

Standard terms and conditions for access to Port Facilities

1 Background

1.1 Formation of Agreement

- (a) This document sets out the terms and conditions of the agreement that is formed between you individually and, where applicable, the entity that has employed / engaged you, 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 you access, use, or occupy any of the Port Facilities at Port Botany or Port Kembla respectively.

- (b) Each time you access, use or occupy any of the Port Facilities, you (and, where applicable, the entity that has employed / engaged you) agree to be bound by this Agreement without limitation or qualification.
- (c) If you or the entity that has employed / engaged you do not agree to be bound by this Agreement or you do not have authority to bind the entity that has employed / engaged you to this Agreement, you must not access, use or occupy the Port Facilities at Port Botany or Port Kembla.
- (d) To the extent of any inconsistency between this Agreement and any applicable Legislative Requirement, the applicable Legislative Requirement shall prevail to the extent of the inconsistency.

1.2 Definitions and interpretation

- (a) Capitalised terms in this Agreement have the meanings 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

- (a) Any obligation imposed on you in this Agreement is to be construed as imposing joint and several liability on

both you and the entity that has employed / engaged you.

- (b) A reference to “you” is, unless expressly stated otherwise, to be construed as a reference to both you and the entity that has employed / engaged you (so that, for example, a representation or warranty given by you is given by the entity that has employed / engaged you).

2 Commencement and duration

This Agreement commences on and from 14 August 2023 and continues in force unless varied, amended or terminated in accordance with its terms or at law.

3 Your obligations

As a condition of accessing, using or occupying any of the Port Facilities, you must:

- (a) comply (and ensure compliance) with the obligations imposed on you in this Agreement;
- (b) ensure that the entity that has employed / engaged you:
- (1) is subject to and bound by:
- (A) the limitations, exclusions and qualifications of NSW Ports’ liability under this Agreement; and
- (B) the releases given by you in favour of NSW Ports under this Agreement,

(**Limiting Provisions**) to the same extent as you are 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 all relevant fees, charges and disbursements payable in connection with the access, use or occupation of the Port Facilities and all other amounts payable to NSW Ports under this Agreement;
- (d) comply with all Legislative Requirements, Port Rules, Port Guidelines and directions given under this Agreement;

- (e) ensure that all works carried out on, in or around any of the Port Facilities are carried out:
 - (1) in accordance with any consent or approval given by NSW Ports (which must be received from NSW Ports prior to the work commencing);
 - (2) by personnel who are fit for work and who possess the appropriate training, experience, qualifications and supervision to do the work; and
 - (3) with a high degree of skill, competence and professionalism at all times;
- (f) co-operate with NSW Ports and all other users of the Port to ensure compliance with all Legislative Requirements;
- (g) ensure that you do not obstruct or cause any interference to NSW Ports, its property or operations, or to anyone else lawfully using the Port Facilities or the Port generally;
- (h) understand and comply with:
 - (1) the security requirements (including those relating to cyber security) of the Port with respect to the protection of people and property, including the relevant Port Security Plan; and
 - (2) your obligations under MTOFSA; and
- (i) If required, provide a Security Deposit in accordance with clause 6 of this Agreement.

4 Use of Port Facilities

4.1 Permitted Use

- (a) Subject to the terms of this Agreement, you are permitted to access, use and occupy the applicable Port Facilities for the Permitted Use for the duration of the Access Period.
- (b) You must not access, use or occupy a Port Facility for any purpose during the Access Period other than the Permitted Use.

4.2 Use subject to this Agreement

You acknowledge and agree that your access to, use and / or occupation of, a Port Facility for the Permitted Use during the

Access Period is subject to, and must be exercised in accordance with, this Agreement.

4.3 No warranty as to suitability

You acknowledge and agree that NSW Ports has made no representation and gives no warranty concerning the adequacy or suitability of any Port Facility for the use intended by you.

4.4 No estate or interest

Your right to access, use or occupy a Port Facility for a Permitted Use for the duration of the Access Period rests in contract only and this Agreement does not create or confer upon you any tenancy, estate or other interest in any Port Facility.

4.5 No rights of priority, exclusive occupation or use

You acknowledge and agree that this agreement:

- (a) does not grant any rights of priority, exclusive use or occupation of a Port Facility; and
- (b) without limiting the generality of this clause 4.5, NSW Ports may at any time exercise its rights to access, possess and enjoy the whole or any part of a Port Facility.

