

Access Policy

of Darwin Port Operations Pty Ltd (ACN 603 472 788) (Port Operator)

Approved by the Utilities Commission of the Northern Territory on [date]

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Schedule 1

Standard Services as at Commencement Date

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1 Background

1.1 Introduction

- (a) The Port Operator 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 Operator is declared to be a regulated industry for the *Utilities Commission Act* (NT).
- (c) The Port Operator provides the Services (excluding pilotage services) in its capacity as trustee for the Darwin Port Manager Trust (ABN 60 269 541 845). Pilotage services are provided by Darwin Port Pilotage Pty Ltd in its capacity as trustee for the Darwin Port Pilotage Trust (ABN 98 744 318 229) who has been appointed as the pilotage services provider under section 85 of the Act.
- (d) Section 127(1) of the Act requires the Port Operator to prepare, and give to the Regulator, a draft access policy in accordance with that section.
- (e) The Regulator has received, and on [date] gave notice to the Port Operator approving, a draft of the Access Policy pursuant to section 127(3) of the Act.
- (f) The Access Policy is the access policy of the Port Operator for the Port.
- (g) The Port Operator must comply with the Access Policy under the Act.

1.2 Objectives

The objectives of the 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, Divisions 1 and 2 of the Act;
- (d) reach an appropriate balance between:
 - (i) the legitimate business interests of the Port Operator;
 - (ii) the legitimate interests of Applicants and Users seeking or having access to the Services; and
 - (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;
- (e) provide an efficient, effective and binding dispute resolution process.

1.3 Relationship to the Act

For the purposes of sections 124(5)(b) and 125(2)(b) of the Act, nothing in this access policy is intended to require or permit the Port Operator to engage in conduct in breach of section 124(1) or section 125(1) of the Act.

2 Definitions and Interpretation

2.1 Definitions

The following definitions apply unless the context requires otherwise.

Access Policy

Access Agreement means an agreement between the Port Operator and an Applicant under which the Port Operator 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 including a request to alter or add to port facilities, made in accordance with clause 6.5.

Access Policy means:

- (a) this document;
- (b) the Standard Terms; and
- (c) the Payment Terms.

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 Operator that the Access Policy is approved pursuant to section 127(3) of the Act.

Confidential Information means information exchanged between the Port Operator 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 the lawful possession of a party prior to being provided by the party; or
- (h) must be disclosed in order to comply with 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 dispute relating to access to a Service, including a dispute as to the price at which, or other terms on which, access will be provided, other than a dispute in relation to an Access Agreement once executed.

Dispute Notice has the meaning given by clause 7.1.

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 4.2.

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

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

Non-Standard Service has the meaning given by clause 6.2.

Payment Terms means the terms and conditions of the Port Operator dealing with payment for services and related matters approved by the Regulator in accordance with the Act.

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 access and pricing principles in section 133 of the Act from time to time. The principles as at the Commencement Date are set out in clause 5.5.

Priority Principles means the principles outlined in clauses 5.7, 5.8 and 5.9 (to the extent each is applicable).

Prohibited Contract means an agreement or arrangement prohibited by section 124 or 125 of the Act.

Prudential Requirements means:

- (a) the Applicant:
 - (i) is 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) does not have a liquidator, receiver, receiver and manager, controller, administrator, trustee-in-bankruptcy appointed to it or any of its assets;
 - (iii) is not subject to an application made to a court for its winding-up;
 - (iv) does not propose to enter into, and has not entered into any form of arrangement with its creditors or any of them, including a deed of company arrangement;
 - (v) is not subject to any event or process which is analogous to the things outlined in paragraphs (i) to (iv);
- (b) the Applicant has demonstrated to the Port Operator 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 Operator; 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 Operator.

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

Regulator means the Utilities Commission of the Northern Territory established under the *Utilities Commission Act*.

Services means the services prescribed by regulation 12 of the Regulations from time to time. As at the Commencement Date, the Services comprise the following services provided by the Port Operator:

- (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 5.2.

Standard Terms means the terms and conditions for access to Standard Services approved by the Regulator in accordance with the Act.

