acknowledgment of a security regulated port

The Customer acknowledges that each Port is a 'security regulated port' within the meaning of the MTOFSA and that security measures required by the MTOFSA will be audited by various agencies, including NSW Ports and the Department of Infrastructure, Regional Development and Cities and their appointees.

16.3 Financial penalties

The Customer acknowledges that financial penalties apply for breaches of the MTOFSA.

16.4 Compliance with access restrictions

- (a) The Customer acknowledges that it is an offence under the MTOFSA for an unauthorised person to enter a Landside Restricted Zone or for an unauthorised vehicle to enter or remain in a Landside Restricted Zone.
- (b) The Customer must ensure that its Personnel take all necessary steps to ensure that an unauthorised person, vehicle or vessel does not enter or remain in a Restricted Area.

16.5 Understanding security requirements

The Customer must comply with, and ensure that its Personnel understand and comply with, NSW Ports' security requirements.

16.6 Access to Vessels

The Customer must, upon request from NSW Ports at any time during the Access Period, give:

- (a) authorised Personnel of NSW Ports; and
- (b) other persons authorised by NSW Ports under the *Marine Safety Act 1998* (NSW),

access to the Vessel, subject to:

- (c) those persons carrying appropriate photo ID at all times; and

- (d) compliance by NSW Ports with the reasonable requirements of the master of the Vessel.

17 Common User Wharves

17.1 Condition

The Customer must ensure that the Common User Wharves are left in the same condition and state as at the commencement of the Access Period.

17.2 Plant and equipment

The Customer must ensure that NSW Ports' plant and equipment, if used by any entity comprised in the Customer or the Customer's Personnel during the Access Period, is left in the same condition and state as at the commencement of the Access Period.

17.3 Failure to maintain

If the Customer fails to leave the Common User Wharves in the condition required by clause 17.1, NSW Ports may:

- (a) direct the Customer to return the Common User Wharves to the condition required by clause 17.1; and
- (b) carry out or cause to be carried out any litter removal, restoration, remediation, cleaning, repairs and other similar work as NSW Ports thinks fit.

The reasonable cost of any work carried out by NSW Ports under clause 17.3(b) will be a debt due and payable from the Customer to NSW Ports and must be paid by the Customer within twenty-eight (28) days of written demand by NSW Ports.

17.4 No alterations

The Customer must not make any alterations or additions to the Common User Wharves.

17.5 No installation

The Customer must not install fixed plant or equipment including any fuel storage tanks on, over or under the Common User Wharves.

17.6 No guarantee of immediate berth

A Vessel will be permitted to berth at the Common User Wharves and the Customer will be granted access to use the Common User Wharves on the dates and times

determined by NSW Ports in its discretion in accordance with the dictates of port operations and usage and as notified to the Customer.

18 Licensed Service Providers

The Customer must not engage a third party to provide Ancillary Services unless that third party is a Licensed Service Provider.

19 Supply of water

19.1 Water for personal consumption

Any fresh water supplied by NSW Ports to Vessels will be for the purpose of personal consumption by the Vessel crew and visitors to the Vessel (e.g. drinking, washing and cooking) and the Customer must ensure that the water supplied is not used for industrial or commercial purposes, including washing down decks or for ballast purposes.

19.2 Hoses

The Customer must ensure that NSW Ports' fresh water hoses and equipment are properly attached to the existing fresh water supply fixtures located at the wharf apron.

19.3 Care of equipment

The Customer must ensure that any person engaged by or on behalf of the Customer to collect water from NSW Ports' fresh water supply takes good care of NSW Ports' water supply equipment and returns such equipment promptly after use in the same condition as supplied. Without limiting any rights of NSW Ports under clause 10, the Customer is responsible for any damage to fresh water supply equipment and will bear the cost of any repair or replacement of such equipment.

19.4 Water charges

The Customer must pay NSW Ports for the use of fresh water at Common User Wharves and Dedicated Facilities in accordance with clause 6.

