



DARWIN PORT OPERATIONS PTY LTD

DRAFT ACCESS POLICY FOR THE PORT OF DARWIN

FINAL DECISION

30 June 2017

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Purpose of this paper

This paper provides the Utilities Commission's Final Decision on the Draft Access Policy submitted by Darwin Port Operations Pty Limited (DPO) for the Port of Darwin.

The Commission's objective is to provide transparency regarding the decision-making process in accordance with the *Ports Management Act* and Ports Management Regulations and pursuant to the objects of the *Utilities Commission Act*.

This paper is separated into two sections.

- Part A contains the Statement of Reasons supporting the Commission's decision and background of the process undertaken by the Commission in reaching its decision.
- Part B contains the Commission's decision in relation to the Draft Access Policy submitted by DPO for the Port of Darwin.

Confidentiality

During the consultation process on the draft access policy and draft decision, a number of submissions were received that were identified by the submitting party as confidential or commercial-in-confidence or both.

In order to preserve the confidentiality of those submissions, the Commission has not provided a summary of submission received.

Glossary of terms

Term	Definition
Act	<i>Ports Management Act</i>
ASCO	ASCO Australia Pty Ltd, operator of the Marine Supply Base
Commission	Utilities Commission of the Northern Territory
DPO	Darwin Port Operations Pty Limited (ABN 62 603 472 788)
DPPS	Darwin Port Pilotage Pty Ltd (ABN 98 744 318 229)
Feasible	As defined by clause 4.3 of the draft access policy (as received 16 May 2017)
Landbridge	Landbridge Infrastructure Australia Pty Ltd
Minister	Minister for Infrastructure, Planning and Logistics as defined by the Administrative Arrangements Order
NTG	Northern Territory Government
Payment Terms	Payment Terms for Standard Services
Prescribed service	Services provided by a private Port Operator to which Part 11 of the <i>Ports Management Act</i> applies as declared in Regulation 12 of the Ports Management Regulations
Regulations	Ports Management Regulations
Standard service	Services identified in Schedule 1 of the Draft Access Policy to which the Standard Terms apply
Standard Terms	Terms and conditions for access to Standard Services.

Part A: Statement of reasons

Chapter 1: Executive summary

- 1.1 The *Ports Management Act* (the Act) provides for the control, management and operation of ports. Part 11 of the Act relates to port access and pricing and the object of Part 11, as declared by section 117, is to promote economically efficient operation and use of, and investment in, major port facilities in the Northern Territory by which services are provided, so as to promote effective competition in upstream and downstream markets.
 - 1.2 Part 11 of the Act applies to prescribed services provided by a Port Operator of a designated port that is not a public sector entity, the latter being defined as a private Port Operator. Section 119 of the Act declares the provision of prescribed services by a private Port Operator to be a regulated industry for the *Utilities Commission Act*.
 - 1.3 Under Part 11 of the Act, the Utilities Commission (the Commission) has a role in relation to port access and price regulation for prescribed services that commences with the appointment of a private Port Operator.
 - 1.4 DPO was declared the operator of the Port of Darwin in accordance with section 8(1) of the Act on and from 1 July 2015. On 15 November 2015, ownership of Darwin Port Operations Pty Limited (DPO) was acquired by Landbridge Infrastructure Australia Pty Ltd (Landbridge) and, with that change of status to a private Port Operator, the application of Part 11 of the Act to the Port of Darwin commenced.
 - 1.5 Pursuant to section 127(1) of the *Ports Management Act* (the Act) and Regulation 13(1) of the Ports Management Regulations, DPO has submitted a draft access policy for the Port of Darwin.
 - 1.6 The draft access policy aims to provide a framework for port users requesting access to prescribed services, the approach to be taken by DPO in determining access and the terms on which access will be provided at the Port of Darwin.
 - 1.7 The requirements for an access policy are specified in section 127(2) of the Act. That section in turn refers to regulations made under section 129 and set out in Regulation 13(2) of the Ports Management Regulations.
 - 1.8 The Commission must approve a draft access policy that meets the requirements of 127(2) of the Act. Section 127(3) provides that, within 60 days after receiving a draft access policy, the Commission must give written notice that the Commission either:
 - a) approves the draft access policy; or
 - b) does not approve the draft access policy because it does not meet the requirements of 127(2) and requires the private Port Operator to amend the draft access policy as directed by the Commission to meet those requirements..
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- 1.9 If the Commission fails to give written notice of its decision within 60 days, the draft access policy is taken to have been approved by the Commission.
- 1.10 Section 127(5) of the Act requires that a private Port Operator who receives notice mentioned in 127(3)(b) of the Act must, within 30 days after the date of the notice, resubmit the draft access policy, as directed, to the Commission for approval.

