

# Standard terms and conditions for Channel access

## 1 Background

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### 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 enters the Port Botany Channel or Port Kembla Channel respectively.

(b) Each time a Vessel enters either the Port Botany Channel or Port Kembla Channel (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 enter, access or use the Port Botany Channel or Port Kembla Channel.

### 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 Commencement and duration

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This Agreement commences on and from 1 July 2022 and continues in force unless varied, amended or terminated in accordance with its terms or at law.

## 3 Customer's obligations

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The Customer must:

(a) comply with, and procure that its Personnel comply with, the obligations imposed on the Customer in this Agreement;

(b) procure 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 procure its Personnel to pay to NSW Ports, all relevant disbursements, fees and charges payable in connection with access, occupation or use of a Channel by any entity comprised in the Customer, including, with respect to access to the Port Kembla Channel, the Navigation Services Charge and all other amounts payable to NSW Ports under this Agreement;

(d) comply with, and procure its Personnel comply with, all Legislative Requirements including the requirements in the Regulations with respect to the provision of information and documentation to NSW Ports;

(e) ensure that all shipping activities and work carried out on the Vessel in or around the Port in connection with the Vessel's Access Period are carried out:

- (1) in accordance with any consent or approval given by NSW Ports (which, in the case of work, 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 and qualifications to do the work; and
- (3) with a high degree of skill, competence and professionalism at all times;

(f) co-operate with, and procure that its Personnel co-operate with, NSW Ports and all other users of the Channel to ensure compliance with all Legislative Requirements;

(g) by no later than 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, Certificate of Registry, Certificate of Class, Certificate of Tonnage, Document of Compliance, Safety Management Certificate, Ship Pre-Arrival Report and Inwards / Outwards Crew Report for and in respect of the Vessel, together with such other documentation as may be reasonably requested by NSW Ports from time to time;

(h) ensure that the certificates and documents referred to in clause 3(g) and the insurances specified in the Certificate of Entry remain valid and in effect for the duration of the Access Period;

(i) ensure that it does not, and procure that its Personnel do not, obstruct or cause any interference to NSW Ports, its property or operations, or to anyone else lawfully using the Port; and

(j) procure that all of its Personnel understand and comply with:

- (1) the security (including cyber 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 the Channel**

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### **4.1 Permitted Uses**

- (a) Subject to the terms of this Agreement, the Customer is permitted to use the Channel for the Permitted Uses for the duration of the Access Period.
- (b) The Customer must not use the Channel 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, the Channel for a 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**

The Customer agrees that NSW Ports has made no representation and gives no warranty concerning the adequacy or suitability of the Channel for the Vessel or the use intended by the Customer.

### **4.4 No estate or interest**

The Customer's rights to enter, access or use the Channel 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 the Channel.

### **4.5 No rights of priority, exclusive occupation or use**

The Customer acknowledges and agrees that this Agreement:

- (a) does not grant any rights of priority, exclusive occupation or use of the Channel to the Customer; and
- (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 Channel (or any part of it) in preference to and to the exclusion of the Customer.

### **4.6 Access to be exercised in accordance with directions**

Further to clause 4.5, the Customer's right to enter, access or use the Channel for the

Permitted Uses is subject to the discretion and directions of NSW Ports, the Harbour Master and the Port Authority.

## **5 Withdrawal of permission to access or use**

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### **5.1 Withdrawal of permission to access or use**

NSW Ports may at any time refuse or withdraw permission for a Vessel to enter, access or use the Channel (or any part of it) if NSW Ports becomes aware of any of the following:

- (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 any agreement with NSW Ports or the Port Authority or failed to pay any amount owed to NSW Ports or the Port Authority by the applicable 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 Channel (or any part of it) is, for any reason, unsuitable for enter, access or use by a Vessel;
- (c) a relevant direction is given by the Harbour Master or the Port Authority;
- (d) the Vessel is deficient, substandard or unseaworthy in any respect or is unable to be loaded or unloaded to its full capacity;
- (e) if permission to carry out required works to a Vessel has been sought and refused; or
- (f) the Customer does not comply with the requirements of clause 3.