20 Electricity

20.1 Electricity charges

The Customer must pay NSW Ports for the use of electricity at Common User Wharves and Dedicated Facilities in accordance with clause 6.

21 Telephone services

The Customer must, at its own cost, ensure that Australian telephone services are

provided to a Vessel while the Vessel is berthed at a Common User Wharf or Dedicated Facility.

22 Insurance

22.1 P&I insurance

- (a) With respect of each Vessel that enters the Port, the Customer warrants that the Vessel, for the duration of the Access Period, is entered with a P&I Club for:
- (1) P&I Cover;
 - (2) hull and machinery liabilities;
 - (3) pollution liabilities; and
 - (4) oil spill Liabilities,
- on the terms commonly provided by the 'International Group of Protection and Indemnity Clubs' for a vessel of a type which is the same or substantially similar to the Vessel type and for an amount not less than the minimum amount calculated in accordance with the *Convention on Limitation of liability for Maritime Claims 1976*.
- (b) If requested to do so by NSW Ports with respect to a Vessel, any entity comprised in the Customer must promptly provide to NSW Ports a copy of any insurance certificate that is required under a Legislative Requirement to be held on board the Vessel.
- (c) If any entity comprised in the Customer fails to comply with a request by NSW Ports under clause 22.1(b) then the Customer:
- (1) authorises NSW Ports to obtain a copy of the insurance certificate referred to in the request from the relevant regulatory or enforcement authority; and
 - (2) agrees to promptly provide the relevant regulatory or enforcement authority with any consent or permission as it may require in order to provide the relevant insurance certificate to NSW Ports.
- (d) If an incident occurs and NSW Ports considers that the incident may give rise to a liability on the part of any entity comprised in the Customer or the Customer's Personnel to NSW

Ports then NSW Ports may request that the Customer:

- (1) promptly provides, or procures the Customer's Personnel to provide, to NSW Ports a letter of indemnity or undertaking in respect of the incident;
 - (2) provides, in accordance with clause 7.1(b)(2), a Security Deposit in a greater amount than the amount of the Security Deposit held by NSW Ports at the relevant time; and
 - (3) procures the P&I Club identified in the relevant Vessel's Certificate of Entry to provide to NSW Ports security, in a form, for an amount and on terms determined by NSW Ports acting reasonably, in respect of the potential liability of the Customer, any entity comprised in the Customer or the Customer's Personnel with respect to the incident.
- (e) The Customer must comply with any request by NSW Ports under clause 22.1(d).
- (f) If the Customer or any entity comprised in the Customer seeks to access a Common User Wharf (or any part of it) or a Dedicated Facility (or any part of its) with a Vessel insured by a P&I club which is not a member of the 'International Group of Protection & Indemnity Clubs', then before the Vessel accesses the relevant Port the Customer must, or must procure that its Personnel, give NSW Ports a copy of any certificates of insurance that cover the Vessel and NSW Ports retains an absolute discretion to refuse access to a Port if it is not satisfied with the adequacy of the insurance. The Customer acknowledges that this clause 22.1(d) does not in any way limit the Customer's obligations under clause 3(f) or clause 3(g) or NSW Ports' rights under clause 5.1.

23 Release

Notwithstanding anything contained in this agreement, the Customer releases, and must ensure that its Personnel release, NSW Ports from all Loss which the Customer or any entity comprised in the Customer may have now or in the future for any loss, damage to property or injury to persons, of whatever nature arising directly or indirectly as a consequence of:

- (a) industrial disputes, restraints of labour, strikes, riots, civil commotion,

lock outs or stoppages (whether protect or unprotected industrial action) whether involving NSW Ports' Personnel or not;

- (b) acts of terrorists, insurgents, war, other hostilities or similar disturbances;
- (c) actions, orders, directions, instructions or requirements of any lawful authority or any person purporting to act on behalf of such authority;
- (d) natural, abnormal or unusual occurrences including earthquake, lightning, flood, fire, adverse sea conditions or adverse weather conditions;
- (e) interruption or disruption to the supply of electricity, gas, water or telecommunication services to the relevant NSW Ports facilities other than those caused by a wrongful act, fault or negligence of NSW Ports; and
- (f) any other cause that NSW Ports could not avoid or prevent by the exercise of reasonable care.

