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## Access Policy

by Darwin Port Operations Pty Ltd (ACN 603 472 788) as trustee for the Darwin Port Manager Trust  
in favour of Utilities Commission of the Northern Territory

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**This Deed Poll is made on Date**

**Given by:**

- 1 **Darwin Port Operations Pty Ltd** (ACN 603 472 788) as trustee for the Darwin Port Manager Trust of Port Administration Building, Darwin Business Park, Berrimah in the Northern Territory (the **Port Manager**); and

**In favour of:**

- 2 **Utilities Commission of the Northern Territory** of 38 Cavenagh Street, Darwin in the Northern Territory (the **Regulator**).

**1 Background**

**1.1 Introduction**

- (a) The Port Manager is the operator of the Port and is a "private port operator" for the purposes of section 118 of the Act.
- (b) Pursuant to section 119(1) of the Act, the provision of the Services by the Port Manager is declared to be a regulated industry for the *Utilities Commission Act* (NT).
- (c) Section 127(1) of the Act requires the Port Manager to prepare, and give to the Regulator, a draft access policy in accordance with that section.
- (d) The Regulator has received, and on [date] gave notice to the Port Manager approving, a draft of this access policy pursuant to section 127(3) of the Act.
- (e) This is the access policy of the Port Manager for the Port.
- (f) The Port Manager must comply with this access policy.

**1.2 Objectives**

The objectives of this access policy are to:

- (a) provide a framework for Applicants to seek access to Services and to manage negotiations regarding the provision of access to Services;
- (b) establish an open, non-discriminatory and efficient process for lodging and determining Access Applications;
- (c) operate consistently with the objectives and principles of Part 11, Division 2 of the Act; and
- (d) reach an appropriate balance between:
  - (i) the legitimate business interests of the Port Manager;
  - (ii) the interests of Applicants wanting access to the Services;
  - (iii) the interest of the public in ensuring the efficient use of resources and the promotion of economically efficient investment in, and use of, the Port and its Facilities.

**2 Definitions and Interpretation**

**2.1 Definitions**

The following definitions apply unless the context requires otherwise.

**Access Agreement** means an agreement between the Port Manager and an Applicant under which the Port Manager provides access to the Applicant to one or more Services.

**Access Application** means an application by an Applicant for access, or increased access, to a Service made in accordance with clause 6.5.

**Act** means the *Ports Management Act 2015* (NT).

**Applicant** means a Port User who applies for access, or increased access, to a Service.

**Associated Entity** has the meaning given to that term by the *Corporations Act 2001* (Cth).

**Business Day** means a day which is not a Saturday, Sunday or a public holiday in Darwin.

**Commencement Date** means the day the Regulator gives notice to the Port Manager that this access policy is approved pursuant to section 127(3) of the Act.

**Confidential Information** means information exchanged between the Port Manager and an Applicant in relation to the business of those persons that:

- (a) is by its nature confidential;
- (b) is specified to be confidential by the person who supplied it; or
- (c) is known, or ought to be known, by a person using or supplying it to be confidential or commercially valuable;

but excludes information that:

- (d) is comprised solely of the name, address and contact details of a person; or
- (e) was in the public domain at the time when it was supplied; or
- (f) subsequently becomes available other than through a breach of confidence or breach of this provision; or
- (g) was in lawful possession of the a party prior to being provided by the party; or
- (h) must be disclosed in order to comply with other legal requirements; or
- (i) ceases to be confidential in nature by any other lawful means;

**Decision Notice** has the meaning given by clause 6.6(b).

**Dispute** means a bona fide dispute between an Applicant or a User an the Port Manager arising under this access policy other than a dispute in relation to an Access Agreement once executed.

**Estimated Costs** has the meaning given by clause 6.6(d).

**Facilities** means the facilities required to provide a Service.

**Feasible** has the meaning given by clause 4.3.

**Feasibility Review** means the review undertaken by the Port Manager pursuant to clause 6.6(a).

**Feasibility Study** means the study undertaken by the Port Manager pursuant to clause 6.7(a).

**Non-Standard Service** has the meaning given by clause 6.3.

**Port** means the Port of Darwin, as defined by the Act.

**Port User** means a "port user" as defined by the Act.

**Pricing Principles** means the principles stated in clause 5.5.

**Prudential Requirements** means:

- (a) the Applicant, in the last five years

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- (i) has been able to pay all its debts as and when they become due and payable and has not failed to comply with a statutory demand under section 459F of the *Corporations Act 2001* (Cth);
  - (ii) has not had a liquidator, receiver, receiver and manager, controller, administrator, trustee-in-bankruptcy appointed to it or any of its assets;
  - (iii) has not had an application made to a court for its winding-up;
  - (iv) has not proposed to enter into or entered into any form of arrangement with its creditors or any of them, including a deed of company arrangement;
  - (v) has not had any event or process occur which is analogous to the things outlined in paragraphs (i) to (iv);
- (b) the Applicant has demonstrated to the Port Manager that it has a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Arrangement;
  - (c) the Applicant, or any Associated Entity of the Applicant, is not currently, and has not in the past two years been, in material default of any agreement with the Port Manager; and
  - (d) the Applicant has in place, or will on the execution of an Access Agreement have in place, policies of insurance reasonably required by the Port Manager.