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.
 - (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 and will be reviewed in accordance with regulations 15(1) and (2) of the Regulations and may be amended subject to sections 127(10) and (11) of the Act.
- (b) This access policy expires on the earlier of:
 - (i) the day upon which, under the terms of the Act, the Port Operator is no longer required to have an access policy; and
 - (ii) the day upon which a new access policy is approved under section 127(3) of the Act.

4 Access Undertaking

4.1 Undertaking

- (a) The Port Operator undertakes to provide Applicants with access to the Services on reasonable terms.

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- (b) In considering whether the terms of, or proposed to be included in, an Access Agreement are reasonable regard may be had to the objectives of this Policy including the legitimate business interests of the Port Operator. Without limitation, the legitimate business interests of the Port Operator include the requirement to comply with any contractual obligations that the Port Operator or its Associated Entities may owe the Northern Territory Government.
- (c) The matters listed in paragraph (b) are not an exhaustive list of the matters that may be considered in determining whether access to Services has been, or is proposed to be, provided on reasonable terms.

4.2 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 Operator is legally entitled to do so;
- (c) to do so would be consistent with:
 - (i) the Port Operator's principal functions to:
 - (A) establish, manage, maintain and operate facilities and services in the Port that promote its safe and efficient operation; and
 - (B) facilitate trade utilising the Port and use its best endeavours to increase the volume of that trade;
- (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 Operator under the Act and under workplace health and safety legislation and all other legislation dealing with human safety;
- (e) to do so would not cause the Port Operator to breach any existing contractual obligations of the Port Operator (and its Australian related bodies corporate who own or lease assets or have any functions relevant to the Port) for access to the Port (but excluding a Prohibited Contract);
- (f) to do so would not unreasonably endanger any aspect of the natural or built environment surrounding the Port; and
- (g) to do so would not contravene any statute or any instrument under a statute, including the Port Operator's obligations under the Act and the Regulations and all relevant planning, building, environmental and competition legislation.

5 Access Framework

5.1 Overview

Access may be provided:

- (a) on Standard Terms for Standard Services, unless otherwise agreed by the Port Operator and the Applicant; or
- (b) on the terms of an Access Agreement for Non-Standard Services.

5.2 Meaning of Standard Services

- (a) The Port Operator may, but is not obliged to, prepare Standard Terms upon which certain Services are offered by the Port Operator.

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- (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 Operator may develop Standard Terms for further Standard Services.

5.3 Variation or withdrawal of Standard Terms

- (a) The Port Operator may vary any Standard Terms or develop proposed Standard Terms for further Standard Services, provided always that:
 - (i) the Standard Terms are consistent with the requirements of this document; and
 - (ii) the Port Operator complies with section 127(10) and (11) of the Act in respect of any variation.
- (b) The Port Operator may withdraw a Service as a Standard Service by withdrawing the Standard Terms for that Service provided that the Port Operator complies with sections 127(10) and (11) of the Act in respect of any withdrawal.

5.4 Requirements for an Access Agreement

Where applicable, 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 which must not be inconsistent with the Priority Principles;
- (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;
- (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 each party, including any necessity to obtain any accreditation or authorisation;
- (k) each party's responsibilities for obtaining planning approvals in relation to the Services; and
- (l) the circumstances in which the Port Operator may relocate the Facilities used in providing the Services.

This is not an exclusive list of the matters that may be included in an Access Agreement.

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.

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- (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 Operator may grant an Applicant exclusive access to a Service that uses a particular Facility if:
 - (i) it is not necessary, reasonable or practicable for the Port Operator to grant access to, or use of, that Facility to other Users; and
 - (ii) exclusive access by the Applicant 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.
- (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 Operator. However, where an Applicant proposes to fund the construction of a new, expanded, upgraded or additional Facility, 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 Operator 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 Operator 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;
 - (vii) in the case of a liquid gas carrier:
 - (A) to allow for the expeditious loading of the vessel where that is required to prevent curtailment of hydrocarbon production due to excessive inventory in the terminal export tankage; or
 - (B) to seek to minimise delay which could result in a compromise of a liquid gas carrier's loading via depletion of its on-board liquid gas reserve (referred to as a "heel") for cooling of the vessel's systems; or
 - (viii) 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 Operator 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 the movement of which is constrained by tides;
 - (iv) in the case of a liquid gas carrier:
 - (A) to allow for the expeditious loading of the vessel is required to prevent curtailment of hydrocarbon production due to excessive inventory in the terminal export tankage; or
 - (B) to seek to minimise delay which could result in a compromise of a liquid gas carrier's loading via depletion of its on-board liquid gas reserve (referred to as a "heel") for cooling of the vessel's systems;
 - (v) to give priority to a vessel that has been given berthing priority pursuant to clause 5.8; or