Review process

- 1.11 Section 127(10) of the Act requires the private Port Operator to consult with port users prior to submitting for approval any amendments to its access policy and Regulation 15 requires consultation with port users on a review of the access policy every five years. There is no legislative requirement for the private Port Operator to consult with port users and interested stakeholders on the first access policy. However, the Commission and DPO considered it would be good practice to consult with interested stakeholders on the first access policy of the Port of Darwin.
- 1.12 The Commission sought submissions from interested stakeholders on a draft access policy received 10 March 2016. A consultation notice was published on the Commission's website and the in Northern Territory News with the consultation period closing on 7 April 2016. The Commission received two confidential submissions from interested stakeholders.
- 1.13 The submissions received were provided to DPO for consideration. Following consideration of the submissions and further discussions with the Commission, DPO made amendments to the draft access policy and submitted this to the Commission for consideration. DPO also engaged with stakeholders who made submissions to clarify specific aspects of the draft access policy and its proposed application.
- 1.14 Section 127(6) of the Act allows a private Port Operator to amend a draft access policy that has not been approved and give it the Commission. Between March and August 2016, DPO further considered the views of the Commission, reviewed the submissions received from stakeholders and amended the draft access policy.
- 1.15 On 16 August 2016, the Commission received an amended draft access policy with proposed Standard Services Terms and Conditions and Payment Terms and Conditions. The Commission sought further comments from stakeholders on the August version of the draft access policy and associated terms and conditions. A consultation notice for the amended draft access policy was published on the Commission's website on 9 September 2016 and then in the Northern Territory News.
- 1.16 The Commission received three commercial-in-confidence submissions from stakeholders. The submissions were provided to DPO with the approval of the submitting parties. Following its review of stakeholder submissions, DPO submitted an amended draft access policy on 19 October 2016.
- 1.17 Between October 2016 and March 2017, the Commission engaged in further discussions with DPO and amended versions of the access policy were submitted addressing the Commission's concerns.

- 1.18 On 16 May 2017, DPO submitted an amended access policy to the Commission for consideration consisting of three documents, entitled:
- a) Access Policy of Darwin Port Operations Pty Ltd (ACN 603 472 788);
 - b) Port of Darwin Standard Service Terms and Conditions; and
 - c) Darwin Port Payment Terms and Conditions.
- 1.19 On 21 June 2017, DPO submitted amended version of the Port of Darwin Standard Service Terms and Conditions which replaced clause 9(d) in response to a question raised in the consultation on the draft decision.
- 1.20 The approved Access Policy of Darwin Port Operations Pty Ltd (ACN 603 472 788)' is provided at Appendix A, the Port of Darwin Standard Service Terms and Conditions is at Appendix B and the Darwin Port Payment Terms and Conditions is at Appendix C. Together, these comprise the access policy that is the subject of the Commission's Final Decision.
- 1.21 The Commission released the 16 May 2017 version of the draft access policy and its draft decision on 24 May 2017 for comments.
- 1.22 On 24 May 2017, the Commission also released draft Guidelines for Reporting of Non-Compliance with the Access Policy. The guidelines were prepared in accordance with section 128 of the *Ports Management Act* are related to prescribed matters in relation to reports in relation to section 130 of the Act. The Commission's consideration of the final Guidelines will be the subject of a separate paper.
- 1.23 The Commission received one confidential submission in relation to the 16 May 2017 version of the draft access policy, the Commission's draft decision and the draft Guidelines for Reporting of Non-Compliance with the Access Policy.
- 1.24 The Commission thanks each of the organisations that made a submission on the draft access policy and Guidelines for Reporting of Non-Compliance with the Access Policy. The Commission also thanks DPO for engaging constructively with the Commission throughout its consideration of the draft access policy and the Commission recognises that many issues were resolved through this process.
- 1.25 As submissions were identified by stakeholders as commercial-in-confidence, this final decision only provides a broad summary of the issues raised and the Commission's position in relation to those issues.

Commission's decision

- 1.26 The Commission approves the draft access policy comprising the documents set out in Appendices A, B and C pursuant to section 127(3) of the Act. The Commission considers that the draft access policy meets the requirement of 127(2) of the Act.
- 1.27 In making this decision, the Commission has had regard to Part 11 of the Act and Regulation 13 of the Ports Management Regulations (the Regulations).
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- 1.28 In accordance with section 127(12) of the Act, DPO must comply with the access policy. Regulation 13(3) requires DPO to publish a copy of its access policy on its website within five days of the Commission's approval of the access policy.

Chapter 2: The Regulatory Framework

Background

- 2.1 The *Port of Darwin Act* (Act No. 10 of 2015), *Ports Management Act* (Act No.11 of 2015), and *Ports Management (Repeals and Related and Consequential Amendments) Act* (Act No. 12 of 2015) commenced on 9 June 2015 (Gazette No. S57 of 9 June 2015), with parts of the *Ports Management Act* and *Ports Management (Repeals and Related and Consequential Amendments) Act* commencing on 1 July 2015.
- 2.2 The package of legislation establishes a uniform framework for regulation of ports in the Territory, by which ports could be progressively brought into that framework by designation, starting with the Port of Darwin.¹ The legislation facilitates the privatisation of the Port of Darwin and related incidental leasehold interests , subject to safeguards that include price monitoring and an access regime.
- 2.3 The object of Part 11 of the Act is to promote the economically efficient operation of, use of and investment in major port facilities in the Territory by which services are provided, so as to promote effective competition in upstream and downstream markets.²
- 2.4 Part 11 of the Act establishes a role for the Commission in relation to access and price regulation of prescribed services. The access and price regulation regime applies to prescribed services provided by a Port Operator of a designated port that is not a public sector entity (a private Port Operator).³
- 2.5 The ports access and price regulation regime is defined by Part 11 of the Act and the Regulations. The Regulations commenced on 1 July 2015 (Gazette No. S69 of 30 June 2015).
- 2.6 On 30 June 2015, the Minister for Transport, in accordance with section 8(1) of the Act, declared DPO (ABN 62 603 472 788) to be the operator of the Port of Darwin on and from 1 July 2015.
- 2.7 On 16 November 2015, a controlling stake in DPO was acquired by private owners (Landbridge) at the same time as the commencement of a 99-year lease by Landbridge of the Port of Darwin.

¹ Second Reading Speech for the Ports Management Bill 2014, the Hon. Adam Giles, Minister for Economic Development and Major Projects, Parliamentary Record (Hansard) 27 November 2014.