**Regulations** means the *Ports Management Regulations 2015* (NT).

**Services** means the services prescribed by section 12 of the Regulations being the following services provided by the Port Manager:

- (a) providing, or allowing for, access for vessels to the Port;
- (b) providing facilities for loading and unloading vessels at the Port;
- (c) providing berths for vessels at the Port;
- (d) providing, or facilitating the provision of, pilotage services in a pilotage area within the Port; and
- (e) allowing entry of persons and vehicles to any land on which port facilities of the Port are located.

**Standard Services** has the meaning given by clause 5.

**Standard Terms** means the terms and conditions published by the Port Manager from time to time for access to Standard Services.

**User** means an existing Port User of a Service.

## 2.2 Interpretation

- (a) Headings are for convenience only and do not affect interpretation.
- (b) Mentioning anything after includes, including, for example, or similar expressions, does not limit what else might be included.
- (c) The following rules apply unless the context requires otherwise.
  - (i) The singular includes the plural, and the converse also applies.
  - (ii) A gender includes all genders.
  - (iii) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.

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- (iv) A reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity.
  - (v) A reference to a clause or Schedule is a reference to a clause of, or Schedule to, this access policy.
  - (vi) A reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form.
  - (vii) 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.
  - (viii) A reference to conduct includes an omission, statement or undertaking, whether or not in writing.
  - (ix) A reference to time is to Darwin time.
- (d) Where the day on or by which something must be done is not a Business Day, that thing must be done on or by the following Business Day.

### 3 Term

- (a) This access policy commences on the Commencement Date.
- (b) This access policy expires on the earlier of:
  - (i) the day upon which, under the terms of the Act, the Port Manager is no longer required to have an access policy; and
  - (ii) the day five years after the Commencement Date, by which time it must have been reviewed in accordance with section 15(1) of the Regulations.

## 4 Access Undertaking

### 4.1 Undertaking

The Port Manager undertakes to provide Applicants with access to the Services on the terms and conditions of this access policy.

### 4.2 Principles of access

The Port Manager will provide access to Services:

- (a) where it is Feasible to do so;
- (b) to Applicants who meet the Prudential Requirements;
- (c) on reasonable terms; and
- (d) on a basis that does not discriminate between Applicants, between Users or between Applicants and Users who are not relevantly different, other than in accordance with the terms of this access policy.

### 4.3 Meaning of Feasible

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

- (a) it is technically feasible to do so according to recognised engineering and construction principles;
- (b) the Port Manager is legally entitled to do so;
- (c) to do so would be consistent with the corporate objectives of the Port Manager, including the Port Manager's objectives to:

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- (i) grow trade through the Port in a sustainable manner;
  - (ii) optimise port efficiency;
  - (iii) allocate and use land in accordance with the Port Manager's "Initial Port Development Plan" or the "Port Development Plan";
  - (iv) obtain a fair and reasonable return on the Port Manager's investment in the Port commensurate with its commercial risk;
- (d) to do so would not endanger the safety of any Users of the Services or persons working on or with the Facilities and would be consistent with the obligations of the Port Manager under workplace health and safety legislation and all other legislation dealing with human safety;
  - (e) to do so would be consistent with all existing contractual or other obligations of the Port Manager (and its related bodies corporate) to any other person;
  - (f) it would be possible to do so at a reasonable price, having regard to the Pricing Principles;
  - (g) to do so would not endanger any aspect of the natural or built environment surrounding the Port in any way;
  - (h) to do so would be consistent with the Port Manager's obligations under all relevant planning and building legislation;
  - (i) to do so would be consistent with the Port Manager's obligations under the Act, the Regulations, the *Competition and Consumer Act 2010* (Cth) and all other legislation dealing with competition or economic regulation.

## 5 Access Framework

### 5.1 Overview

Access may be provided:

- (a) to Standard Services which, unless otherwise agreed by the Port Manager and the Applicant, will be provided on Standard Terms; or
- (b) to Services other than Standard Services, on the terms of an Access Agreement.

### 5.2 Meaning of Standard Services

- (a) The Port Manager may, but is not obliged to, prepare Standard Terms upon which certain Services are offered by the Port Manager.
- (b) A Service to which Standard Terms apply is a **Standard Service**.
- (c) As at the Commencement Date, the Standard Services are those listed in Schedule 1.
- (d) The Port Manager may develop Standard Terms for further Standard Services.

### 5.3 Variation or withdrawal of Standard Terms

- (a) The Port Manager may vary any Standard Terms, provided always that the Standard Terms are consistent with the requirements of this access policy.
- (b) The Port Manager may withdraw a Service as a Standard Service by withdrawing the Standard Terms for that Service.
- (c) The Port Manager may vary or withdraw the Standard Terms for a Service at any time by publishing notice of the variation or withdrawal in a prominent place on its website no later than 2 Business Days prior to the variation or withdrawal taking effect.