4.6 Access to be exercised in accordance with directions

Further to clause 4.5, your right to access, use or occupy a Port Facility is subject to the discretion and directions of NSW Ports and, in certain circumstances, the Harbour Master and the Port Authority, which directions may specify the permitted dates and times of access and control, methods of access and control and certain other operational requirements.

5 Refusal or withdrawal of permission to access, occupy or use

5.1 Refusal or withdrawal of access rights

NSW Ports may at any time and for any reason refuse or withdraw permission for you to access, use or occupy a Port Facility (or any part of the same) including, without limitation, if NSW Ports becomes aware of any of the following:

- (a) you, or the entity that has employed / engaged you, have / has committed a default under any agreement with NSW Ports or failed to pay an amount owed to NSW Ports 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 Port Facility (or any part of the same) is, in the opinion of NSW Ports, unsuitable for the Permitted Use;
- (c) a relevant direction is given by NSW Ports, the Harbour Master or the Port Authority (where applicable); or
- (d) you do not comply with the requirements of clause 3 of this Agreement.

5.2 No compensation

NSW Ports is not liable to pay, and you are not entitled to, any remedy, compensation or damages for any refusal or withdrawal of permission referred to in clause 5.1.

6 Security Deposit

6.1 Requirement to provide Security Deposit

- (a) You hereby acknowledge NSW Ports' right to require the provision of a Security Deposit to NSW Ports.
- (b) Following receipt of a written notice from NSW Ports requiring the provision of a Security Deposit (a **Security Deposit Notice**), you must provide the Security Deposit referred to in the Security Deposit Notice to NSW Ports within the timeframe stipulated in the Security Deposit Notice (or, if no timeframe is stipulated, then within twenty-four (24) hours).
- (c) The amount of the Security Deposit will be determined by NSW Ports, in its sole discretion.
- (d) 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, without limitation:
 - (1) any prior breach by you of this Agreement;
 - (2) the subject matter of any dispute between the parties;
 - (3) your creditworthiness;
 - (4) any prior or current non-compliance with the terms of any other agreement with NSW Ports; and
 - (5) any incident that NSW Ports considers may give rise to a

liability on your part to NSW Ports.

- (e) NSW Ports may review the amount of the Security Deposit at any time, in its sole discretion.

6.2 Application of 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.
- (b) Any such draw down is without prejudice to any other rights NSW Ports may have against you under this Agreement or at law.
- (c) 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 17 in respect of the draw down of the Security Deposit.
- (d) You hereby 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 6.2(a) occurs.
- (e) If NSW Ports draws down on a Security Deposit, NSW Ports will provide prompt written notice of the same to you.

6.3 Return of Security Deposit

- (a) NSW Ports will return the Security Deposit to you if / when:
 - (1) you have performed all of the obligations required to be performed or procured under this Agreement or such obligations have been waived by NSW Ports; and
 - (2) any and all disputes between the parties arising out of or in connection with this Agreement have been fully and finally resolved; or
- (b) upon receipt of a replacement Security Deposit.

7 Acknowledgements

7.1 Rights to access, use or occupy are personal

You acknowledge and agree that the rights conferred upon you by this Agreement to access, use or occupy a Port Facility may not be transferred or assigned to any other party.

7.2 General indemnities

You indemnify (and will keep indemnified) 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, use or occupation of a Port Facility;
- (b) any breach of, or default under, this Agreement; and / or
- (c) any negligence or wilful / intentional misconduct of or by you,

including, without limitation, any:

- (d) loss of, or damage to, the property of NSW Ports;
- (e) claims by any other person and / or entity against NSW Ports in respect of personal injury or death or loss of, or damage to, any property; and
- (f) Loss incurred by NSW Ports due to disturbance to, or interference with, NSW Ports' use of a Port (including the partial or complete blockage or unavailability of any Port Facility) or the carrying on of its business at a Port.

Your liability to indemnify NSW Ports is reduced proportionately to the extent that an act or omission of NSW Ports caused or contributed to the relevant Loss.

7.3 Specific environmental indemnity

You indemnify NSW Ports for Losses incurred by NSW Ports arising from any Pollution Incident, Environmental Hazard or Contamination caused by you without prejudice to any defences, exclusions from liability and rights of limitation provided by law.

7.4 Responsibility for damage to Port Facilities

You are liable for any and all loss or damage to the Port Facilities arising from or in connection with any access to, use or occupation of that Port Facility.

7.5 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 in connection with your access to, use or occupation of a Port Facility must be borne by you or, if such costs are incurred by NSW Ports, you must reimburse NSW Ports such costs which are recoverable by NSW Ports as a debt due and payable.