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

6 Negotiations for Access

6.1 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 clause 6.1(g), the Port Operator will, within five Business Days, grant access to the Standard Service on Standard Terms whenever it is Feasible to grant access using Facilities in existence at the time Access is to be provided.
- (c) If access to the Standard Service on Standard Terms is not Feasible at the time access is to be provided, the Port Operator will advise the Applicant in writing within 2 Business Days of receiving the application:
 - (i) of any alternative time(s) or Facilities at which access to the Standard Service may be provided on Standard Terms, having regard to the Priority Principles; or
 - (ii) if there are no alternative times or Facilities at which access could be granted to the Standard Service on Standard Terms—the reasons for the Port Operator forming that view.
- (d) Upon receiving notice under paragraph (c), the Applicant may:
 - (i) seek access to a Standard Service on Standard Terms at an alternative time or at an alternative Facility as proposed by the Port Operator;
 - (ii) seek access to a Non-Standard Service in accordance with clauses 6.4 to 6.9; or
 - (iii) withdraw its application.
- (e) An agreement to access Standard Services on Standard Terms is an Access Agreement for the purposes of the Access Policy.
- (f) An Applicant may apply for access to Standard Services on terms other than the Standard Terms for that Service under clause 6.2.
- (g) The obligation of the Port Operator to grant access under clause 6.1(b) is subject to the Port Operator being satisfied on reasonable grounds that the Applicant satisfies the Prudential Requirements. Clauses 6.3(b), 6.3(c) and 6.3(d) apply for the purposes of this clause.

6.2 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 Operator (clause 6.4);
 - (ii) **Access Application:** submission of an Access Application by the Applicant (clause 6.5);

- (iii) **Feasibility Review:** the Port Operator must prepare a Feasibility Review to determine whether it is prima facie Feasible to provide access to the Facility (clause 6.6);
 - (iv) **Feasibility Study:** if required by the Port Operator (acting reasonably) and the Applicant, the Port Operator 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 Operator, either party may seek to resolve the Dispute in accordance with the Dispute resolution process outlined in clause 7.

6.3 Prudential Requirements

- (a) The obligation of the Port Operator to enter into negotiations about the terms of an Access Agreement with an Applicant (or to offer Standard Terms for Standard Services to the Applicant) is subject to the Port Operator being satisfied on reasonable grounds that the Applicant satisfies the Prudential Requirements.
- (b) In satisfying itself for the purposes of clause 6.3(a), the Port Operator may request the Applicant to provide information to the Port Operator that the Port Operator reasonably requires for that purpose.
- (c) When the Port Operator is not satisfied on reasonable grounds of matters mentioned in the definition of Prudential Requirements, the Port Operator must notify the Applicant, in writing within five Business Days of the provision of information by the Applicant, of the reasons and give the Applicant an opportunity to provide additional information. The Applicant must provide the additional information within five Business Days after being notified or such longer period as may be agreed by the Port Operator. That information having been provided, the Port Operator must make a decision as to whether the Port Operator is satisfied on reasonable grounds that the Applicant satisfies the Prudential Requirements within five Business Days of the information being provided and notify the Applicant.
- (d) A dispute about a decision as to whether the Applicant satisfies the Prudential Requirements is a Dispute for the purpose of the Access Policy.

6.4 Initial Inquiry and Information

- (a) An Applicant may make a written request to the Port Operator requesting information which is reasonably required by the Applicant to make an Access Application. The Applicant may make a request on more than one occasion at any time prior to the making of an Access Application.
- (b) Subject to paragraph (d) below, the Port Operator 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 Operator to identify the information sought by the Applicant, the Port Operator must notify the Applicant within five Business Days and seek clarification of the Applicant's

request. Time under paragraph (b) will not run during the period from the date of the Port Operator's request to the date the requested information is provided by the Applicant.