#### **5.4 Requirements for an Access Agreement**

An Access Agreement must contain the following terms:

- (a) the cost of access to the Services;
- (b) the responsibility of each party to develop, or pay for, any Facilities that need to be developed in order to provide access to the Services;
- (c) the timing and term of access to the Services;
- (d) the purpose or purposes for which the Services can be used;
- (e) a policy for queuing and ordering priority for access to the Services;
- (f) the degree of exclusivity or non-exclusivity for access to the Services;
- (g) the obligation of each party to maintain any Facilities used in providing the Services;
- (h) a mechanism for resolving Disputes between the parties which, unless otherwise agreed by the parties, must not be inconsistent with clause 7 of this access policy;
- (i) the performance criteria to apply to the Applicant's use of the Services, whether based on volume, timing, efficiency of use or enhancing the competitive position of the Port;
- (j) the environmental and safety obligations applicable to the Applicant, including any necessity to obtain any accreditation or authorisation;
- (k) the parties' responsibilities for obtaining planning approvals in relation to the Services; and
- (l) the circumstances in which the Port Manager may relocate the Facilities used in the providing the Services.

#### **5.5 Pricing Principles**

- (a) The price of access to a Service should be set so as to:
  - (i) generate expected revenue from the Service that is at least sufficient to meet the efficient costs of providing access to it; and
  - (ii) include a return on investment commensurate with the regulatory and commercial risks involved.
- (b) Price structures should:
  - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
  - (ii) not allow a vertically integrated provider of access to Services to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others is higher.
- (c) Access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

#### **5.6 Exclusivity Principles**

- (a) The Port Manager will not grant exclusive access to a Service that uses a particular Facility unless the Applicant can demonstrate to the Port Manager's reasonable satisfaction that such access would optimise the use and efficiency of that Facility and enhance both the competitive position of the Port and competition in the relevant market generally.

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- (b) Paragraph (a) applies equally to Facilities developed, owned or paid for by a User as to Facilities developed, owned or paid for by the Port Manager. However, the Applicant must be reasonably compensated for any use of its Facilities by a third party.

### 5.7 Priority Principles

- (a) Subject to paragraph (b), the Port Manager may grant:
- (i) priority access to a Service or to a Service that uses a particular Facility;
  - (ii) lower-priority access to a Service or to a Service that uses a particular Facility and to which another User has been granted access of higher priority;
  - (iii) any combination of (i) and (ii) in relation to various Services or in relation to various Facilities.
- (b) Priority of access will be determined taking into account:
- (i) the time at which access is sought;
  - (ii) the availability of other access to equivalent Services;
  - (iii) the requirements and legitimate business interests of each User of, and Applicant for, the relevant Services;
  - (iv) the financial and other contribution of each User to the development of the relevant Facility; and
  - (v) the effect of granting the priority of access sought upon competition in the relevant markets.

### 5.8 Berthing Scheduling Principles

- (a) Subject to paragraphs (b) and (c) below, berthing of vessels at a berth will be determined by order of arrival of vessels at the Port of Darwin pilot station.
- (b) Priority may be afforded to the following vessel types at the following berths:

Berth	Priority Vessel Types
East Arm Wharf Berth 2	Bulk Ore Carriers
East Arm Wharf Berth 4	Bulk Liquid Tankers
Fort Hill Wharf	Cruise Vessels Defence Vessels

- (c) The Port Manager may alter the priority of vessels berthing at a berth:
- (i) in an emergency (including due to weather conditions);
  - (ii) due to the nature of the cargo to be loaded on, or unloaded from, the vessel (for example, in respect of a livestock vessel, for animal welfare reasons);
  - (iii) to give priority to a vessel anticipated to load or unload its cargo and depart the berth earlier than another vessel;
  - (iv) to give priority to a vessel which requires the use of equipment at the berth;
  - (v) to give priority to a vessel the movement of which is constrained by tides;
  - (vi) to avoid a conflict with the berthing of vessels at an adjacent berth; or

- (vii) as is reasonably required for the efficient and effective operation of the Port.

## 5.9 Pilotage Scheduling Principles

- (a) Subject to paragraph (b) below, the allocation of pilots to vessels will be determined by order of arrival of vessels at the Port of Darwin pilot station.
- (b) The Port Manager may alter the priority of pilot allocation to vessels:
  - (i) in an emergency (including due to weather conditions);
  - (ii) due to the nature of the cargo to be loaded on, or unloaded from, the vessel (for example, in respect of a livestock vessel, for animal welfare reasons);
  - (iii) to give priority to a vessel that has been given berthing priority pursuant to clause 5.8; or
  - (iv) as is reasonably required for the efficient and effective operation of the Port.

## 6 Negotiations for Access

### 6.1 Good faith negotiations

The Port Manager will negotiate with an Applicant for the provision of access to Services in good faith in accordance with the terms of this access policy. Applicants must also negotiate with the Port Manager in good faith in accordance with the terms of this access policy.

### 6.2 Access to Standard Services

- (a) An Applicant may apply for access to a Standard Service on Standard Terms at any time.
- (b) Upon such a request and subject to the Applicant satisfying the Prudential Requirements, the Port Manager will, within 5 Business Days, grant access to the Standard Service on Standard Terms whenever it is Feasible to grant access using presently available Facilities.
- (c) The Port Manager and an Applicant may agree to terms for access to Standard Services on terms other than the Standard Terms for that Service.