² Section 117 of the Act

³ Section 118 of the Act

Draft access policy and approval process

- 2.8 Section 127 of the Act details a process for a private Port Operator to submit a draft access policy for consideration by the Commission.
- 2.9 Section 127(1) of the Act requires the private Port Operator to prepare a draft access policy in accordance with the Act and Regulations. Section 127(2) requires that an access policy:
- a) must be prepared in accordance with any requirement prescribed by Regulation;
 - b) must contain any matter required by the Minister under section 129 of the Act (the Minister may, by Gazette notice, require that an access policy deal with a matter specified in the notice); and
 - c) may consist of more than one document.
- 2.10 As at 19 June 2017, the Minister had not issued a notice under section 129 of the Act.
- 2.11 Regulation 13(1) requires a private Port Operator to give to the Commission a draft access policy no later than four months after the operator becomes a private Port Operator. DPO commenced as the private Port Operator on 16 November 2015 and submitted its initial draft access policy on 10 March 2016.
- 2.12 In accordance with section 127(6) of the Act, the private Port Operator may amend a draft access policy that has not been approved and give it to the regulator. Several amended versions of the draft access policy were submitted by DPO following consideration of stakeholder submissions and discussions with the Commission.
- 2.13 The amended draft access policy submitted by DPO on 16 May 2017 was the subject of the Commission's Draft Decision. The draft access policy comprising the documents set out in Appendices A, B and C is the subject of the Commission's Final Decision.
- 2.14 The Commission must approve a draft access policy that meets the requirements of 127(2) of the Act. Within 60 days after receiving a draft access policy, the Commission must give written notice that the Commission either:
- a) approves the draft access policy; or
 - b) does not approve the draft access policy because it does not meet the requirements of 127(2) and requires the private Port Operator to amend the draft access policy as directed by the Commission to meet those requirements.
- 2.15 If the Commission fails to give written notice of its decision within 60 days, the draft access policy is taken to have been approved by the Commission.

Access policy requirements

- 2.16 Section 127(2) requires that an access policy must be prepared in accordance with any requirement prescribed by Regulation. Regulation 13(2) requires that an access policy of a private operator must:
- a) state the approach to be taken by the operator to providing, or allowing for, access for vessels to the designated port, including the factors that it takes into account in carrying out vessel scheduling; and
 - b) contain a commitment that the operator will respond to an access request within a specified period (which must be reasonable); and
 - c) contain a commitment that the operator will provide access to a port user to any prescribed service on reasonable terms; and
 - d) set out the basis on which the Port Operator will determine access to a prescribed service that is the subject of an access request if the demand for access from port users exceeds the capacity to provide access; and
 - e) set out the terms on which access to a prescribed service will be provided; and
 - f) set out a process for the resolution of access disputes that are not frivolous or vexatious that:
 - i. provides for a port user to give written notice of a dispute to the operator within a specified period; and
 - ii. requires the operator to undertake genuine and good faith negotiations through discussion with the port user with a view to resolving the dispute as quickly as possible; and
 - iii. if the dispute is not resolved through discussion – provides for the operator to arrange mediation or conciliation to resolve the dispute; and
 - iv. if the dispute is not resolved through mediation or conciliation – provides for it to be referred to arbitration by an independent arbitrator appointed by the parties to the dispute; and
 - v. specifies the method by which the independent arbitrator is to be appointed which may be, but is not required to be, requesting the Regulator to nominate a person for appointment as an independent arbitrator; and
 - vi. requires that the arbitration be conducted in accordance with Part 5 of the *Commercial Arbitration (National Uniform Legislation) Act*; and
 - vii. sets out the powers and duties of the arbitrator in conducting the arbitration, including a requirement to take into account the access and pricing principles set out in section 133 of the Act; and
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- viii. provides a mechanism for the apportionment of the costs of an arbitration; and
 - ix. provides for the decision of the arbitrator to be treated as an award under the *Commercial Arbitration (National Uniform Legislation) Act*; and
 - x. requires the parties to an arbitration not to disclose its outcome to third parties; and
- g) require the parties to an access dispute to keep confidential information provided during any access request negotiations or access dispute resolution process; and
 - h) provide for the right of each party to an access dispute to request from the other party, within a specified period, information specified by the requesting party that, in the opinion of the requesting party, is reasonably necessary for the resolution of the dispute; and
 - i) require a party to comply with a request of a kind mentioned in paragraph (h) within a specified period; and
 - j) require the operator to give reasons for any decision made by the operator that affects a port user.

Prohibitions on certain conduct that hinders access or unfairly differentiates between users

- 2.17 Division 2 of Part 11 of the Act prohibits certain conduct of private Port Operators:
- a) a prohibition on conduct for the purpose of preventing or hindering the access of a user or potential user to any prescribed service (section 124(1)); and
 - b) a prohibition, in negotiating access to a prescribed service, on unfairly differentiating between port users in a way that has a material adverse effect on the ability of one or more of them to compete with other port users (section 125(1)).
- 2.18 Section 127 of the Act does not expressly state the Commission should take into consideration sections 124(1) and 125(1) in its decision whether to approve the access policy. However, sections 124(5)(b) and 125(2)(c) allow an access policy to create exceptions to sections 124(1) and 125(1).
- 2.19 For the reasons explained below, the Commission has adopted the position that it should consider the extent to which a draft access policy might create exceptions to sections 124(1) and 125(1).