7.6 Payment for damage to the Port Facilities

You must pay to NSW Ports the reasonable cost of any repairs referred to in clause 7.5 carried out, or procured by, NSW Ports within twenty-eight (28) days after written demand is made by NSW Ports for such payment.

8 Limitation of Liability

8.1 Release of NSW Ports

Subject to clause 8.2, you will use the Port and the relevant Port Facilities at your own risk and the Released Parties will not be liable to you, and you release each Released Party to the fullest extent permitted by law from and against any claim of any kind arising out of, or in connection with, directly or indirectly, the access, use or occupation of the Port Facilities, including but not limited to:

- (a) any claim or liability arising from the closure of, or delay in accessing, the Port or the Port Facilities;
- (b) the loss of, or any destruction or damage to, or claim in respect of, any plant, equipment or other property;
- (c) any claim or liability arising from injury or damage done or suffered to any person, including death; or
- (d) any claim or liability arising from any Pollution Incident, Environmental Hazard or Contamination caused by you or arising from or in connection with your use of the Port or your access, use or occupation of the relevant Port Facilities.

8.2 Gross negligence / Wilful misconduct

Subject to clause 8.3, the releases in clause 8.1 will not apply for the benefit of a Released Party to the extent that the relevant claim is directly caused by the gross negligence or wilful / intentional misconduct of NSW Ports.

8.3 Further limitations

Notwithstanding any other provision of this Agreement, under no circumstances will a Released Party be liable for, or responsible to you or any other person for, any claim or liability arising from or in connection with any Consequential Loss howsoever caused or contributed to including, without limitation, the gross negligence of a Released Party.

9 Compliance with Legislative Requirements, Port Rules, Port Guidelines and Directions

9.1 Legislative Requirements, Port Rules and Port Guidelines

You must comply with all Legislative Requirements, Port Rules and Port Guidelines, including any / all port operator directions issued by NSW Ports under the Act.

9.2 Compliance with directions

You must comply with any directions given by:

- (a) NSW Ports;
- (b) NSW Ports' Security Manager;
- (c) NSW Ports' Security Contractor;
- (d) the Harbour Master;
- (e) the Port Authority; 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, use or occupation of the Port Facilities.

10 Environmental obligations

10.1 Obligation not to pollute

You must not:

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

at, or in the vicinity of, the Port and the Port Facilities.

10.2 Environmental incident reporting

Without limiting your obligations under clause 13, you must immediately, and no

later than one (1) hour after you become aware of any Pollution Incident, give NSW Ports and the Port Authority written notice of the occurrence of such a Pollution Incident.

10.3 Obligation to clean up

- (a) You must, at your 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 your cost, engage an environmental auditor in respect of a Pollution Incident.

10.4 Statutory notices and legal proceedings

Within forty-eight (48) hours after you receive any notices or legal proceedings in respect of the impact of your activities on the Environment over, under, on, in or in the vicinity of the Port Facilities or the Ports generally, including notices or proceedings issued by the NSW Environment Protection Authority or any other statutory or governmental body, you must give written notice to NSW Ports of the issue of that notice or legal proceedings, together with a copy of such notice or proceedings and such other information as NSW Ports may request.

10.5 Obligation to comply with statutory notice

You must comply with any and all statutory notices referred to in clause 10.4 and are liable for any costs of compliance with such statutory notices.

10.6 Obligations regarding storage of Dangerous Goods

You must not, without NSW Ports' prior written consent, use or allow the Port Facilities to be used in connection with 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, Port Rules and Port Guidelines.

10.7 Rights of NSW Ports

- (a) Without limiting this clause 10, if NSW Ports reasonably believes that:

- (1) a Pollution Incident has occurred (or is likely to occur); or
- (2) a condition of Environmental Hazard or Contamination has arisen or is likely to arise,

as a result of, or in connection with, any act or omission of or by you, NSW Ports may issue a direction requiring that specified corrective action be undertaken to the satisfaction of NSW Ports and within the timeframe specified by NSW Ports.

- (b) Without limiting this clause 10, if you fail to:
 - (1) comply with a direction under clause 10.7(a) to the satisfaction of NSW Ports; or
 - (2) clean up and otherwise address or rectify a Pollution Incident, Environmental Hazard or Contamination or the cause of a Pollution Incident, Environmental Hazard or Contamination 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 properly due and owing from you to NSW Ports; or
 - (4) deny you the continuance of any right you would otherwise have had under this Agreement, including the right to remain at the Port.
- (c) You must pay to NSW Ports the costs referred to in clause 10.7(b)(3) within twenty-eight (28) days after written demand is made by NSW Ports for such payment.