### **5.2 No compensation**

- (a) If NSW Ports refuses or withdraws permission for a Vessel to enter, access or use to the Channel, 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 the Navigation Services Charges for the applicable Access Period that does not proceed.
- (b) NSW Ports is not liable to pay, and neither the Customer nor the Customer's Personnel are entitled to, any other remedy, relief, compensation or damages at law for a decision by NSW Ports to refuse or withdraw its permission as referred to in clause 5.2(a).

## **6 Port Entry**

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### **6.1 Order of entry and departure**

- (a) The Customer acknowledges and agrees that NSW Ports will allocate (and may change) in its absolute discretion the order of Channel access (entry and departure) for the Vessel and / or berthing of the Vessel or access to the services.
- (b) In general (but subject always to NSW Ports' absolute discretion and the lawful directions of the Harbour Master, where applicable), Channel access (entry and departure) will be based on:
  - (1) Port safety and security;
  - (2) Port operational efficiency;
  - (3) the order of arrival at the pilot boarding ground or designated anchorage providing:
    - A. the order of arrival is consistent with the details provided by the Customer to NSW Ports;
    - B. the Vessel is, in all respects, ready to commence loading or unloading its nominated cargo immediately upon arrival at berth; and
    - C. the Vessel is able to work its nominated cargo at a loading or unloading rate commensurate with the design capacity of the relevant facilities and services at the Port; and
  - (4) subject always to the Port Rules.

### **6.2 Condition survey**

If the Vessel requires a condition survey prior to the commencement of cargo operations, the Customer must ensure that the condition survey is fully completed / certified prior to the Vessel's entry to the Channel. If the Vessel fails to pass a condition survey, it will lose its Channel entry priority. All costs and expenses incurred by NSW Ports in relation to this clause 6.2 must be paid by the Customer on demand by NSW Ports as a debt due and payable to NSW Ports within 7 days of the date of NSW

Ports' invoice without set off, deduction or counterclaim.

### **6.3 Port State Control Inspections**

The Customer warrants that as at the time of the Vessel's entry to the Channel, there are no outstanding deficiencies as reported by any Port State Control.

## **7 Fees and charges**

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### **7.1 Acknowledgment of liability**

The Customer must pay, or procure that its Personnel pays, to NSW Ports the Navigation Services Charge in respect of access to the Port Kembla Channel, any other applicable charges as identified in the Act and any other monies otherwise payable in accordance with this Agreement.

### **7.2 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 Navigation Services Charge in respect of access to the Port Kembla Channel and any other amounts payable by the Customer or the Customer's Personnel in connection with this Agreement (including, without limitation, any other charges referred to in the Act); and
- (b) the GST Amount applicable to the Navigation Services Charge and other amounts specified in the invoice.

### **7.3 Payment of fees**

The Customer must pay, or must procure that its Personnel pays, as a debt due and payable by the Customer, the amount of any 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.

### **7.4 Payments**

The Customer must procure that all payments required to be made under this Agreement are made by:

- (a) direct electronic 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.

### **7.5 Disputed Invoices**

- (a) If the Customer or any entity comprised in the Customer disputes an invoice (whether or not the Customer or any entity comprised in the Customer has given NSW Ports a Dispute Notice) then the Customer must still pay the invoiced amount in full and without any set-off, deduction or counterclaim in accordance with clause 7.3. Any such dispute must be determined in accordance with the dispute resolution procedures in clause 23.
- (b) If an amount paid by the Customer or the Customer's Personnel to NSW Ports under this Agreement is determined pursuant to clause 23 or agreed by the parties not to have been properly 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 ten (10) Business Days after the date of such determination or agreement.

### **7.6 Costs of compliance with certain Legislative Requirements**

Without limiting any other right that NSW Ports may have, 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 (including their health and wellbeing), property or other services related to the protection of people or property, then the Customer is liable to reimburse NSW Ports such costs and those costs are recoverable by NSW Ports as a debt properly due and payable by the Customer without set off, deduction or counterclaim:

- (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.

## 7.7 Interest

Without in any way limiting any other rights it may have under this Agreement, including but not limited to calling the Customer in breach of this Agreement and / or requiring that a Security Deposit be immediately provided, 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. The parties acknowledge and agree that the Default Rate is a genuine pre-estimate of the costs, loss and damage that NSW Ports' is likely to suffer if any amount payable by the Customer is not paid by the due date.