### 6.3 Access to Non-Standard Services

- (a) Clauses 6.4 to 6.9 below outline the process an Applicant must follow to gain access to:
  - (i) a Service other than a Standard Service;
  - (ii) a Standard Service other than on Standard Terms;
  - (iii) a Standard Service where it is not Feasible to grant access using presently available Facilities,(each, a **Non-Standard Service**).
- (b) By way of overview, the process involves:
  - (i) **Initial Inquiry**: preliminary exchanges of information and meeting to enable an Access Application to be lodged with the Port Manager (clause 6.4);
  - (ii) **Access Application**: submission of an Access Application by the Applicant (clause 6.5);
  - (iii) **Feasibility Review**: the Port Manager must prepare a Feasibility Review to determine whether it is prima facie Feasible to provide access to the Facility (clause 6.6);

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- (iv) **Feasibility Study:** if required by the Port Manager (acting reasonably) and the Applicant, the Port Manager must undertake a Feasibility Study to determine whether it is Feasible to provide access to the Facility (clause 6.7);
  - (v) **Negotiations for access:** negotiating the terms of an Access Agreement (clause 6.8); and
  - (vi) **Access Agreement:** acceptance and execution of an Access Agreement (clause 6.9).
- (c) If, at any time during the process for negotiating an Access Agreement, a Dispute arises between the Applicant and the Port Manager, either party may seek to resolve the Dispute in accordance with the Dispute resolution process outlined in clause 7.

#### 6.4 Initial Inquiry

- (a) An Applicant may make a written request to the Port Manager requesting information which is reasonably required by the Applicant to make an Access Application.
- (b) Subject to paragraph (d) below, the Port Manager will provide, within 10 Business Days, any information reasonably requested by an Applicant which is related to access to the Services to which the Applicant seeks access (or increased access) and which is reasonably required by the Applicant to assist in making an Access Application.
- (c) If the Applicant's request for information is not sufficiently clear or detailed to enable the Port Manager to identify the information sought by the Applicant, the Port Manager must notify the Applicant within 5 Business Days and seek clarification of the Applicant's request. Time under paragraph (b) will not run during the period in which the Port Manager is seeking clarification of the Applicant's request. The Port Manager may seek clarification of the Applicant's request on more than one occasion and at any time prior to the execution of an Access Agreement.
- (d) The Port Manager's obligation under paragraph (b) is subject to:
  - (i) the Port Manager not disclosing any information which would breach a confidentiality obligation binding upon it or which it considers (acting reasonably) is commercially sensitive in relation to its own operations; and
  - (ii) the Port Manager being able to refuse the request if it is unduly and manifestly onerous to the Port Manager or the information is not ordinarily and freely available to the Port Manager.
- (e) Prior to an Applicant submitting an Access Application, the Port Manager will, if requested by the Applicant, attend an initial meeting or telephone call with the Applicant within 5 Business Days of the request to discuss the Access Application and to provide clarification of the process outlined in this access policy.

#### 6.5 Access Application

- (a) If an Applicant seeks access to a Non-Standard Service then the Applicant must make a written request to the Port Manager stating (to the extent applicable):
  - (i) the Applicant's name, Australian Business Number, business address, postal address, telephone number, relevant contact person and that person's email address;
  - (ii) the Services to which access is sought;
  - (iii) the purpose for which access is sought;
  - (iv) all Facilities required for the Service;

- (v) the capacity required of those Facilities;
- (vi) the time or times at which access to the Services is required,  
(an **Access Application**).
- (b) Upon receiving an Access Application from the Applicant, the Port Manager will acknowledge receipt in writing within 3 Business Days, or if paragraph (c) applies, within 3 Business Days of receiving the additional or clarifying information from the Applicant.
- (c) If the Access Application is incomplete or requires clarification, the Port Manager may, prior to acknowledging receipt of the Access Application, seek in writing from the Applicant:
- (i) such additional information as is reasonably required to enable the Port Manager to consider the Access Application; or
  - (ii) clarification of the information that has been provided in the Access Application, to the extent that such clarification is reasonably necessary to enable the Port Manager to consider the Access Application.