- (d) The Port Operator's obligation under paragraph (b) is subject to:
 - (i) the Port Operator 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 Operator being able to refuse the request if it is unduly and manifestly onerous to the Port Operator or the information is not ordinarily and freely available to the Port Operator.
- (e) Prior to an Applicant submitting an Access Application, the Port Operator will, if requested by the Applicant, attend an initial meeting or telephone call with the Applicant within five Business Days of the request to discuss the proposed Access Application and to provide clarification of the process outlined in the 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 Operator 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,and must include with the request a statement that the Applicant agrees to submit to arbitration all Disputes arising under the Access Policy in relation to the request (an **Access Application**).
- (b) Upon receiving an Access Application from the Applicant, the Port Operator will acknowledge receipt in writing within three Business Days, or if paragraph (c) applies, within three Business Days of receiving the additional or clarifying information from the Applicant.
- (c) If the Access Application is incomplete or requires clarification, the Port Operator may, prior to acknowledging receipt of the Access Application and within 10 Business Days of the receipt of the Access Application, seek in writing from the Applicant:
 - (i) such additional information as is reasonably required to enable the Port Operator 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 Operator to consider the Access Application.

6.6 Feasibility Review

- (a) The Port Operator 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 Operator (acting reasonably)

and based upon the information then known to the Port Operator, the access sought in the Access Application is:

- (i) prima facie Feasible; or
 - (ii) if not prima facie Feasible, would be prima facie Feasible if certain steps based on information then known to the Port Operator were taken,
(the **Preliminary Access Requirements**).
- (b) Within three Business Days of concluding the Feasibility Review, the Port Operator must give the Applicant a notice (a **Decision Notice**) stating whether the Port Operator considers the access sought in the Access Application satisfies the Preliminary Access Requirements.
- (c) If the Decision Notice states that the access sought in the Access Application does not satisfy the Preliminary Access Requirements, the Port Operator must when giving the Decision Notice, state in writing reasons as to why the Port Operator reached that conclusion and what steps the Applicant may take to enable the access sought to satisfy the Preliminary Access Requirements. The Applicant may then dispute the finding or 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 access sought in the Access Application satisfies the Preliminary Access Requirements, the Port Operator must when giving the Decision Notice state in writing:
- (i) whether the Port Operator requires a Feasibility Study to be undertaken to determine if the access sought in the Access Application is Feasible (including whether the Port Operator (acting reasonably) proposes to engage an expert to determine if the access sought is Feasible);
 - (ii) the estimated reasonable costs to the Port Operator of undertaking the Feasibility Study, including an itemisation of the costs by reference to the party to whom the costs are to be paid (or incurred) and the nature of the work to be performed in respect of those costs (the **Estimated Costs**); and
 - (iii) the information that the Port Operator reasonably expects that it will require the Applicant to provide for the Feasibility Study.
- (e) Upon receiving a Decision Notice under paragraph (d):
- (i) if the Decision Notice states that the Port Operator requires a Feasibility Study to be undertaken, the Applicant must within 30 Business Days of the date of the Decision Notice:
 - (A) notify the Port Operator in writing that it wishes the Port Operator to undertake a Feasibility Study and pay the Estimated Costs to the Port Operator on account of the anticipated costs of the Feasibility Study; or
 - (B) give a Dispute Notice to the Port Operator disputing:
 - (1) the requirement of the Port Operator to undertake a Feasibility Study; and/or
 - (2) the Estimated Costs of the Feasibility Study;
 - (ii) otherwise, commence negotiations with the Port Operator in accordance with clause 6.8 within five 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 Operator in its Decision Notice states that it requires a Feasibility Study to be undertaken; and
 - (ii) the Applicant gives written notice to the Port Operator in accordance with clause 6.6(e)(i) and pays the Estimated Costs to the Port Operator,the Port Operator must undertake a Feasibility Study.
- (b) The Feasibility Study must determine whether the access sought in the Access Application is Feasible (or would, if certain additional steps stated in the Feasibility Study were taken, be Feasible) and, in particular, must determine and must state:
 - (i) whether it is Feasible to provide the access sought using existing Facilities and the indicative costs and charges for that access or how such costs and charges may be determined;
 - (ii) if it is not Feasible to provide the access sought, whether it is Feasible to provide the access sought by:
 - (A) obtaining a licence or other approval required by law;
 - (B) undertaking consultation with a third party or the obtaining of consent of a third party;
 - (C) developing new Facilities; or
 - (D) taking other steps,(collectively, **Additional Steps**) and the indicative costs and charges for that access or how such costs and charges may be determined;
 - (iii) if it is Feasible to provide the access sought by taking Additional Steps, the nature of those Additional Steps and, to the extent known by the Port Operator, an estimate of the cost and time to undertake them; and
 - (iv) if it is not Feasible for the Port Operator to provide the access sought (after the consideration of possible Additional Steps), the reasons why it is not Feasible and whether the Port Operator 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 Operator may, acting reasonably, require the Applicant to provide any additional information necessary to complete the Feasibility Study reasonably available to the Applicant.
- (d) The Port Operator may engage an expert to assist in the Port Operator determining whether the access sought in the Access Application is, or would be, Feasible provided details of that expert and the estimated costs of that expert were included in the Estimated Costs or are otherwise agreed to by the Applicant before the expert is engaged.
- (e) Subject to paragraph (f), the Port Operator 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). At the request of the Applicant, the Port Operator shall provide a copy of the Feasibility Study to the Applicant.