## 7.8 Administration Fees

Without in any way limiting any other rights that it may have under this Agreement, NSW Ports may, in its absolute discretion, charge the Customer an Administration Fee for each and every act or omission of the Customer that necessitates additional administrative effort or manual processing on the part of NSW Ports including, without limitation, in the following circumstances:

- (a) where a credit adjustment is required due to Customer error;
- (b) where a request for a credit adjustment is received after the invoice due date; or
- (c) where NSW Ports has raised an invoice for interest pursuant to clause 7.7 of this Agreement.

## 8 Security Deposit

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### 8.1 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 8.2(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 within the timeframe stipulated in the Security Deposit Notice (or, if no timeframe is stipulated, then within twenty-four (24) hours).

- (c) For the avoidance of doubt, and without limiting clause 8.1(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 8.1(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 8.1(b); or
  - (2) otherwise in accordance with clause 8.4(a).
- (e) For the avoidance of doubt, if NSW Ports holds an amount under clause 8.1(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 8.3.

### 8.2 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 including, without limitation:

- (1) any breach by the Customer or any entity comprised in the Customer of this Agreement;
  - (2) the subject matter of any dispute between the parties, whether or not that dispute is subject to a Dispute Notice under clause 23 of this Agreement;
  - (3) the creditworthiness of the Customer or any entity comprised in the Customer and their Related Entities;
  - (4) any prior or current non-compliance with the terms of any other agreement with NSW Ports or the Port Authority;
  - (5) the amount that is three (3) times the average monthly fees / charges invoiced by NSW Ports to the Customer or the Customer's Personnel over the preceding twelve (12) months immediately prior to the date of issue of the Security Deposit Notice;
  - (6) 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
  - (7) 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, having regard to the potential Access Periods of the Customer in the 12 month period following the date of issue of the Security Deposit Notice.
- (c) NSW Ports may review the amount of the Security Deposit at any time, in its sole discretion.

### 8.3 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, including (without limitation) as a result of the Customer failing to:
  - (1) pay the fees, charges, GST Amounts or any other

amounts actually or contingently owing to NSW Ports when due and any reasonably incurred legal costs; or

- (2) pay any interest calculated in accordance with clause 7.7 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 20 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 8.3(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.

### 8.4 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 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) 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 8.1(b).

## 9 Events of Default

### 9.1 Events of Default

(a) On the occurrence of any of the events listed in clauses 9.1(b) to 9.1(e) (each an **Event of Default**) (whether or not it is continuing), in addition to any other rights of NSW Ports under this Agreement or provided by law:

- (1) all unpaid invoices issued by NSW Ports to the Customer or an entity comprised in the Customer;
- (2) all fees / charges and related GST Amounts in respect of which an invoice has not yet been issued by NSW Ports; and
- (3) any other amounts actually or contingently owing under this Agreement,

**(Total Amounts Outstanding)** will be deemed immediately properly due and payable as an undisputed debt 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 9.1(a)(1), the Event of Default; or
- (5) in respect of an amount referred to in clauses 9.1(a)(2) or 9.1(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 (other than whilst solvent), 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 9.1(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, including, without limitation, by failing to pay in accordance with clause 7.3 the full amount of any invoice issued by NSW Ports under 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 8.1(b).

## 9.2 Right to withhold Services

- (a) The Customer acknowledges NSW Ports' right to immediately withhold or withdraw the provision of services or facilities under section 72 of the Act.
- (b) If the Customer:
  - (1) fails to pay any fees, charges, GST Amounts, any other amount payable by the Customer to NSW Ports or any interest calculated in accordance with clause 7.7 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 8.1,

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 immediately withheld or withdrawn until such time as the Customer has remedied the failure to NSW Ports' reasonable satisfaction.

## 10 Acknowledgements by the Customer

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### 10.1 Rights to access and use the Channel are personal

The Customer acknowledges and agrees that the rights conferred upon it by this Agreement to enter, access and use the Channel 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 use of the Channel.