## 6.6 Feasibility Review

- (a) The Port Manager must, within 15 Business Days of acknowledging receipt of the Access Application, prepare an initial review (a **Feasibility Review**) based upon the Access Application to consider whether, in the opinion of the Port Manager (acting reasonably):
- (i) based upon the information then known to the Port Manager, the access sought in the Access Application is prima facie Feasible;
  - (ii) the Applicant satisfies the Prudential Requirements; and
  - (iii) the Applicant has the skills or experience likely to be needed to be able to make effective use of the Service to which access is sought,
- (the **Preliminary Access Requirements**).
- (b) Within 3 Business Days of concluding the Feasibility Review, the Port Manager must give the Applicant a notice (a **Decision Notice**) stating whether the Port Manager considers the Applicant and the Access Application satisfies the Preliminary Access Requirements.
- (c) If the Decision Notice states that the Applicant does not satisfy the Preliminary Access Requirements, the Port Manager must when giving the Decision Notice, state in writing reasons as to why the Port Manager reached that conclusion. The Applicant may then amend and resubmit its Access Application, according to the results of the Feasibility Review, and the resubmitted Access Application will be a new Access Application for the purposes of clause 6.5.
- (d) If the Decision Notice states that the Applicant satisfies the Preliminary Access Requirements, the Port Manager must when giving the Decision Notice state in writing:
- (i) whether the Port Manager requires a Feasibility Study to be undertaken to determine if the access sought in the Access Application is Feasible (including whether the Port Manager (acting reasonably) proposes to engage an expert to determine if the access sought is Feasible); and
  - (ii) the estimated costs to the Port Manager of undertaking the Feasibility Study (the **Estimated Costs**).
- (e) Upon receiving a Decision Notice under paragraph (d):

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- (i) if the Decision Notice states that the Port Manager requires a Feasibility Study to be undertaken, the Applicant must within 20 Business Days of the date of the Decision Notice:
  - (A) notify the Port Manager in writing that it wishes the Port Manager to undertake a Feasibility Study; and
  - (B) pay the Estimated Costs to the Port Manager on account of the anticipated costs of the Feasibility Study;
- (ii) otherwise, commence negotiations with the Port Manager in accordance with clause 6.8 within 5 Business Days of the date of the Decision Notice.
- (f) If the Applicant does not satisfy the requirements of paragraph (e)(i) or (ii) (as applicable) it will be deemed to have withdrawn its Access Application.

## **6.7 Feasibility Study**

- (a) If:
  - (i) the Port Manager in its Decision Notice states that it requires a Feasibility Study to be undertaken; and
  - (ii) the Applicant gives written notice to the Port Manager in accordance with clause 6.6(e)(i) and pays the Estimated Costs to the Port Manager,the Port Manager must undertake a Feasibility Study.
- (b) The Feasibility Study must determine whether the access sought in the Access Application is Feasible and, in particular, must determine:
  - (i) whether it is Feasible to provide the access sought using existing Facilities;
  - (ii) if it is not Feasible to provide the access sought using existing Facilities, whether it is Feasible to develop the new Facilities required;
  - (iii) if it is Feasible to develop the new Facilities required, the nature of those Facilities and an estimate of the cost and time to develop them; and
  - (iv) if it is not Feasible for the Port Manager to provide the access sought, whether the Port Manager knows of a third party who might be able to provide the access sought and if so, the identity of that third party.
- (c) The Port Manager may require the Applicant to provide any additional information necessary to complete the Feasibility Study.
- (d) The Port Manager may engage an expert to assist in the Port Manager determining whether the access sought in the Access Application is Feasible.
- (e) The determination of the Feasibility of the access sought in the Access Application by the Port Manager may be conditional on the occurrence of a specified action, omission or event including:
  - (i) the approval by the Board of the Port Manager of the determination, including the approval of the determination in amended form; or
  - (ii) the provision of an environmental impact statement or report by any specified person; or
  - (iii) the obtaining of any licence or approval required under any law; or
  - (iv) the undertaking of consultation with a third party or the obtaining of consent of a third party.

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- (f) Subject to paragraph (g), the Port Manager must prepare the Feasibility Study and notify the Applicant in writing of the results of the Feasibility Study within 40 Business Days of the Applicant satisfying the requirements of clause 6.6(e)(i).
- (g) The time period set out in paragraph (f) is extended by the length of time taken by the Applicant to provide the information sought in a request under paragraph (c).
- (h) If the actual costs to the Port Manager of undertaking the Feasibility Study exceed the Estimated Costs, the Applicant shall pay the difference to the Port Manager. If the actual costs to the Port Manager of undertaking the Feasibility Study are less than the Estimated Costs, the Port Manager shall refund the difference to the Applicant.
- (i) If the Feasibility Study concludes that the access sought in the Access Application is Feasible, the Applicant must commence negotiations with the Port Manager in accordance with clause 6.8 within 5 Business Days of the Port Manager giving notice pursuant to paragraph (f).
- (j) If the Feasibility Study concludes that the access sought in the Access Application is not Feasible:
- (i) the Applicant may amend and resubmit its Access Application according to the results of the Feasibility Study and the resubmitted Access Application will be a new Access Application for the purposes of clause 6.5; and
  - (ii) if the Feasibility Study considers that access sought by the Access Application may be provided by a third party, the Port Manager must use its reasonable endeavours at the Applicant's cost to facilitate that access.
- (k) If the Applicant disagrees with the results of the Feasibility Study, this disagreement constitutes a Dispute for the purposes of clause 6.9(a).