24 GST

24.1 Interpretation

Words or expressions used in this clause 24 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause 24.

24.2 Consideration is GST exclusive

Any consideration to be paid or provided to for a supply made under or in connection with this agreement unless specifically described in this agreement as 'GST inclusive', does not include an amount on account of GST.

24.3 Gross up of consideration

Despite any other provision in this agreement, if a party (**Supplier**) makes a supply under or in connection with this agreement on which GST is imposed (not being a supply the consideration for which is specifically described in this agreement as 'GST inclusive'):

- (a) the consideration payable or to be provided for that supply under this agreement but for the application of this clause 24.3 (**GST exclusive consideration**) is increased by, and the recipient of the supply (**Recipient**) must also pay to the Supplier, an amount equal to the

GST exclusive consideration multiplied by the prevailing rate of GST (**GST Amount**); and

- (b) subject to clause 24.5, the GST Amount must be paid to the Supplier by the Recipient without set off, deduction or requirement for demand, at the same time as the GST exclusive consideration is payable or to be provided.

24.4 Reimbursements (net down)

If a payment to a party (or an entity comprised in a party) under this agreement is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party (or an entity comprised in that party), then the payment will be reduced by the amount of any input tax credit to which that party (or an entity comprised in that party) is entitled in respect of that loss, cost or expense.

24.5 Tax invoices

The Recipient need not pay the GST Amount in respect of a taxable supply made under or in connection with this agreement until the Supplier has given the Recipient a tax invoice in respect of that taxable supply.

25 Notices

- (a) Any notice or other communication in relation to this agreement may only be given by the Customer or an entity comprised in the Customer to NSW Ports if the communication is:
 - (1) in writing and addressed to NSW Ports and delivered in person to the delivery address, sent by post to the postal address or sent by email to the email address, specified for the relevant Port in item 1 of Schedule 1; or
 - (2) an Inward Manifest or Outward Manifest, sent by email to the email address specified for the relevant Port in item 3 of Schedule 1.
- (b) NSW Ports may give a notice or communication in relation to this agreement to the Customer or any entity comprised in the Customer in such form, by such method and to such address as NSW Ports, acting reasonably, may determine.

26 Trustee limitation

- (a) Port Botany Operations or Port Kembla Operations (as applicable) (**Trustee**) enters into this agreement

solely in its capacity as trustee of the Port Botany Unit Trust (**PBUT**) or the Port Kembla Unit Trust (**PKUT**) (as applicable) and in no other capacity.

- (b) The parties acknowledge that the Trustee incurs the Trustee's liabilities solely in its capacity as trustee of the PBUT or PKUT (as applicable) and agree that (to the maximum extent permitted by law) the Trustee will cease to have trustee's liability if the Trustee ceases for any reason to be trustee of the PBUT or PKUT (as applicable).
- (c) Subject to clause 26(e), the Trustee's liability may be enforced against the Trustee only to the extent to which the Trustee is actually indemnified in respect of the Trustee's liability out of the property of the PBUT or PKUT (as applicable).
- (d) Subject to clause 26(e), no person will be entitled to:
 - (1) claim from or commence proceedings against the Trustee in respect of any trustee's liability in any capacity other than as trustee of the PBUT or PKUT (as applicable);
 - (2) enforce or seek to enforce any judgment in respect of any trustee's liability against any property of the Trustee other than property held by the Trustee as trustee of the PBUT or PKUT (as applicable);
 - (3) take any steps to procure or support the appointment of a liquidator, administrator or any other similar office holder to the Trustee on the basis of a trustee's liability, or prove in any liquidation, administration or arrangement of or affecting the Trustee; or
 - (4) in respect of a trustee's liability, appoint or take any steps to procure or support the appointment of a receiver or receiver and manager to any property of the Trustee, other than property which is held by it in its capacity as trustee of the PBUT or PKUT (as applicable).
- (e) The restrictions in clauses 26(c) and 26(d) do not apply to any Trustee's liability to the extent to which there is, whether under the constitution of PBUT or PKUT (as applicable) or by

operation of law, a reduction in the extent of the Trustee's indemnification, or in respect of which the Trustee is not entitled to be indemnified, out of the property of the PBUT or PKUT (as applicable), as a result of the Trustee's fraud, wilful misconduct, wilful default, negligence or breach of trust in the performance of its duties as trustee of the PBUT or PKUT (as applicable).