### 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 to or use of the Channel 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 and / or an entity comprised in the Customer and / or its Personnel; and / 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 and / or entity against NSW Ports in respect of personal injury or death or loss of, or damage to, any property; and
- (g) Loss incurred by NSW Ports due to disturbance to, or interference with, NSW Ports' use of a Port (including the partial or complete blockage of the Channel) 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 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 Channel**

The Customer is liable for any and all loss or damage to the Channel, arising from or in connection with any access to or use of the Channel by the Vessel, 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 or use of the Channel by the Vessel, 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 Channel**

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 Limitation of Liability**

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#### **11.1 Release of NSW Ports**

Subject to clause 11.2, the Customer (and its Personnel) will use the Port and the Channel at their own risk and the Released

Parties will not be liable to the Customer (or its Personnel), and the Customer releases (and will procure that its Personnel 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 Vessel's visit to the Port or use of the Channel, including but not limited to:

- (a) any claim or liability arising from the closure of, or any delay in accessing, the Port or the Channel;
- (b) the loss of, or any destruction or damage to, or claim in respect of, any Vessel, plant, equipment, cargo 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 and / or Contamination caused by the Vessel, the Customer or any of the Customer's Personnel, or arising from or in connection with the Vessel's use of the Port or the Channel.

#### **11.2 Gross negligence / Wilful misconduct**

Subject to clause 11.4, the releases in clause 11.1 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 misconduct of NSW Ports.

#### **11.3 Re-Supply of Services**

Without limiting this clause 11, to the extent that any rights or warranties cannot be excluded or limited as a matter of law, the Liability of NSW Ports (or any other Released Party) to the Customer or its Personnel for any failure to provide, or default in providing any services in accordance with this Agreement must be strictly limited to either of the following remedies as elected by the applicable Released Party:

- (a) the re-supply of equivalent services as were to be provided under this Agreement; or
- (b) the payment by that Released Party of the costs necessary to have the relevant services supplied again.

#### **11.4 Further limitations**

Notwithstanding any other provision of this Agreement, under no circumstances will a Released Party be liable for, or responsible to the Customer, its Personnel or any other

person for, any claim or liability arising from or in connection with:

- (a) the availability of, or inability of, the Vessel to access or use the Channel;
- (b) the availability of, or inability of the Vessel to access or use the Channel;
- (c) the failure to perform or delay in providing any services;
- (d) for any demurrage, delay or other costs of transportation of any kind; or
- (e) any Consequential Loss,

howsoever caused or contributed to including, without limitation, the gross negligence of a Released Party.

## **12 Compliance with Legislative Requirements and directions**

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### **12.1 Legislative Requirements**

The Customer must, and must procure that its Personnel:

- (a) comply with all Legislative Requirements; and
- (b) without limiting clause 12.1(a), pay any charges or other amounts payable to the Port Authority from time to time.

### **12.2 Compliance with directions**

The Customer must comply with, and procure its Personnel to 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 use of the Channel by the Customer, any entity comprised in the Customer or the Customer's Personnel.

## **13 Environmental obligations**

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### **13.1 Obligation not to pollute**

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

- (a) cause or contribute to a Pollution Incident;

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

over, under, on, in or in the vicinity of, the Channel.

### **13.2 Environmental incident reporting**

Without limiting the Customer's obligations under clause 16, 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.

### **13.3 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.

### **13.4 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 Channel, 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.

### **13.5 Obligation to comply with statutory notice**

The Customer must comply with any and all statutory notices referred to in clause 13.4 and is liable for any costs of compliance with such statutory notices.

### 13.6 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 Channel 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.

### 13.7 Rights of NSW Ports

- (a) Without limiting this clause 13, 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 13, if any entity comprised in the Customer fails to:
- (1) comply with a direction under clause 13.7(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 properly due and owing 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 continue to use the Channel.

- (c) The Customer must pay to NSW Ports the costs referred to in clause 13.7(b)(3) within twenty-eight (28) days after written demand is made by NSW Ports for such payment.

## 14 Safety

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### 14.1 Work health and safety responsibility

The Customer acknowledges that work health and safety on, or in any way related to, a Vessel during the Access Period is the Customer's responsibility.

### 14.2 Work health and safety obligations

The Customer must:

- (a) procure that its Personnel 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) procure 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 Channel; and
- (d) immediately notify NSW Ports of any incident or dangerous occurrence on the Channel which is notifiable to SafeWork NSW pursuant to the provisions of any WHS Law.