### 6.8 Negotiations for Access

- (a) If:
- (i) the Port Manager determines in its Feasibility Review that the access sought in the Access Application is prima facie Feasible and the Port Manager does not require a Feasibility Review to be undertaken; or
  - (ii) the Port Manager determines in its Feasibility Study that the access sought in the Access Application is Feasible,
- the Applicant and the Port Manager must negotiate in good faith to conclude an Access Agreement that is consistent with:
- (iii) the Access Application;
  - (iv) the Feasibility Study, including any condition specified in accordance with clause 6.7(e);
  - (v) if no Feasibility Study was required by the Port Manager, the Feasibility Review;
  - (vi) the Prudential Requirements;
  - (vii) the terms of this access policy.
- (b) The negotiations will conclude on the earliest of:
- (i) the execution of an Access Agreement in respect of the access sought in the Access Application;
  - (ii) the Applicant giving written notice to the Port Manager that it no longer wishes to proceed with its Access Application;

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- (iii) the expiration of 60 Business Days after negotiations commenced pursuant to clause 6.6(e)(ii) or 6.7(i) (as the case may be);
  - (iv) following referral to arbitration in accordance with clause 7.4, the arbitrator determines that the Applicant is not negotiating in good faith;
  - (v) the Applicant no longer meeting the Prudential Requirements.
- (c) If for any reason permitted by paragraph (b) the negotiations conclude and an Access Agreement has not been executed, the Applicant will be entitled to submit a new Access Application to which the requirements of this clause 5.8 will apply.

## 6.9 Access Agreement

- (a) The granting of access to a Service will be finalised by the execution of an Access Agreement. The parties to the Access Agreement will be the Applicant and the Port Manager.
- (b) In the case of a Standard Service, the Access Agreement will take the form of the Applicant agreeing to the Standard Terms for that Service.
- (c) The Access Agreement must comply with the requirements of this access policy, including clause 5.4.
- (d) Once the Applicant has notified the Port Manager that it is satisfied with the terms and conditions of a draft Access Agreement offered by the Port Manager, the Port Manager will, within 3 Business Days, provide a final Access Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.
- (e) If the Port Manager offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, both the Port Manager and the Applicant will execute the Access Agreement. The parties will endeavour to do so within 5 Business Days of the Port Manager providing a final Access Agreement to the Applicant in accordance with paragraph (e).
- (f) No Access Agreement will exist, or will bind the parties, unless and until it is executed by both the Port Manager and the Applicant.

## 7 Dispute Resolution

### 7.1 Disputes

- (a) Any Dispute will, unless otherwise expressly agreed to the contrary by the parties, be resolved in accordance with this clause 7. Either party may give to the other party to the Dispute, within 20 Business Days of the Dispute arising, notice in writing (a **Dispute Notice**) specifying the Dispute and requiring it to be dealt with in the manner set out in this clause 7. The Port Manager and the Applicant must act in good faith to seek to resolve the dispute in accordance with this clause 7.
- (b) Any disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provision of the Access Agreement.
- (c) No party may institute any legal proceedings in relation to a Dispute unless the proceedings relate to a failure to comply with the provisions of this clause 7 or with the decision of an arbitrator or otherwise seek urgent injunctive relief.



## 7.2 Negotiation

Within 5 Business Days of a party giving the other a Dispute Notice, senior representatives from each party will meet in person or by telephone and use reasonable endeavours acting in good faith to resolve the Dispute.

## 7.3 Mediation

- (a) If the Dispute is not resolved in accordance with clause 7.2 within 10 Business Days of the date the Dispute Notice is received by the recipient, then:
- (i) if the parties agree, they will attempt to resolve the Dispute by mediation pursuant to this clause 7.3; or
  - (ii) if the parties do not agree to resolve the Dispute by mediation, either party may be notice in writing to the other (and without limiting clause 7.4(a)) refer the Dispute to be determined by arbitration pursuant to clause 7.4.
- (b) A Dispute referred to mediation will be mediated by a single mediator appointed by agreement of the parties or, if they fail to agree within 3 Business Days of the referral, a mediator appointed by the President for the time being of the Queensland Chapter of the Institute of Arbitrators and Mediators Australia (or similar body if that body ceases to exist (**IAMA**)) acting on the request of either party.
- (c) Unless the parties agree otherwise:
- (i) the mediation will be conducted in accordance with such rules as may be agreed by the parties or, failing agreement within five Business Days after referral of the Dispute to mediation, as nominated by the person agreed or nominated to be the mediator;
  - (ii) the parties may appoint a person, including a legally qualified person, to represent it or assist it in the mediation;
  - (iii) each party will bear their own costs relating to the preparation for and attendance at the mediation;
  - (iv) the costs of the mediator, and of any nomination fee, will be borne equally by the parties; and
  - (v) the Port Manager and the Applicant will use reasonable endeavours to ensure that the mediation is completed within 20 Business Days from the date the mediator is appointed, or such longer period as agreed between the parties.