Prescribed services

- 2.20 Part 11 of the Act applies to prescribed services provided by a Port Operator of a designated port that is not a public sector entity. The provision of prescribed services by a private Port Operator is a regulated industry for the *Utilities Commission Act* (section 119(1)).
- 2.21 Regulation 12(1) identifies the following services provided by a private Port Operator to which Part 11 of the Act applies:
- a) providing, or allowing for, access for vessels to the designated port;
 - b) providing facilities for loading or unloading vessels at the designated port;
 - c) providing berths for vessels at the designated port;
 - d) providing, or facilitating the provision of, pilotage services in a pilotage area within the designated port; and
 - e) allowing entry of persons and vehicles to any land on which port facilities of the designated port are located.
- 2.22 Regulation 12(2) confirms that a service mentioned in 12(1) does not include any service provided under a lease granted by the private Port Operator.
- 2.23 Regulation 12(3) confirms the following services provided by a private Port Operator are not services to which Part 11 of the Act applies:
- a) a towage service for facilitating access to the designated port;
 - b) a bunkering service at the designated port;
 - c) a service for the provisioning of vessels (including the supply of electricity and water) at the designated port; and
 - d) a service for the removal of waste from vessels at the designated port.
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Chapter 3: Review of Draft Access Policy

The Commission's approach

- 3.1 The Commission must approve a draft access policy that meets the requirements of 127(2) of the Act. The matters that must be included in an access policy are set out in Regulation 13(2) of the Ports Management Regulations.
- 3.2 The Commission reviewed the draft access policies provided by DPO to consider whether the matters prescribed in Regulation 13(2) were each included. In doing so, the Commission considered whether any other contents of the access policy were directly or indirectly inconsistent with those prescribed matters. Matters considered included:
- a) considering whether the access policy as a whole contains a commitment to the provision of access to a port user to any prescribed service on reasonable terms as required by Regulation 13(2)(c); and
 - b) developing a process for the resolution of access disputes that are not frivolous or vexatious as required by regulation 13(2)(f).
- 3.3 In the course of its reviews, the Commission identified matters it considered required to be changed to meet the requirements of Regulation 13(2) and raised those matters with DPO. A number of these matters were also identified in submissions from interested stakeholders and are mentioned in the commentary below.
- 3.4 The Commission is satisfied that the revised draft access policy in Appendices B, C and D addresses the matters prescribed by Regulation 13(2).
- 3.5 The Commission also considered the extent to which a draft access policy creates exceptions to sections 124(1) and 125(1), given that such exceptions might defeat the operation of the provisions required by Regulation 13(2) and in light of the objects of Part 11 of the Act.
- 3.6 The draft access policy expressly states in clause 1.3 that nothing in the 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.

Key issues raised in submissions

- 3.7 The Commission sought submissions from interested stakeholders on the 10 March and 16 August 2016 versions of the draft access policy. In relation to the first consultation process, the Commission received two submissions. From the second consultation process, the Commission received three submissions. All submitting parties requested their submissions be treated as confidential.

- 3.8 Submissions received raised issues regarding compliance with the Act and Regulations, made suggestions for improvements to the access policy and sought amendments and clarifications regarding operational aspects of the proposed access policy.

Objectives

- 3.9 The March 2016 draft of the access policy contained comments about the objectives in clause 1.2. The comments sought, for example, the addition of objectives and clarification about how the objectives would be applied. The objectives have since been amended.
- 3.10 Regulation 13(2) does not require objectives to be included in the access policy. The Commission has considered whether the objectives in the draft access policy as now formulated are inconsistent with Regulation 13(2) and is satisfied they are not.

Feasibility test

- 3.11 A number of submissions raised concerns with the proposed feasibility test (clause 4.2) in the earlier versions of the draft access policy, with particular concern about provisions that would have allowed for consideration of corporate objectives and contractual obligations of DPO. The concerns focused on DPO having potentially wide discretion in determining feasibility and denying access to the prescribed services at the Port of Darwin.
- 3.12 The Commission considered the proposed feasibility test in light of the requirements of the Act and the Regulations. The Commission's position is that the feasibility test should not operate in such a way as to defeat the substantive operation of the provisions required by Regulation 13(2) including the commitment to provide a port user with access to any prescribed services on reasonable terms.
- 3.13 The Commission engaged in further discussion with DPO on the feasibility test and a number of amendments were made, including removal of the requirement to be consistent with the corporate objectives of the Port Operator and removal of the provision requiring access to be possible at a reasonable price, having regard to the Pricing Principles. Other drafting changes were made to address concerns about the detailed application of the test and how it was applied under the access policy.

Contractual obligations

- 3.14 The Commission was concerned with DPO's proposal to include provisions in the feasibility test that would enable the Port Operator to reject an access application on the grounds of consistency with any of its contractual or other obligations. Some stakeholders also raised concerns on this point.
- 3.15 The Commission does accept that contractual obligations may be relevant in determining whether the terms offered by the Port Operator are reasonable.
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- 3.16 The Commission's position is that the extent to which the feasibility test may include any reference to contracts, the reference should be only to contracts for port access. DPO has amended the draft access policy submitted 16 May 2017 to reflect this position.
- 3.17 DPO also amended the draft access policy to restrict the application of the contractual obligations to exclude prohibited contracts. Prohibited contracts are defined in the draft access policy under clause 2.1 as an agreement or arrangement prohibited by section 124 or 125 of the Act. This supports the prohibition on conduct for the purpose of preventing or hindering the access of a user or potential user to any prescribed service (section 124(1)), and on unfairly differentiating between port users in a way that has a material adverse effect on the ability of one or more of them to compete with other port users (section 125(1)).

Commitment to access on reasonable terms

- 3.18 Clause 4.1 of the draft access policy provides an undertaking that the Port Operator will provide access to prescribed services on reasonable terms, as required by Regulation 13(2). Submissions on earlier drafts of the access policy raised concerns about qualifications to this commitment. These qualifications have been removed.
- 3.19 The Commission accepts that contractual obligations may be relevant considerations in determining reasonable terms. This is reflected in clause 4.1(b), which notes that, in determining whether the terms of an access agreement are reasonable, regard may be had to the objectives of the access policy, including the legitimate business interests of the Port Operator.