### 14.3 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.

### 14.4 Obligation to comply with statutory notice

The Customer must comply with any and all statutory notices referred to in clause 14.3

and is liable for any costs of compliance with such statutory notices.

## **15 Emergencies**

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The Customer must, in the event of any emergency, accident or security situation onboard or relating to a Vessel, 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.

## **16 Notification of damage or injury**

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### **16.1 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 Channel;
- (b) injury to any person in, or in the vicinity of, the Channel; 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.

### **16.2 Detailed incident report**

Within seventy-two (72) hours after the Customer gives notice in accordance with clause 16.1, 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 16.1.

## **17 Port security**

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### **17.1 Compliance with MTOFSA**

The Customer must comply with, and must procure that its Personnel comply with, the requirements of:

- (a) the MTOFSA; and
- (b) the ISPS Code.

### **17.2 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, the Department of Home Affairs and the Infrastructure New South Wales and their respective appointees.

## **17.3 Financial penalties**

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

## **17.4 Compliance with access restrictions**

- (a) The Customer acknowledges 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) The Customer must procure 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.

## **17.5 Understanding security requirements**

The Customer must comply with, and procure its Personnel to understand and comply with, NSW Ports' security requirements (as varied / updated from time to time).

## **17.6 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.

## **18 Insurance**

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### **18.1 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 (including cover for pollution / oil spill liabilities); and
  - (2) H&M Cover;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:

- (A) in the case of P&I Cover, an amount that is the greater of (i) A\$50,000,000, or (ii) the maximum amount that is reasonably available to the Vessel or to vessels of a type which is the same or substantially similar to the Vessel type, or (iii) the amount calculated in accordance with the Convention on Limitation of liability for Maritime Claims 1976 (but, in the case of (ii) and (iii), an amount that is not less than A\$20,000,000) for any single event; and
  - (B) in the case of H&M Cover, an amount that is equal to or in excess of the reasonable market value of the Vessel.
- (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 18.1(b) then the Customer:
- (1) authorises NSW Ports to obtain a copy of the insurance certificate referred to in the request from the relevant insurance provider or regulatory or enforcement authority; and
  - (2) agrees to promptly provide the relevant insurance provider or 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 8.1(b)(2), a Security Deposit in a greater amount than the amount of the Security Deposit held by NSW Ports at the relevant time (if applicable); 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 18.1(d).
- (f) If the Customer or any entity comprised in the Customer seeks to access a Channel 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 the relevant Port if it is not satisfied with the adequacy of the insurance. The Customer acknowledges that this clause 18.1(d) does not in any way limit the Customer's obligations under clause 3(g) or clause 3(h) or NSW Ports' rights under clause 5.1.

## **19 Release**

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Notwithstanding anything contained in this Agreement, the Customer releases, and must procure that its Personnel release, NSW Ports from all Loss which the Customer or any entity comprised in the Customer and its Personnel 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 including, without limitation, a Cybercrime or Cyber Security Incident;
- (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; and
- (e) any other cause that NSW Ports could not avoid or prevent by the exercise of reasonable care.

## 20 GST

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### 20.1 Interpretation

Words or expressions used in this clause 20 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause 20.

### 20.2 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.

### 20.3 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 20.3 (**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 20.5, 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.

### 20.4 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.

### 20.5 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.

## 21 Notices

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- (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 in writing and addressed to NSW Ports and:
  - (1) delivered in person to the delivery address;
  - (2) sent by post to the postal address; or
  - (3) sent by email to the email address,

specified for the relevant Port in item 1 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.

## 22 Trustee limitation

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- (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 22(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 22(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 22(c) and 22(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.

## 23 Dispute resolution

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### 23.1 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 Channel, 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**).

### 23.2 Continue to perform the Agreement

Notwithstanding the existence of a dispute, NSW Ports and the Customer must continue to perform their respective obligations under this Agreement including, but not limited to, by complying with clause 7.

### 23.3 Further steps before proceeding

- (a) 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.
- (b) At any such conference (which may be in person or via audio / visual means), 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.
- (c) For the avoidance of doubt, where a party fails to comply with any of its obligations under either clause 23(a) or 23(b), the other party is entitled to

proceed to refer the matter for arbitration in accordance with this Agreement.