- (f) This limitation of the Trustee's liability applies despite any other provisions of this agreement and extends to all trustee's liabilities of the Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this agreement.

27 Dispute resolution

27.1 Notice of dispute

If a dispute or difference (a **dispute**) between NSW Ports and the Customer or any entity comprised in the Customer arises out of or in connection with the agreement, the subject matter of this agreement or use of the Port Facilities, Common User Wharves or Dedicated Facilities, including a dispute:

- (a) at law or in equity; or
(b) under statute,

then, if a party desires to pursue the dispute, that party must deliver to the other party a written notice of dispute adequately identifying and providing details of the dispute (**Dispute Notice**).

27.2 Continue to perform the agreement

Notwithstanding the existence of a dispute, NSW Ports and the Customer continue to perform their respective obligations under the agreement, and the Customer must comply with clause 6.

27.3 Further steps before proceeding

Within seven (7) days after a Dispute Notice is served, the parties must confer at least once to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference each party will be represented by a person having authority to agree to a resolution of the dispute. Each party must make reasonable efforts in an attempt to resolve the dispute.

27.4 Arbitration – Australian entities

- (a) If:
- (1) the dispute or difference is not resolved as a result of one of the steps arising from the operation of clause 27.3; and
 - (2) the entities comprised in the Customer are entities registered under the Corporations Act or are Australian,
- then either party will have the right to notify the other party in writing that it requires the dispute or difference to be referred to arbitration.
- (b) Any arbitration pursuant to this clause 27.4 will be administered by the Resolution Institute in accordance with the IAMA Arbitration Rules.
- (c) Any arbitration pursuant to this clause 27.4 will apply the substantive law of the state of New South Wales and will apply the rules of procedure as prescribed in the state of New South Wales.
- (d) Any arbitration pursuant to this clause 27.4 will take place in Sydney, Australia and will be conducted in English.

27.5 Arbitration – non-Australian entities

- (a) If:
- (1) the dispute or difference is not resolved as a result of one of the steps arising from the operation of clause 27.3; and
 - (2) one of the parties (or an entity comprised in one of the parties) to the dispute or difference has its place of business outside Australia,
- then either party will have the right to notify the other party in writing that it requires the dispute or difference to be referred to arbitration.
- (b) Any arbitration pursuant to this clause 27.5 will be in accordance with the UNCITRAL Model Law on International Commercial Arbitration.
- (c) The dispute or difference will be arbitrated by a single arbitrator.
- (d) If the parties cannot agree on an Arbitrator within fourteen (14) days of the written notification referred to in clause 27.5 the Arbitrator will be

appointed in accordance with the requirements of the *Model Law and the International Arbitration Act 1974* (Cth).

- (e) The arbitral tribunal will apply the substantive law of the state of New South Wales. The arbitral tribunal will apply the rules of procedure as prescribed in the state of New South Wales.
- (f) The arbitration will take place in Sydney, Australia.
- (g) The language of the arbitration will be English.

28 Miscellaneous

28.1 Consents or approvals

If the doing of any act, matter or thing under this agreement is dependent on the consent or approval of a party or is within the discretion of a party, the consent or approval may be given or the discretion may be exercised conditionally or unconditionally or withheld by the party in its absolute discretion unless expressly provided otherwise.

28.2 Governing law and jurisdiction

The law of the State of New South Wales governs this agreement and the parties irrevocably and unconditionally submit to the non-exclusive jurisdiction of New South Wales.