Port lease and related agreements

- 3.20 Clause 4.1(b) states that, without limitation, the legitimate business interests of the Port Operator include (in summary) compliance with its contractual obligations owed to the Northern Territory Government. Clause 7.7(a)(iv) refers to the need for the arbitrator to have regard to the need for the Port Operator to comply with those agreements in deciding disputes.
- 3.21 The reference to contractual obligations owed to the Northern Territory Government reflects that DPO and its related entities have entered into a suite of agreements with the Northern Territory Government in relation to the Port of Darwin. While some of these are on the public record, most are not. The Commission did not consider these agreements should be included in the feasibility test because they could justify a refusal of access. The Commission accepts that a reference to them in clauses 4.1(b) and 7.7(a)(iv) is consistent with Regulation 13(2).

Prudential requirements

- 3.22 Stakeholder submissions raised concerns about the definition of prudential requirements and, in particular, the difficulty of demonstrating compliance with some elements of the definition. The Commission notes new provisions in the draft access

policy at clause 6.3 give applicants an opportunity to provide additional information to the Port Operator to demonstrate the applicant meets the Prudential Requirements and also that a disagreement about whether the Prudential Requirements are met may be the subject of a dispute.

- 3.23 The Commission is satisfied the Prudential Requirements as applied under the draft access policy are consistent with the commitment to provide access on reasonable terms.

Access disputes

- 3.24 Stakeholder submissions previously raised concerns with the definition of access and that the dispute resolution process did not apply to disputes in relation to an access agreement once executed.
- 3.25 The Commission's view is that the amended draft access policy received 16 May 2017 aligns with the definition of access dispute in clause 2.1 with the Regulations.
- 3.26 The Commission's position is that requiring the access policy to define the dispute resolution process in an access agreement is outside the Commission's authority under the Act and Regulations.
- 3.27 The Commission notes stakeholder comment in relation to clause 6.5(a), which requires an access applicant to submit a statement agreeing to arbitration, suggesting this should be broader and require an applicant to agree to the full dispute resolution process in clause 7. The Commission notes that clause 6.5(a) is consistent with Regulation 13(2)(f)(vi) that requires arbitration be conducted in accordance with Part 5 of the *Commercial Arbitration (National Uniform Legislation) Act* and provides for the operator to arrange mediation or conciliation to resolve the dispute.

DPO as trustee for the Darwin Port Manager Trust

- 3.28 Previous versions of the draft access policy were submitted by 'Darwin Port Operations Pty Ltd (ACN 603 472 788) as trustee for the Darwin Port Manager Trust'.
- 3.29 The Commission noted that the Declaration of Operator of Port of Darwin made by the Minister for Transport on 30 June 2015 declared 'Darwin Port Operations Pty Ltd ABN 62 603 472 788' as the operator.
- 3.30 For this reason, the Commission formed the view that the access policy must be submitted by the entity named in the Declaration and the references to trust arrangements should be omitted. The draft access policy received on 16 May 2017 reflects this change.
- 3.31 The draft access policy has been amended to reflect that services (other than pilotage services) provided under the access policy are provided by the DPO in its capacity as trustee for the Darwin Port Manager Trust (ABN 60 269 541 845), and pilotage services are provided by Darwin Port Pilotage Pty Ltd (DPPS) in its capacity as trustee for the Darwin Port Pilotage Trust (ABN 98 744 318 229).

- 3.32 The Commission notes stakeholder comment in relation to the application of the access policy to DPPS. Stakeholder comment suggested that the access policy be refined to include DPPS within the definition of the Port Operator where applicable in the delivery of pilotage services.
- 3.33 The Commission notes that the legislative framework provides for the access policy to be issued by the private Port Operator, in this case DPO, and applies to prescribed services which include 'providing, or facilitating the provision of, pilotage services in a pilotage area within the designated port'. This wording appears to be intended to reflect the appointment of the pilotage service provider as separate from the appointment of the declared private Port Operator.
- 3.34 The Commission's view is that the approach in the access policy, whereby DPO is the party issuing the access policy, but the entity providing pilotage services under the contract will be DPPS on behalf of Darwin Port Pilotage Trust, is consistent with DPO's obligations to prepare the access policy and with DPO 'facilitating the provision of ...pilotage services'.

Application of access policy to the Marine Supply Base

- 3.35 Submissions raised issues with the application of regulatory oversight at the Marine Supply Base. The Commission understands the Marine Supply Base is currently operated by ASCO Australia Pty Ltd (ASCO) under a fee for service arrangement with a term up to 20 years from June 2014. As a result, the services are not provided by the declared Port Operator and cannot be regulated by the Commission.
- 3.36 This issue may be further considered as part of the Commission's review of the access and price regulation regime due to commence in late 2017.

Queuing and priority

- 3.37 Stakeholders made a number of comments about queuing and priority arrangements in earlier drafts of the access policy.
- 3.38 Regulation 13(2) requires the access policy to state the factors it will take into account in carrying out vessel scheduling and how it will determine access where demand exceeds capacity. The draft access policy states those factors and changes have been made to earlier drafts to ensure the principles in the access policy are reflected in access agreements. The Commission's position is that (subject to the Act and its other legal and regulatory obligations) the Regulation otherwise leaves the queuing and priority arrangements to be determined by the Port Operator.