#### **23.4 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 23.3; 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 23.4 will be administered confidentially by the Resolution Institute in accordance with the IAMA Arbitration Rules.
- (c) Any arbitration pursuant to this clause 23.4 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 23.4 will take place in Sydney, Australia and will be conducted in English.

#### **23.5 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 23.3; 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 23.5 will be administered confidentially 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 23.5, 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.

### **24 Miscellaneous**

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#### **24.1 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.

#### **24.2 Governing law**

The law of the State of New South Wales governs this Agreement.

#### **24.3 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.

#### **24.4 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.

#### **24.5 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.

#### **24.6 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	<p><b>Delivery address:</b> Brotherson House, Level 2, Gate B103 Penrhyn Road PORT BOTANY NSW 2036</p> <p><b>Postal address:</b> PO Box 297 BOTANY NSW 1455</p> <p><b>Email address:</b> 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>
3	Harbour Master	<p>Phone: 02 9296 4999 Email: vts@portauthoritynsw.com.au (or as otherwise published on the Port Authority's 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, with respect to a Vessel, the period commencing from the earliest time at which the Vessel enters a Port and expires when the Vessel departs 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.

**Certificate of Entry** means, with respect to a Vessel, a certificate which is issued by a P&I Club to the Vessel as evidence of the contract of indemnity insurance (including all relevant limits of cover) 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.

**Channel** means the Port Botany Channel or Port Kembla Channel (as applicable).

**Consequential Loss** means any of the following (and analogous) types of loss:

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

**Cybercrime** means the use of a computer or online network to commit crimes such as fraud, online image abuse, identity theft or threats and intimidation.

**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.

**Default Rate** means 10%, except to the extent that the sum of 5% and the interest rate that in the ordinary course of business would be charged by the Commonwealth Bank for the relevant period on unsecured overdrafts of more than \$100,000 is less than 10%, in which case that lower rate shall prevail.

**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 23.1.

**Dispute Notice** means the meaning given in clause 23.1.

**Document of Compliance** has the same meaning as in the International Safety Management (ISM) Code.

**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 9.1(a).

**GST Amount** means the meaning given in clause 20.3(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 master' for the Port.

**Inwards / Outwards Crew Report** means the Australian Border Force's Form 3b (or any replacement of the same) which, among other things, provides details of the Vessel's crew.

**ISPS Code** means the International Ship and Port Facility Security Code.

**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 the *Biosecurity Act 2015* (Cth) in regard to ballast water management and discharge, anti-fouling and in-water cleaning and other biosecurity requirements in respect of the Vessel's visit to the Port, including the reporting of biosecurity incidents;
- 3 the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) and applicable MARPOL requirements regarding the prevention of pollution from the Vessel in its visit to the Port;
- 4 certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in the State of New South Wales;
- 5 any permit or licence concerning use of the Channel;
- 6 directions of the Harbour Master;
- 7 the Port Rules;
- 8 the Port Guidelines; and
- 9 directions of any statutory bodies or authorities with relevant jurisdiction.

**Limiting Provisions** 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).

**Navigation Services Charge** means any charge for navigation services specified in the 'Schedule of Port Charges' published on the NSW Ports website for Port Kembla.

**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.

**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 the occupation and use of the Channel for the end purpose(s) of:

- 1 the embarking and disembarking of passengers;
- 2 the transit, receipt, delivery, loading, unloading, storage and stevedoring of cargo;

- 3 providoring and bunkering;
- 4 ship repair and maintenance (where approved in writing by NSW Ports); 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) 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 to any entity comprised in the Customer from time to time.

**Port Botany Channel** means the area of navigable waters and subjacent land in Port Botany as shown on the Channel Plan in item 1 of Schedule 3.

**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 Kembla Channel** means the area of navigable waters and subjacent land in Port Kembla as shown on the Channel Plan in item 2 of Schedule 3.

**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.

**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.

**Safety Management Certificate** has the same meaning as in the International Safety Management (ISM) Code.

**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

- 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** has the meaning given in clause 8.1(b).

**Service Date** means

- 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.

**Ship Pre-Arrival Report** means the Australian Border Force's Form 13a (or any replacement of the same) which, among other things, provides details of the Vessel's particulars and security / safety reports.

**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.

**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.

**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.

# Schedule 3

## 1 Port Botany Channel Plan