28.3 Entire agreement

This agreement constitutes the entire agreement between the parties as to its

subject matter and supersedes all prior representations and agreements made by the parties and may only be changed in writing signed by the parties.

28.4 Severability of provisions

Any provision of this agreement which is prohibited or unenforceable in any jurisdiction will, as to the jurisdiction, be ineffective to the extent of the prohibition or unenforceability but that will not invalidate the remaining provisions of this agreement or affect the provision in any other jurisdiction.

28.5 Survival

- (a) None of the warranties, indemnities nor any other provision of this agreement merges on the completion of this agreement.
- (b) The indemnities contained in this agreement, including the indemnities provided in clauses 10 and 12 of this agreement, are continuing obligations and remain in full force and effect following the expiry of the Access Period.
- (c) The following clauses of this agreement survive the expiry of the Access Period: clauses 6, 7, 12, 15, 23, 26 and 28.

28.6 Binding of successors

Each party enters into this agreement so as to bind its successors in title, administrators and assigns.

Schedule 1

Particulars

Item	Description	Detail
1	NSW Ports' addresses	Delivery address: Brotherson House, Level 2, Gate B103 Penrhyn Road PORT BOTANY NSW 2036 Postal address: PO Box 297 BOTANY NSW 1455 Email address: Enquiries@nswports.com.au
2	NSW Ports' Security Manager	Name: Wayne Ashton Address: Brotherson House, Level 2, Gate B103 Penrhyn Road PORT BOTANY NSW 2036 Phone: 0417 217 274 Email: wayne.ashton@nswports.com.au
3	Lodgement of Manifests	Port Botany: edimanifest@nswports.com.au Port Kembla: edipk@nswports.com.au

Schedule 2

1.1 Definitions

In this document, unless the contrary intention appears, the following words and expressions will be construed in accordance with the meanings given below:

Access Period means with respect to a Vessel, means the period commencing from the earliest time at which the Vessel enters a Port and expires when the Vessel departs the Port.

Acceptable Code Values means a value of 6 digits in length known as the 'HS Code', and must be numeric only (no letters, special characters, full stops or spaces).

Act means the *Ports and Maritime Administration Act 1995* (NSW).

Agreement means this document including any schedules to this document.

Ancillary Services means:

- 1 stevedoring services; and
- 2 mooring services.

Approved Manifest means:

- 1 a forwarding and consolidation summary message (IFCSUM) Version: D, Release: 94B (AU11 or AU12) or 98B (ANZ20) (available at: <http://www.unece.org/tradewelcome/un-centre-for-trade-facilitation-and-e-business-uncedfact/outputs/standards/unedifac/directories/download.html> and <http://www.unece.org/trade/untdid/d98b/trmd/trmdi1.htm> respectively); or
- 2 any other form of manifest prescribed by NSW Ports from time to time.

BBSW

- 1 the Mid Australian Bank Bill Swap Reference Rate administered by the ASX (or any other party which takes over the administration of that rate) for bills of a tenor of 6 months displayed on page BBSW of the Thomson Reuters screen (or any replacement Thomson Reuters page which displays an equivalent rate); or
- 2 if:
 - (a) the Thomson Reuters page BBSW is discontinued and not replaced by a Thomson

Reuters page which displays an equivalent rate; or

- (b) for any reason a rate cannot be determined in accordance with paragraph 1 of this definition,

the rate determined by NSW Ports to be the average of the bid rates quoted by three Reference Banks selected by NSW Ports for bills which have a term equivalent to 6 months and which are accepted by an Australian bank, rounded up to the nearest fourth decimal place and provided that rates will be expressed as a yield percent per annum to maturity.

Business Day means a day that is not a Saturday, Sunday, gazetted public holiday or bank holiday in Sydney, Australia.

Certificate of Condition means a certificate issued by NSW Ports which records the state of repair and condition of the Common User Wharves, including any discernible pre-existing contamination.

Certificate of Entry means with respect to a Vessel, means a certificate which is issued by a P&I Club to the Vessel as evidence of the contract of indemnity insurance between the P&I Club and the club member named in the certificate for P&I Cover and H&M Cover for the Vessel.