Standard Terms and Payment Terms

- 3.39 The amended draft access policy includes a provision that any changes arising from a review of the access policy or to the Standard Terms and Payment Terms will be subject to sections 127(10) and (11) of the Act. This reflects that the Standard Terms and Payment Terms form part of the access policy.

- 3.40 Stakeholder comments sought clarification of the priority of the Standard Terms, Payment Terms and other instruments. The Commission notes this has been sufficiently clarified in the draft access policy.
- 3.41 Stakeholder consultation raised some issues in relation to the Standard Terms and Payment Terms. The amended draft access policy incorporates changes to the proposed Standard Terms and Payment Terms, including some changes that address points raised by stakeholders.
- 3.42 The Commission reviewed the Standard Terms and Payment Terms to consider whether they contained any provisions directly or indirectly inconsistent with the commitment in the access policy to provide access on reasonable terms.
- 3.43 DPO amended the draft Standard Terms and Payment Terms in response to issues identified by the Commission, including changes to the draft indemnities and limitation of liability. The Commission is satisfied the issues it identified have been adequately addressed.
- 3.44 Stakeholder consultation raised issues with the requirement in clause 9(d) of the 16 May 2017 version of the Standard Terms to provide copies of insurance policies, making observations to the effect that it is industry standard to provide the certificate of insurance rather than a copy of the policy and that the policy may contain sensitive commercial terms. The Commission raised these points with DPO and, in the 21 June 2017 version of the Standard Terms, DPO has replaced clause 9(d) in response. The Commission is satisfied the replacement clause addresses the points raised.
- 3.45 In relation to the 16 May 2017 version of the Payment Terms, stakeholder consultation raised concerns that:
- a) the requirement for payment within 14 days of receipt of an invoice was too short; and
 - b) the different interest would accrue relating to unpaid amounts by a port user and repayments by the Port Operator.

The Commission noted these comments but was not convinced that the provisions are inconsistent with the provision of access on reasonable terms.

Part B: Commission's decision

- 4.1 In making this decision, the Commission has had regard to section 127 of the Act, the objective in Part 11 of the Act and the Ports Management Regulation 13.
- 4.2 The draft access policy submitted by DPO and the subject of this decision consists of three documents, being:
- a) Access Policy of Darwin Port Operations Pty Ltd (ACN 603 472 788), the version submitted on 16 May 2017;
 - b) Port of Darwin Standard Service Terms and Conditions, the version submitted on 21 June 2017; and
 - c) Darwin Port Payment Terms and Conditions, the version submitted on 16 May 2017.
- 4.3 Pursuant to section 127(3) of the Act, the Commission gives notice its decision is to approve the draft access policy. The Commission considers the draft access policy meets the requirement of 127(2) of the Act.

Part C: Appendices

APPENDIX A:

APPROVED ACCESS POLICY

Access Policy

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

Approved by the Utilities Commission of the Northern Territory on 30 June 2017

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Access Policy

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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 30 June 2017 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 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.

- (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.

- (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.

- (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.

- (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.

- (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).

- (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.

- (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.

APPENDIX B:

APPROVED STANDARD SERVICE TERMS

DATED 21 JUNE 2017

PORT OF DARWIN STANDARD SERVICES TERMS AND CONDITIONS

1 Introduction and scope of Terms and Conditions

- (a) These Terms and Conditions apply to the provision of Services and use of the Facilities which are Standard Services.
- (b) To the extent there are inconsistencies, the following terms will apply in the order of precedence below:
 - (i) first, the Priority Principles;
 - (ii) second, the Port Requirements;
 - (iii) third, these Terms and Conditions; and
 - (iv) fourth, any agreements with the particular User other than these Terms and Conditions (except if and to the extent those agreements expressly vary the order of precedence set out above).
- (c) Notwithstanding any other provision of these Terms and Conditions nothing is intended to or operates to limit Darwin Port's obligations, rights or powers under the *Ports Management Act 2015* or its regulations.

2 Request for use of the Facilities and the Services

- (a) A User may request Darwin Port to provide Standard Services and access the Facilities by submitting to Darwin Port, at least 48 hours (where the User is a Prequalified User) or 5 Business Days (for all other Users) prior to the earliest requested time for the provision of Services, a completed Notice of Arrival (either on-line or other form required by Darwin Port and published on the Website from time to time), together with all information required by Darwin Port, to the email address published on the Website from time to time. It is the User's responsibility to ensure that the information provided to Darwin Port is complete and accurate and not misleading.
- (b) Darwin Port may accept or reject a Notice of Arrival in accordance with the Access Policy.
- (c) A User may submit a written request to Darwin Port to vary or withdraw a Notice of Arrival previously submitted by the User. Darwin Port may accept or reject a request to vary or withdraw a Notice of Arrival. If a Notice of Arrival is varied or withdrawn (other than where such variation or withdrawal is solely due to a delay caused by Darwin Port or is solely due to Darwin Port's failure to provide the Services in accordance with these Terms and Conditions), the User will be liable for all Loss incurred by Darwin Port in connection with that variation or withdrawal.
- (d) Each User will only use the Facilities for the Permitted Use.
- (e) A User is not granted any exclusive use of the Facilities, and Darwin Port may allow access to the Facilities to any other person for any purpose, including without limitation, access by agents, staff, contractors and

representatives of Darwin Port.

- (f) In the case of pilotage services only:
 - (i) Users may submit a Notice of Arrival or a request to vary or withdraw a Notice of Arrival without incurring any cancellation Fees, provided that the Minimum Notice is given.
 - (ii) If a User has not provided the Minimum Notice under paragraph 2(f)(i) or the User's vessel is a 'no show' (other than where such variation or withdrawal is solely due to a delay caused by Darwin Port or is solely due to Darwin Port's failure to provide the Services in accordance with these Terms and Conditions), then the User must pay Darwin Port the applicable cancellation Fees.
 - (iii) Darwin Port may impose a Fee where a Pilot is detained on board the User's vessel that is not ready to sail (other than where the detention of the Pilot is solely due to a delay caused by Darwin Port or is solely due to Darwin Port's failure to provide the Services in accordance with these Terms and Conditions).