## 7.4 Referral to arbitration

- (a) An Applicant or the Port Manager may, by notice in writing to the other (an **Arbitration Notice**), refer a Dispute to arbitration in accordance with this clause 7.4 at any time after:
- (i) the parties not agreeing to resolve the Dispute by mediation within 10 Business Days of the date of the Dispute Notice;
  - (ii) the day following 20 Business Days from the date the mediator is appointed, or such longer period as agreed by the parties, in accordance with clause 7.3(c)(v);
  - (iii) the holding of mediation attended by the parties at which the Dispute was not resolved; or
  - (iv) the failure by a party (other than the party seeking to serve an Arbitration Notice) to attend mediation at a time previously agreed by the parties.
- (b) The Arbitration Notice must specify:

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- (i) the nature of the Dispute;
  - (ii) the matters in respect of which the party is seeking arbitration;
  - (iii) the contact details of the person issuing the Dispute Notice (and, if that person is the Port Manager, the contact details of the party to whom the Dispute Notice is issued).
- (c) If the Dispute referred to in the Arbitration Notice is already the subject of mediation in accordance with clause 7.3, that mediation will immediately cease.
- (d) Any arbitration will be conducted in accordance with clauses 7.5 to 7.7.

## 7.5 Appointment of arbitrator

- (a) The parties must appoint a single arbitrator by agreement. If the parties fail to agree an arbitrator within 5 Business Days of referral of the dispute to arbitration then either party may request the President of IAMA to appoint the arbitrator.
- (b) The arbitrator may require the parties to indemnify him or her from any claims made against the arbitrator by that party arising in connection with the performance by the arbitrator of its duties under this clause 7, such indemnity excluding circumstances where the conduct of the arbitrator constitutes negligence (whether wilful or otherwise), dishonest or unlawful conduct. Where the arbitrator requests such an indemnity, the parties will execute a document providing such an indemnity within 5 Business Days of request by the arbitrator.

## 7.6 Conduct of arbitration

- (a) The parties may agree on the terms on which the arbitration will be conducted.
- (b) Subject to the terms of this clause 7.6, the arbitration will be conducted in accordance with and subject to the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).
- (c) If the parties are unable to reach agreement on the terms on which the arbitration will be conducted within 10 Business Days of the arbitrator being appointed, the arbitration will be conducted in accordance with the following procedures:
  - (i) the arbitrator will not be required to proceed with the arbitration unless and until the party that issued the Arbitration Notice has agreed to pay the arbitrator's and other costs as determined in accordance with clause 7.7(g) and provided any indemnity as required in accordance with clause 7.5(b);
  - (ii) the arbitration will be conducted in private;
  - (iii) a party may appoint a person, including a legally qualified person, to represent it or assist in the arbitration;
  - (iv) the arbitrator must observe the rules of natural justice, but is not bound by technicalities, legal forms or rules of evidence;
  - (v) the arbitrator must act as speedily as a proper consideration of the Dispute allows, having regard to the need to carefully and quickly enquire into and investigate the Dispute and all matters affecting the merits, and fair settlement, of the Dispute;
  - (vi) the arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to a Dispute, and may require that the cases be presented within those periods;

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- (vii) the arbitrator may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument;
  - (viii) the arbitrator will present his or her determination in a draft form to the parties and allow the parties the opportunity to comment before making a final determination;
  - (ix) the arbitrator will deliver a final determination in writing which includes his or her reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based;
  - (x) the arbitrator may make any determination or direction in relation to the Dispute that it considers appropriate. For the avoidance of doubt, such determination or direction may include making a binding determination in relation to the Dispute, or requiring the parties to continue or re-commence negotiations.
- (d) Any determination by the arbitrator will be confidential and may only be disclosed in accordance with section 27F of the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).
- (e) The arbitrator may at any time terminate an arbitration (without making an award) if he or she thinks that:
- (i) the notification of the Dispute is vexatious;
  - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (iii) the party who notified the Dispute has not engaged in negotiations in good faith.
- (f) The arbitrator must not, without the consent of all parties, allow any other person to join or intervene in the arbitration.
- (g) The arbitrator may receive expert technical advice from a technical expert agreed by the parties, or if the parties cannot agree, from a person determined by the arbitrator.

## **7.7 Decision of arbitrator**

- (a) In deciding a Dispute, the arbitrator must have regard to the terms of:
- (i) this access policy (including the principles set out in clause 4);
  - (ii) the access and pricing principles in section 133 of the Act;
  - (iii) any Access Application;
  - (iv) any Feasibility Review;
  - (v) any Feasibility Study; and
  - (vi) any other matter relevant to the Dispute.
- (b) The Arbitrator must not, without the consent of all parties make a determination which relates to matters which were not specified in the Arbitration Notice;
- (c) In relation to a Dispute concerning a Feasibility Review or Feasibility Study:
- (i) the arbitrator may determine only that the result of the Feasibility Review or Feasibility Study has not been determined by the Port Manager in accordance with the terms of this access policy;
  - (ii) if the arbitrator determines that the Feasibility Review or Feasibility Study has not been determined in accordance with the terms of this access policy, the arbitrator

must provide to the parties in writing details of the non-conformity and the Port Manager shall reconsider the Feasibility of the access sought in the Access Application; and

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- (iii) the arbitrator shall have no power to determine the Feasibility of the access sought in an Access Application.
- (d) A determination or direction of the arbitrator will be final and binding, subject only to any rights of review by a court under the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).
- (e) Other than in circumstances where the determination or direction is the subject of review by a court, if an Applicant does not comply with a determination or direction of the arbitrator, the Port Manager will not be obliged to continue negotiations for the provision of access to Services for that Applicant.
- (f) Other than where the determination or direction is the subject of review by a court, the Port Manager will comply with the lawful determination or direction of the arbitrator.
- (g) The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to the arbitrator's costs determination.
- (h) The arbitrator's determination shall be an award for the purposes of the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).