Certificate of Registry means the certificate issued pursuant to the national law of the Vessel's port of registry.

Certificate of Tonnage means the tonnage and measurement of the Vessel carried out by, and recorded in a certificate prepared by, class societies or recognised organisation with the equivalent standing of Lloyds Register of Shipping or Det Norske Veritas.

Cleared Zone means an area of land or water within a Port which is established as a 'cleared zone' (being a type of 'port security zone' as defined by section 10 of the MTOFSA) under the MTOFSA and MTOFSR.

Common User Wharves

- 1 Bulk Liquids Berth 1 at Port Botany;
- 2 Bulk Liquids Berth 2 at Port Botany;
- 3 Berth 104 at Port Kembla;
- 4 Berth 201 at Port Kembla; and
- 5 Berth 206 at Port Kembla.

Consequential Loss means any of the following types of loss:

- 1 loss of profit;
- 2 loss of revenue;
- 3 loss of contract;
- 4 loss of opportunity;
- 5 loss of production; or
- 6 business interruption.

Contamination means the presence in the Environment at a level above background levels of any substance which is potentially harmful to human health and comfort, detrimental to the well-being of flora or fauna and/or detrimental to the beneficial uses of the Environment, irrespective of whether the quantity of the substance does or does not exceed statutory or industry criteria applicable to commercial or industrial land use.

Corporations Act means the *Corporations Act 2001* (Cth).

Customer means each of the owner, charterer and operator of a Vessel that enters a Port.

Dangerous Goods means the meaning given in the *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) or the Australian Code for the Transport of Dangerous Goods by Road and Rail.

Dedicated Facilities means any berths located at Port Botany or Port Kembla that are not specified in the definition of 'Common User Wharves'.

Default Rate means the sum of:

- 1 BBSW; and
- 2 5%.

Demise Charter means the hire of a Vessel by which the charterer obtains possession and control of the Vessel and is responsible for the Vessel, its operation and maintenance.

Dispute means the meaning given in clause 27.1.

Dispute Notice means the meaning given in clause 27.1.

EDI means electronic data interchange.

Environment means the physical factors of the surroundings of human and non-human life forms, including the land, soil, plants, habitat, waters, atmosphere, climate, sound, odours, tastes, biodiversity and the social and aesthetic values of landscape.

Environmental Hazard means a state of danger to human health or the Environment, whether imminent or otherwise, resulting from the location,

storage, handling or release of any substance having toxic, corrosive, flammable, explosive, infectious, irritant or otherwise dangerous or damaging characteristics.

Event of Default means the meaning given in clause 8.1(a).

GST Amount the meaning given in clause 24.3(a).

H&M Cover means insurance covering loss and damage to the hull and machinery of a vessel from marine perils including sinking, burning, stranding and collision.

Harbour Master means:

- 1 the person appointed under section 85 of the *Marine Safety Act 1998* (NSW) as the 'harbour master' for the Port; or
- 2 a person appointed under section 86 of the *Marine Safety Act 1998* (NSW) to exercise the functions of the 'harbour mater' for the Port.

Harmonized System means the 'Harmonized Commodity Description and Coding System' developed and maintained by the World Customs Organisation.

Inward Manifest means a manifest referred to in clause 9.1.

Landside Restricted Zone means an area of land or a structure within the boundaries of a Port which is established as a 'land-side restricted zone' (being a type of 'port security zone' as defined by section 10 of the MTOFSA) under the MTOFSA and MTOFSR.

Laying-up means the process of a Vessel being 'laid up' or temporarily not in service.

Legislative Requirements means:

- 1 Acts, ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and the state of New South Wales;
- 2 certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in the State of New South Wales;
- 3 any permit or licence concerning use of the Port Facilities, the Common User Wharves or the Dedicated Facilities;
- 4 directions of the Harbour Master;
- 5 the Port Rules;
- 6 the Port Guidelines; and
- 7 directions of any statutory bodies or authorities with relevant jurisdiction.