3 Access to the Facilities and Services provided by Darwin Port

- (a) Subject to this paragraph 3 and the User's compliance with these Terms and Conditions, Darwin Port will provide the Services and access to the Facilities as requested by the User.
- (b) Priority of provision of Services and access to Facilities to Users will be determined by Darwin Port in accordance with the Priority Principles.
- (c) Users acknowledge and agree that Darwin Port may change the berthing order of vessels or access to the Facilities.
- (d) Darwin Port may, at the User's cost, conduct reasonable vessel inspections of new vessels to the Port of Darwin and to which these Terms and Conditions apply.
- (e) Darwin Port may change the Facilities to be used by a User by giving reasonable prior notice to that User and provided that Darwin Port makes an alternative facility available with substantially the same features (relevant to the Permitted Use) as the Facilities originally applied for by the User.
- (f) If Darwin Port has agreed to provide access to a Facility (Original Facility) and then subsequently changes the Facility in accordance with clause 3(e) (Changed Facility), the Fees to be charged will be determined by reference to the Fees applicable to the Original Facility not the Changed Facility.

4 Payments to Darwin Port

- (a) Users will be charged, and will pay, for the provision of Services and the use of Facilities at the Fees fixed by Darwin Port in accordance with Part 10 of the *Ports Management Act 2015* (NT).
- (b) Users will make all payments to Darwin Port for the provision of Services and the use of the Facilities in accordance with the Payment Terms and Conditions.
- (c) Users will pay Darwin Port the Fees invoiced by Darwin Port without any

deduction or right of set-off.

- (d) Users will pay Darwin Port, or any relevant Utility Service provider, the charges for any Utility Services used by them at the Facilities at the rate applicable to use of those services from time to time.

5 Obligations of Users

- (a) Any damage caused or contributed to by the User, its staff, contractors, agents or representatives to the Facilities or the Port of Darwin or surrounding areas will be repaired or remediated by Darwin Port at the expense of the User, other than fair wear and tear as reasonably determined by Darwin Port. The User must pay on demand any costs incurred under this paragraph 5(a) as a liquidated debt in accordance with the Payment Terms and Conditions, provided that where a cost is incurred due to damage contributed to by the User, its staff, contractors, agents or representatives the User is only liable for such proportion of the cost which equates to the proportion of the damage contributed to by the User, its staff, contractors, agents or representatives. Without limitation, this paragraph 5(a) will apply to any damage to the environment in or around the Facilities or the Port of Darwin resulting from or relating to damage, contamination or pollution caused by a vessel or by any materials or liquids from a vessel.
- (b) Users must at all times when within the Port of Darwin, have current all:
 - (i) required international certifications applicable to their vessel(s); and
 - (ii) certifications for their vehicles and equipment as required by Law.
- (c) Users will promptly provide all information reasonably required by Darwin Port to enable the efficient and orderly use of the Facilities in co-ordination with other Users, including without limitation, any changes to the Time of Arrival or Time of Departure, and full details of any item or substance on a vessel or which will be handled at the Facilities of a hazardous, toxic or dangerous nature.
- (d) Users must, and must ensure that their staff, contractors, agents and representatives:
 - (i) use the Facilities in a manner which prevents damage (including any environmental damage, contamination or pollution) to the Facilities or the Port of Darwin;
 - (ii) keep and maintain the Facilities in good condition (having regard to the age of the Facilities and general condition) and leave them in a good, clean and operational condition after use; and
 - (iii) leave the Facilities clean of all rubbish and in the same condition as they were in prior to use.
- (e) No improvements can be constructed on, or made to, the Facilities by Users without the prior written consent of Darwin Port. If any improvements are permitted to be made to the Facilities by a User, the User must remove those improvements upon request by Darwin Port and make good all damage arising from the improvements or the removal of the improvements. If the User does not remove improvements or make good any damage referred to in this paragraph 5(e), Darwin Port may remove those improvements or repair that

damage and the User will pay all costs incurred by Darwin Port in that regard as a liquidated debt in accordance with the Payment Terms and Conditions.

- (f) Users must not operate or leave equipment at the Facilities without obtaining a 'permit to occupy' from Darwin Port. If a User is permitted to, and leaves, equipment at the Facilities the equipment is left at the User's risk and the User releases Darwin Port from all Claims in connection with the equipment.

6 Use of Facilities and the Services

- (a) Darwin Port will provide the Services and access to the Facilities in accordance with good industry practice and all applicable Laws.
- (b) Darwin Port makes no representation or warranty, and to the fullest extent permitted by Law excludes any representation or warranty provided or implied by Law, regarding the Facilities and the Services.
- (c) Users access the Facilities and use the Services at their own risk. Subject to paragraph 6(d) and to the fullest extent permitted by Law, Darwin Port will not be liable to the User, and the User releases Darwin Port in relation to, all Claims that may be made against, and all Loss incurred by, the User at any time arising out of or in connection with, directly or indirectly, access to the Facilities or the provision of the Services to the User or in connection with these Terms and Conditions, including without limitation Loss:
 - (i) to any property;
 - (ii) arising from, or in connection with, injury or damage done or suffered to any person including death, environmental damage, pollution or contamination or a failure to deliver, or delay in the provision or delivery of, access to the Facilities or the Services;
 - (iii) suffered by a User as a result of termination of access to the Facilities and provision of the Services by Darwin Port under paragraph 11;
 - (iv) as a result of any delay in provision of access to the Facilities or provision of the Services under paragraph 12;
 - (v) as a result of any delay in provision of access to the Facilities or provision of Services due to the application of the Priority Principles; and
 - (vi) arising in connection with the exercise or attempted exercise of, failure to exercise, or delay in exercising, a consent or approval under these Terms and Conditions.
- (d) Paragraph 6(c) does not apply to the extent that such Loss is caused or contributed to by the negligent act or omission or criminal conduct for which Darwin Port is responsible or breach of these Terms and Conditions by Darwin Port.