Access Policy

- (f) The time period set out in paragraph (e) is extended by the length of time taken by the Applicant to provide the information sought in a request under paragraph (c).
- (g) If the actual reasonable costs to the Port Operator of undertaking the Feasibility Study exceed the Estimated Costs, the Applicant shall pay the difference to the Port Operator within 20 Business Days of demand. If the actual reasonable costs to the Port Operator of undertaking the Feasibility Study are less than the Estimated Costs, the Port Operator shall refund the difference to the Applicant within 20 Business Days of demand.
- (h) If the Feasibility Study concludes that the access sought in the Access Application is Feasible or would, if the Additional Steps were undertaken, be Feasible, the Port Operator and the Applicant must commence negotiations in accordance with clause 6.8 within five Business Days of the Port Operator giving notice pursuant to paragraph (e).
- (i) If the Feasibility Study concludes that the access sought in the Access Application is not Feasible (after the consideration of possible Additional Steps):
 - (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 Operator must at the request of the Applicant use its reasonable endeavours at the Applicant's cost to facilitate that access.
- (j) If the Applicant disagrees with the results of the Feasibility Study, this disagreement constitutes a Dispute for the purposes of the Access Policy.

6.8 Negotiations for Access

- (a) If:
 - (i) the Port Operator determines in its Feasibility Review that the access sought in the Access Application is prima facie Feasible and the Port Operator does not require a Feasibility Study to be undertaken; or
 - (ii) the Port Operator determines in its Feasibility Study that the access sought in the Access Application is, or would be, Feasible,the Applicant and the Port Operator must negotiate to conclude an Access Agreement in respect of that access.
- (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 Operator that it no longer wishes to proceed with its Access Application;
 - (iii) the expiration of 60 Business Days (or longer period requested by the Applicant and agreed by the Port Operator, acting reasonably) after negotiations commenced pursuant to clause 6.6(e)(ii) or 6.7(h) (as the case may be);
 - (iv) the Applicant no longer meeting the Prudential Requirements.
- (c) If for any reason permitted by clause 6.8(b) the negotiations conclude and an Access Agreement has not been executed, the Applicant will be entitled to submit a new Access Application under the Access Policy in respect of the same or different access.

Access Policy

- (d) A dispute about whether negotiations have concluded pursuant to clause 6.8(b) is a Dispute for the purposes of the Access Policy.