Licensed Service Provider means those service providers licensed by NSW Ports or the Port Authority to provide Ancillary Services.

Limiting Provisions means the meaning given in clause 3(b).

Loss means any action, claim, loss, damage, liability, cost or expense including all:

- 1 interest and other amounts payable to third parties;
- 2 liabilities on account of taxes;
- 3 legal (on a full indemnity basis) and other expenses reasonably incurred in connection with investigating or defending any claims or actions, whether or not resulting in any liability;
- 4 amounts paid in settlement of claims or actions; and
- 5 Consequential Loss.

MTOFSA means the Maritime Transport and Offshore Facilities Security Act 2003 (Cth).

MTOFSR means the Maritime Transport and Offshore Facilities Security Regulations 2003 (Cth).

NSW Ports means Port Botany Operations or Port Kembla Operations (as applicable).

NSW Ports' Security Contractor means the contractor engaged by NSW Ports from time to time to implement the Port Security Plan and includes its Personnel.

NSW Ports' Security Manager means the manager named in item 2 of Schedule 1, or as otherwise notified by NSW Ports from time to time.

Outward Manifest means a manifest referred to in clause 9.2.

P&I Club means a mutual insurance association which provides P&I Cover and is a member of the 'International Group of Protection & Indemnity Clubs'.

P&I Cover means protection and indemnity insurance that covers liabilities concerning or arising from the following risks:

- 1 death and personal injury to seamen, passengers and third parties;
- 2 in respect of stowaways or persons rescued at sea;
- 3 collisions;
- 4 groundings;
- 5 damage to fixed and floating objects;
- 6 pollution;

- 7 wreck removal;
- 8 towage operations; and
- 9 cargo damage.

Permitted Use means:

- 1 the embarking and disembarking of passengers;
- 2 the transit, receipt, delivery, loading, unloading, storage and stevedoring of cargo;
- 3 providing and bunkering;
- 4 ship repair and maintenance; and
- 5 crew change.

Personnel means any employee, officer, agent, consultant, contractor, representative, invitee or licensee of the relevant party (or an entity comprised in the relevant party) and, with respect to the Customer:

- 1 includes:
 - (a) any shipping agent engaged by an entity comprised in the Customer in relation to a Vessel; and
 - (b) all crew and other personnel engaged by an entity comprised in the Customer in relation to a Vessel; and
- 2 excludes any charterer or operator of a Vessel.

Pollution Incident means the occurrence of 'pollution' within the meaning of the *Protection of the Environment Operations Act 1997* (NSW).

Port means Port Botany or Port Kembla, as applicable.

Port Authority means the Port Authority of New South Wales.

Port Botany the area designated as the 'site' of Botany Bay in accordance with the Act or such other area as may be notified by NSW Ports to any entity comprised in the Customer from time to time.

Port Charges means any fees or charges specified in the 'Schedule of Port Charges' published on the NSW Ports website for Port Botany or Port Kembla (as applicable).

Port Facilities means the land, channels and facilities owned, managed or controlled by NSW Ports other than the Common User Wharves or Dedicated Facilities.

Port Guidelines means the guidelines established by the Port Authority or NSW Ports as applying to Port Botany or Port Kembla (as applicable) from time to time and, in the case of the guidelines established by NSW Ports, published on NSW Ports' website.

Port Kembla means the area designated as the 'site' of Port Kembla in accordance with the Act or such other area as may be notified by NSW Ports to any entity comprised in the Customer from time to time.

Port Rules means the rules established by the Port Authority or NSW Ports as applying to Port Botany or Port Kembla (as applicable) from time to time, and in the case of the rules established by NSW Ports, published on NSW Ports' website.

Port Security Plan means the port security plan prepared by NSW Ports and/or the port security plan prepared by the Port Authority in accordance with the MTOFSA.

Reference Bank means a bank which has a rating from Standard & Poor's of at least A- or a rating from Moody's of at least A3.

Regulations means the *Ports and Maritime Administration Regulation 2012* (NSW).