11 Safety

11.1 Work health and safety obligations

You must:

- (a) ensure that you and others are not exposed to conditions or practices that have the likely potential to cause personal injury (including psychological injury) or property damage;
- (b) fully comply with all WHS Laws;
- (c) comply with all work health and safety requirements, including the work health and safety management

plan and induction training for the relevant Port Facilities; and

- (d) immediately notify NSW Ports of any incident or dangerous occurrence at the Port and / or the Port Facilities which is notifiable to SafeWork NSW pursuant to the provisions of any WHS Law.

11.2 Statutory notices and legal proceedings

Within forty-eight (48) hours after receiving any notices or legal proceedings in respect of the impact of your activities on human health and safety, including notices or proceedings issued by a statutory or governmental body, you must give written notice to NSW Ports of the issue of that notice or legal proceedings, together with a copy of such notice or proceedings and such other information as NSW Ports may request.

11.3 Obligation to comply with statutory notice

You must comply with any and all statutory notices referred to in clause 11.2 and are liable for any costs of compliance with such statutory notices.

12 Emergencies

You must, in the event of any emergency, accident or security situation, provide NSW Ports and any other relevant agencies, including PANSW, NSW Police, the Australian Federal Police and medical services, with reasonable and prompt access to the relevant work areas on or in the vicinity of the Port Facilities.

13 Notification of damage or injury

13.1 Immediate notification to NSW Ports

As soon as practicable after becoming aware of any:

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

you must notify NSW Ports of such damage, injury or circumstances.

13.2 Detailed incident report

Within seventy-two (72) hours after giving notice in accordance with clause 13.1, you must lodge a detailed written report with

NSW Ports in respect of the accident, event or other circumstances referred to in clause 13.1.

14 Port security

14.1 Compliance with MTOFSA

You must comply with the requirements of:

- (a) the MTOFSA; and
- (b) the ISPS Code (as / when applicable).

14.2 Acknowledgment of a security regulated port

You acknowledge 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, the Department of Home Affairs and Infrastructure New South Wales and their respective appointees.

14.3 Financial penalties

You acknowledge that financial penalties apply for breaches of the MTOFSA.

14.4 Compliance with access restrictions

- (a) You acknowledge that it is an offence under the MTOFSA for an unauthorised person or vehicle to enter a Landside Restricted Zone or a Waterside Restricted Zone.
- (b) You must, and must procure that all other personnel, take all necessary steps to ensure that an unauthorised person, vehicle or vessel does not enter or remain in a Restricted Area.

14.5 Understanding security requirements

You must comply with NSW Ports' security requirements (as varied / updated from time to time).

15 Maintenance and Repair

15.1 Condition

You must ensure that the Port Facilities are left in the same state and condition as at the commencement of the Access Period.

15.2 Plant and equipment

You must ensure that NSW Ports' plant and equipment, if used during the Access Period, is left in the same state and condition as at the commencement of the Access Period.

15.3 Failure to maintain

If you fail to leave the Port Facilities in the condition required by clauses 15.1 and 15.2, NSW Ports may:

- (a) direct you to return the relevant Port Facilities and / or plant and equipment to the condition required by clauses 15.1 and 15.2; 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 15.3(b) will be a debt properly due and payable by you to NSW Ports and must be paid within twenty-eight (28) days of written demand by NSW Ports.

15.4 No alterations

You must not make any alterations or additions to the Port Facilities.

15.5 No installation

You must not install fixed plant or equipment including any fuel storage tanks on, over or under the Port Facilities.

16 Insurance

16.1 Insurance

- (a) With respect to each Access Period, you must effect and maintain the following insurance policies with insurers approved by NSW Ports:
 - (1) contract works insurance;
 - (2) public liability insurance for at least \$20m per event and in the annual aggregate;
 - (3) professional indemnity insurance for at least \$5m per event and in the annual aggregate (albeit only when providing professional services); and
 - (4) such other insurances as may be required by law or by NSW Ports from time to time.
- (b) Each of the above insurance policies must note NSW Ports (and such other entities as NSW Ports may reasonably require) as co-insureds.
- (c) You must provide to NSW Ports certificates of currency evidencing each of the above insurance policies on request.