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 Operator in its capacity as trustee for the Darwin Port Manager Trust (ABN 60 269 541 845) or where the Service is pilotage services the parties will be the Applicant and Darwin Port Pilotage Pty Ltd as trustee for the Darwin Port Pilotage Trust (ABN 98 744 318 229).
- (b) In the case of an Access Agreement in respect of a Non-Standard Service, the Port Operator will provide a draft Access Agreement to the Applicant as soon as is reasonably practicable following the commencement of negotiations.
- (c) The Access Agreement must comply with the requirements of the Access Policy, including clause 5.4.
- (d) Once the Applicant has notified the Port Operator that it is satisfied with the terms and conditions of a draft Access Agreement offered by the Port Operator, the Port Operator will, within three 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 Operator offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, both the Port Operator and the Applicant will execute the Access Agreement. The parties will endeavour to do so within five Business Days of the Port Operator 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 Operator 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 30 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.
- (b) The Dispute Notice must specify:
 - (i) the matters that are in Dispute;
 - (ii) the contact details of the person issuing the Dispute Notice (and, if that person is the Port Operator, the contact details of the party to whom the Dispute Notice is issued).
- (c) Any disputes in relation to an Access Agreement once executed, or the Standard Terms once access has been granted on such terms, will be dealt with in accordance with the provision of the Access Agreement or Standard Terms respectively and this clause 7 will not apply.
- (d) 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 to seek urgent injunctive relief or as permitted or required by the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).

Access Policy

- (e) For the purposes of this clause 7.1, a Dispute is taken to have arisen:
- (i) if the Dispute is in relation to a decision by the Port Operator that it is not Feasible to provide access to a Standard Service on Standard Terms—on the date upon which that decision is notified to the Applicant;
 - (ii) if the Dispute is in relation to a decision by the Port Operator that the Applicant does not meet the Prudential Requirements—on the date upon which the Port Operator notified the Applicant that it does not meet the Prudential Requirements;
 - (iii) if the Dispute is in relation to a decision by the Port Operator to refuse to provide information under clause 6.4—on the date upon which the Port Operator notified the Applicant of its refusal to provide the information sought;
 - (iv) if the Dispute is in relation to a Decision Notice or whether a Feasibility Study is to be undertaken or in relation to the Estimated Costs of a Feasibility Study—on the date upon which the Port Operator gave the Decision Notice to the Applicant;
 - (v) if the Dispute is in relation to the results of a Feasibility Study, whether the Access Application is Feasible or whether Additional Steps are required—on the date upon which the Port Operator notified the Applicant of the results of the Feasibility Study or if the Applicant requests a copy of the Feasibility Study within 10 Business Days of the Port Operator notifying the Applicant of the results of the Feasibility Study, from the date a copy of the Feasibility Study is provided to the Applicant;
 - (vi) if the Dispute is in relation to the actual costs of a Feasibility Study—on the date upon which the Port Operator notified the Applicant of the actual costs of the Feasibility Study;
 - (vii) if the Dispute is in relation to whether negotiations for an Access Agreement have concluded (including a Dispute in relation to a refusal to extend the period for negotiation of an Access Agreement)—on the date upon which the negotiations for an Access Agreement are taken to have concluded pursuant to clause 6.8.
 - (viii) if the Dispute is in relation to a failure by the Port Operator to take a step, or to take a step by a required time—on the date upon which that step was to have been undertaken;
 - (ix) if the Dispute is otherwise about a decision of, or step taken by, the Port Operator—on the date upon which the Port Operator notified the Applicant of the relevant decision or step taken under the Access Policy;
 - (x) if the Dispute relates to the terms and conditions on which the Port Operator is offering access or is not otherwise covered by the preceding sub-paragraphs – on the date which is 60 Business Days after the terms are provided under clause 6.9(b) (in the case of a dispute relating to the terms and conditions) or otherwise 60 Business Days after negotiations commenced pursuant to clause 6.6(e)(ii) or 6.7(h) (as the case may be).
- (f) If a Dispute Notice is given by an Applicant after the period stated in clause 7.1(a), the Applicant is not precluded from making a new Access Application on the same, or substantially the same, terms as the Access Application the subject of the claimed Dispute.

7.2 Negotiation

Within five Business Days of a party giving the other a Dispute Notice, senior representatives from each party will meet in person or by telephone and undertake genuine and good faith negotiations with a view to resolving the Dispute as quickly as possible.