Related Entity means in relation to an entity (the first entity):

- 1 a Subsidiary of the first entity;
- 2 an entity of which the first entity is a Subsidiary; or
- 3 a Subsidiary of another entity of which the first entity is also a Subsidiary.

Restricted Area means an area declared to be either a:

- 1 Landside Restricted Zone;
- 2 Waterside Restricted Zone; or
- 3 Cleared Zone.

Security means any mortgage, pledge, lien or charge or any security or preferential interest or arrangement of any kind including:

- 1 anything which gives a creditor priority to other creditors with respect to any asset; and
- 2 retention of title (other than in the ordinary course of day to day trading) and a deposit of money by way of security,

but does not include:

- 3 an interest of the kind referred to in section 12(3) of the *Personal Property Securities Act 2009* (Cth) where the transaction concerned does not, in substance, secure payment or performance of an obligation; or
- 4 charge or lien arising in favour of a governmental agency by operation of statute unless there is default in

payment of money secured by that charge or lien.

Security Deposit means a cash deposit; or an irrevocable bank guarantee in a form reasonably acceptable to NSW Ports, given by a bank acceptable to NSW Ports and capable of being drawn on in Sydney, New South Wales.

Security Deposit Notice means has the meaning given in clause 7.1(b).

Service Date

- 1 with respect to an import Vessel, the date the Vessel berths at the Port; and
- 2 with respect to an export Vessel, the date the Vessel departs the Port.

Subsidiary means has the meaning given in the Corporations Act, but an entity will also be taken to be a Subsidiary of an entity if it is controlled by that entity, as contemplated by the power to:

- 1 determine substantially the conduct of the entity's business activities;
- 2 determine the outcome of decisions about the entity's financial and operating policies; or
- 3 dispose of, or control the disposal of, more than or equal to half (by value) of the entity's assets,

and:

- 4 a trust may be a Subsidiary, for the purpose of which a unit or other beneficial interest will be regarded as a share; and
- 5 an entity may be a Subsidiary of a trust if it would have been a Subsidiary if that trust were a corporation.

Time Charter means the hire of a Vessel by which the charterer obtains possession and control of the Vessel for an agreed period of time or an agreed voyage.

Vessel means any vessel:

- 1 in relation to which an entity comprised in the Customer holds a legal or equitable interest;
- 2 which is subject to charter by an entity comprised in the Customer (including by way of Demise Charter or Time Charter); or
- 3 which is operated by an entity comprised in the Customer,
- 4 and which calls at or enters, or proposes to call at or enter, a Port.

Waterside Restricted Zone means an area of water within a Port which is

established as a 'water-side restricted zone' (being a type of 'port security zone' as defined by section 10 of the MTOFSA) under the MTOFSA and MTOFSR.

Wharfage Charge means the 'Wharfage Charge' specified in the 'Schedule of Port Charges' published on the NSW Ports website for Port Botany or Port Kembla (as applicable).

WHS Laws means all legislation, regulations, by-laws, orders and legal requirements concerning the health, safety and welfare of people at work, including the *Work Health and Safety Act 2011* (NSW).

1.2 Interpretation

The following rules apply to this agreement unless the context requires otherwise:

- (a) The singular includes the plural, and the converse also applies.
- (b) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (c) A reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity.
- (d) A reference to a clause or Schedule is a reference to a clause or Schedule to, this agreement
- (e) A reference to an agreement or document (including a reference to this agreement) is to the agreement or document as amended, supplemented, novated or replaced, except to the extent prohibited by this agreement or that other agreement or document, and includes the schedules and annexures to that agreement or document.
- (f) A reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form.
- (g) A reference to a party to this agreement or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
- (h) A reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (i) A reference to conduct includes an omission, statement or undertaking, whether or not in writing.
- (j) A reference to an agreement includes any undertaking, deed, agreement and legally enforceable arrangement, whether or not in writing, and a reference to a document includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind.
- (k) A reference to dollars or \$ is to Australian currency.
- (l) A reference to time is to Sydney, NSW time.
- (m) "includes" in any form is not a word of limitation.