## 7.8 Information request

- (a) Subject to paragraph (c), within 10 Business Days of the giving of a Dispute Notice, a party (the **requesting party**) may request in writing that the other party (the **disclosing party**) to provide information to the requesting party:
  - (i) that is in the disclosing party's possession;
  - (ii) that is relevant to the access sought in the Access Application;
  - (iii) that is not otherwise publicly or freely available to the requesting party; and
  - (iv) that is directly relevant to resolving the Dispute.
- (b) The disclosing party shall provide the information requested by the requesting party within 5 Business Days.
- (c) The disclosing party's obligation under paragraph (a) is subject to:
  - (i) the disclosing party not disclosing any information which would breach a confidentiality obligation binding upon it;
  - (ii) where the disclosing party is the Port Manager, the disclosing party not disclosing any information which it considers (acting reasonably) is commercially sensitive in relation to its own operations; and
  - (iii) the disclosing party being able to refuse the request if it is unduly and manifestly onerous to the disclosing party or the information is not ordinarily and freely available to the disclosing party.
- (d) The requesting party must keep any Confidential Information obtain pursuant to this clause 7.8 confidential in accordance with clause 8.
- (e) Upon the resolution of the Dispute, the disclosing party may request that the requesting party return or destroy any documents provided to the disclosing party pursuant to this

clause 7.8 together with any documents created by the requesting party which contain or summarise Confidential Information obtained pursuant to this clause 7.8.

## **8 Confidentiality**

### **8.1 Treatment of Confidential Information**

(a) Subject to paragraph (b), if a party provides Confidential Information to another party either:

- (i) as part of the negotiation process for access to the Services; or
- (ii) for the purpose of resolving any Dispute,

the recipient of that Confidential Information will treat that Confidential Information as confidential, the property of the provider of that information, and will use that information solely for the purpose of negotiating access to the Services or resolving any Dispute in accordance with this access policy.

(b) A party is permitted to disclose Confidential Information:

- (i) to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants or professional advisers (including any expert retained in connection with a Feasibility Study) provided they are under a legal obligation not to disclose the Confidential Information to any third party;
- (ii) to any mediator or arbitrator appointed in accordance with clause 7 for the purposes of that mediation or arbitration;
- (iii) to the Regulator to the extent necessary for a party to comply with any written request by the Regulator; or
- (iv) if and to the extent required by law, provided that it first consults with the party that provided the Confidential Information in relation to the manner and timing of that disclosure.

### **8.2 Dispute resolution**

- (a) If Confidential Information is provided to a mediator or arbitrator for the purpose of assisting in the resolution of any Dispute in accordance with clause 7, the mediator or arbitrator must (and the terms and conditions of appointment of the mediator or arbitrator must require them to) take all reasonable steps to protect the confidentiality of information that any party to the dispute has identified as confidential or commercially sensitive.
- (b) For the purpose of this clause 8.2, any arbitrator appointed in accordance with clause 7 may require the parties to a Dispute to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
  - (i) requiring each party and their advisers to give confidentiality undertakings to each other party; and
  - (ii) limiting access to Confidential Information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (c) Any arbitrator appointed in accordance with clause 7 may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.

**9 Review**

- (a) No later than five years after the Commencement Date the Port Manager must review this access policy.
- (b) In reviewing this access policy, the Port Manager must seek submissions from Users and the Regulator.
- (c) Following a review, the Port Manager may seek to amend this access policy in accordance with section 127(10) of the Act.

## Schedule 1

### Standard Services as at Commencement Date

#### *Wharfage and Berthage*

- 1 The provision of access by vessels to the shipping channels and waters of the Port.
- 2 The provision of access for vessels to berth at:
  - (a) East Arm Wharf - Berths 1 to 4;
  - (b) Fort Hill Wharf - East Berth and West Berth.

#### *Moorings*

- 3 The provision of access to moorings within the Port owned or leased by the Port Manager but excluding:
  - (a) tug moorings and tug pens; and
  - (b) moorings on or from pontoons.

#### *Equipment and Facilities*

- 4 The provision of access to mobile or moveable loading or unloading equipment owned or operated by the Port Manager but excluding:
  - (a) the rail mounted dry bulk ship loader on East Arm Wharf Berth 2; and
  - (b) the train unloading facility, dumping facility, stockpile areas, dump station, conveyor systems and related equipment and facilities.
- 5 The provision of access to ablution facilities owned or leased by the Port Manager.

#### *Pilotage*

- 6 The provision of pilotage services within the Port.

Access Policy

**Executed and delivered as a Deed Poll** in Darwin.

**Executed** as a deed poll in accordance with section 127 of the *Corporations Act 2001* by **Darwin Port Operations Pty Ltd** (ACN 603 472 788) as trustee for the Darwin Port Manager Trust:

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Director Signature

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Director/Secretary Signature

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Print Name

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Print Name