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, either party may by notice to the other refer the Dispute to mediation pursuant to this clause 7.3.
- (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 three Business Days of the referral, a mediator appointed by the Chair of the Resolution Institute (ACN 008 651 232) (or similar body if that body ceases to exist) 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 Operator 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) The Port Operator agrees to submit to arbitration all Disputes arising under the Access Policy.
- (b) An Applicant or the Port Operator 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 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);
 - (ii) the holding of mediation attended by the parties at which the Dispute was not resolved; or
 - (iii) 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.
- (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 five Business Days of referral of the Dispute to arbitration then either party may request the Chair of the Resolution Institute 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 five Business Days of request by the arbitrator.

7.6 Conduct of arbitration

- (a) The arbitration will be conducted in accordance with and subject to the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) and as provided by this clause 7.6.
- (b) Without limiting the procedures available under the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), 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 parties to the Dispute have agreed to pay the arbitrator's and other costs as determined in accordance with clause 7.7(f) 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;
 - (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.

- (c) 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).
- (d) 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; or
 - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance.
- (e) The arbitrator must not, without the consent of all parties, allow any other person to join or intervene in the arbitration. However, nothing in this clause shall prevent the arbitrator from consolidating arbitral proceedings pursuant to section 27C of the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).
- (f) 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:
 - (i) the Act;
 - (ii) the Access Policy;
 - (iii) any other matter relevant to the Dispute; and
 - (iv) the need for the Port Operator and its Associated Entities to comply with any contractual obligations the Port Operator or its Associated Entities may owe the Northern Territory Government.
- (b) 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).
- (c) Other than in circumstances where the determination is the subject of review by a court, if an Applicant does not comply with a lawful determination of the arbitrator:
 - (i) the Port Operator will not be obliged to continue negotiations for the provision of access to Services for that Applicant on the same or on substantially the same terms as sought in the Access Application the subject of the arbitration;
 - (ii) the Applicant may not make a further application for access to the same or substantially the same Services as was the subject of the arbitration, for a period not exceeding 12 months from the date of the lawful determination.
- (d) Other than where the determination or direction is the subject of review by a court, the Port Operator will comply with the lawful determination or direction of the arbitrator.
- (e) Irrespective of the terms of an arbitrator's lawful determination or direction, an Applicant shall not be obliged to enter into an Access Agreement. However, if an Applicant decides not to enter into an Access Agreement following an arbitrator's lawful determination or direction the Applicant may not make a further application for access to the same or substantially the same Services as was the subject of the arbitration for a period not exceeding 12 months from the date of the lawful determination or direction.

Access Policy

- (f) 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.
- (g) 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) and without limiting section 17F of the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), 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; and
 - (ii) that is reasonably necessary for the resolution of the Dispute.
- (b) The disclosing party shall provide the information requested by the requesting party within five 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) 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 obtained 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 the 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 Reasons for Decisions

- (a) Where the Port Operator makes a decision under or in relation to the Access Policy, a User or Applicant affected by that decision may request the Port Operator to provide written reasons for that decision.
- (b) A request under paragraph (a):
 - (i) must be in writing; and
 - (ii) must be made within 10 Business Days after notice of the decision was given.
- (c) The Port Operator must comply with a request as soon as practicable, and in any case, within 10 Business Days after receiving the request.
- (d) The Port Operator's written statement must contain the following:
 - (i) the reasons for the decision; and
 - (ii) any findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based.

10 Review

- (a) No later than five years after the Commencement Date the Port Operator must review the Access Policy.

Access Policy

- (b) In reviewing the Access Policy, the Port Operator must seek submissions from Users and the Regulator.
- (c) Following a review, the Port Operator may seek to amend the 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; and
 - (b) Fort Hill Wharf - East Berth and West Berth.

Equipment and Facilities

- 3 The provision of access to mobile or moveable loading or unloading equipment owned or operated by the Port Operator 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.
- 4 The provision of access to ablution facilities owned or leased by the Port Operator.

Entry of Persons and Vehicles

- 5 The provision of access by persons or vehicles to land within the Port on which Facilities are located where access is reasonably necessary in connection with the provision of access to items 1 to 4 above.

Pilotage

- 6 The provision of pilotage services within the Port.