17 GST

17.1 Interpretation

Words or expressions used in this clause 17 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause 17.

17.2 Consideration is GST exclusive

Any consideration to be paid or provided 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.

17.3 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 17.3 (**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 17.5, 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.

17.4 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.

17.5 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.

18 Notices

- (a) Any notice or other communication in relation to this Agreement may only be given by you to NSW Ports if the communication is 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 in Schedule 1.
- (b) NSW Ports may give a notice or communication in relation to this Agreement to you in such form, by such method and to such address as NSW Ports may determine, acting reasonably.

19 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 19(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 19(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 19(c) and 19(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.

20 Miscellaneous

20.1 Consents or approvals

If the doing of any act, matter or thing under this Agreement is dependent on the consent or approval of NSW Ports or is within the discretion of NSW Ports, the consent or

approval may be given or the discretion may be exercised conditionally or unconditionally or withheld by NSW Ports in its absolute discretion unless expressly provided otherwise.

20.2 Governing law

The law of the State of New South Wales governs this Agreement and the parties submit to the exclusive jurisdiction of the Courts of New South Wales to determine any dispute hereunder.

20.3 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.

20.4 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.

20.5 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 are continuing obligations and remain in full force and effect following the expiry of the Access Period.

20.6 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' Notice Details	<p>Delivery address: Brotherson House, Level 2 Gate B103 Penrhyn Road PORT BOTANY NSW 2036</p> <p>Postal address: PO Box 297 BOTANY NSW 1455</p> <p>Email address: enquiries@nswports.com.au (or as otherwise published on the NSW Ports' website from time to time)</p>
2	NSW Ports' Security Manager	<p>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 (or as otherwise published on the NSW Ports' website from time to time)</p>

Schedule 2

1.1 Definitions

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

Access Period means the period commencing from the earliest time at which you enter a Port and expires when you depart the Port.

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

Agreement means this document including any schedules to this document.

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

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 means:

- 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 (and analogous) types of loss:

- 6 loss of profit;
- 7 loss of revenue;
- 8 loss of contract;
- 9 loss of opportunity;
- 10 loss of production; or
- 11 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).

Cyber Security Event means an occurrence of a system, service or network state indicating a possible breach of security policy, failure of safeguards or a previously unknown situation that may be relevant to security.

Cyber Security Incident means an unwanted or unexpected Cyber Security Event, or a series of such events, that have a significant probability of compromising business operations.

Dangerous Goods has 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' and any other facility leased / licenced by NSW Ports to a third party.

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 affairs that has or is likely to adversely impact or pose a risk to human health, the comfort or repose of human and non-human life forms or the Environment, whether imminent or otherwise and, without limitation, may also result from the location, storage, handling or release of any noise or substance having toxic, corrosive, flammable, explosive, infectious, irritant or otherwise dangerous or damaging characteristics.

GST Amount the meaning given in clause 17.3(a).

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 master' for the Port.

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.

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 agreement, permit or licence concerning use of the Port Facilities and the Permitted Use;
- 4 directions of the Harbour Master;
- 5 port operator directions issued by NSW Ports; and
- 6 directions of any statutory bodies or authorities with relevant jurisdiction.

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 costs (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 Schedule 1, or as otherwise notified by NSW Ports from time to time.

Permitted Use means any use of a Port Facility agreed to by NSW Ports in writing

(without the assumption of any liability) from time to time.

Pollution Incident means the occurrence of 'pollution' within the meaning of the *Protection of the Environment Operations Act 1997* (NSW) or the *Marine Pollution Act 2012* (NSW).

Port means Port Botany or Port Kembla, as applicable.

Port Authority means the Port Authority of New South Wales.

Port Botany means 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 from time to time.

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

Port Guidelines means the guidelines established by NSW Ports or the Port Authority 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 from time to time.

Port Rules means the rules established by the NSW Ports or the Port Authority 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 or otherwise provided or made available to key stakeholders.

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.

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.

Released Party means each of:

- 1 NSW Ports and any related body corporate of NSW Ports; and

2 any employee, officer, agent or contractor of NSW Ports or of any related body corporate of NSW Ports.

Restricted Area means an area declared to be either a:

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

Security Deposit means

- 1 a cash deposit;
- 2 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; or
- 3 such other security as NSW Ports is willing to accept at its sole discretion.

Security Deposit Notice means has the meaning given in clause 6.1(b).

Subsidiary 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.

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.

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) and the obligations imposed by the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth).

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) The word "includes" in any form is not a word of limitation.