7 Indemnity by Users

- (a) Subject to paragraph 7(c), each User indemnifies and will keep indemnified Darwin Port from and against:
 - (i) any loss of or damage to the property of Darwin Port; and

- (ii) Claims by any person against Darwin Port in respect of personal injury or death or loss of or damage to any property,

caused by or arising out of or as a consequence of the access, occupation or use of the Facilities or other Port property by the User, its staff, contractors, agents or representatives.
- (b) In addition to 7(a) but subject to paragraph 7(c), each User indemnifies and will keep indemnified Darwin Port from and against any loss or damage caused by or contributed to by:
 - (i) any breach by the User of any contract between the User and Darwin Port;
 - (ii) the negligence of the User;
 - (iii) fraud or criminal conduct by the User for which the User is responsible;
 - (iv) any breach of any applicable Laws by the User; and
 - (v) any pollution or contamination caused by the User.
- (c) The rights of indemnity in paragraphs 7(a) and 7(b) will be reduced to the extent the relevant Claim or Loss is directly caused or contributed to by the negligent act or omission or criminal conduct for which Darwin Port is responsible or breach of these Terms and Conditions by Darwin Port.
- (d) The User acknowledges the existence of equipment at the Facilities which may not be owned by Darwin Port (including ship loaders and associated gantry equipment, shore cranes and associated equipment and cargo). Without limiting paragraph 7(a), each User indemnifies and will keep indemnified Darwin Port from and against all Claims that may be brought by any person against, and all Loss incurred by, Darwin Port, directly or indirectly, whether in contract, tort or otherwise, in relation to or arising from the use of the equipment referred to in this paragraph 7(d) by the User, its staff, contractors, agents or representatives, or resulting from any damage to or destruction of such equipment or any part of such equipment, to the extent caused or contributed to by the User or its staff, contractors, agents and representatives.

8 Notification of incidents to Darwin Port

- (a) Users must report incidents in relation to or arising from the use by the User of the Facilities or the provision of the Services to the User as soon as reasonably practicable in writing:
 - (i) of a notifiable nature - to Darwin Port and any other relevant Government Authority; and
 - (ii) all other incidents - to Darwin Port.
- (b) Users must, in the event of emergency, accident or threat to security, notify the emergency services by dialing 000 and contacting Darwin Port. Users must provide Darwin Port and any emergency services with all access, assistance and information as either of them may lawfully and reasonably require.

9 Insurance

- (a) Prior to use of the Facilities, Users must obtain and maintain a comprehensive public liability insurance, including coverage for sudden and accidental pollution, for an amount of at least A\$20 million and any other insurance that may reasonably be requested by Darwin Port as published on its website.
- (b) Users warrant that any stevedore or other contractor which they engage or use in relation to the Facilities has appropriate insurance with a reputable insurance company in relation to the following:
 - (i) workers compensation or similar employee insurance as required by any Laws; and
 - (ii) damage caused by the contractor at the Facility, including damage arising from the use of vehicles, cranes or any other machinery.
- (c) Users warrant that the owner of any vessel engaged or used in relation to the Facilities has protection and indemnity insurance for the vessel connected with the Users' use of the Facilities, including coverage for pollution, spillage and wreck removal, for an amount of at least US\$50 million or, in the case of recreational vessels, A\$10 million. For the purposes of this paragraph "owner" includes Users, vessel owners and charterers.
- (d) The insurances referred to in paragraphs (a) to (c) above must be for any single event and cover all operations by the Users on or about the Facilities. The insurance policies must be with reputable insurance companies and a certificate of currency must be provided upon request. If Darwin Port requests a copy of the policy of insurance the User must also provide this to Darwin Port along with any other relevant documentation prior to use of the Facilities by the Users. Subject to the User acting reasonably it may redact commercially sensitive information from the policy of insurance prior to disclosure or arrange for the policy to be provided to Darwin Port's insurance broker or lawyer on terms that will maintain the confidentiality of the commercially sensitive information but subject to Darwin Port being able to obtain the advice required to assess the risks associated with the provision of the Services to the User.

10 Conduct of Users at the Port of Darwin

Users must, and must ensure that their staff, contractors, agents and representatives:

- (a) comply with all:
 - (i) Laws and Port Requirements; and
 - (ii) reasonable directions from or on behalf of Darwin Port including directions which may be published on its Website from time to time as port notices, safe work procedures, policies, security arrangements, ancillary procedures or directions related to the Darwin Port Induction System;
- (b) not obstruct or endanger any person at the Port of Darwin;
- (c) take all reasonable steps to prevent interference, nuisance, unreasonable noise and disturbance to any other person at the Port of

Darwin; and

- (d) co-ordinate their activities in consultation with other Users.

11 Termination by Darwin Port

- (a) Without limiting any other rights of Darwin Port, Darwin Port may terminate or refuse to provide access to the Facilities and provision of the Services to a User if:
 - (i) the User breaches these Terms and Conditions and such breach creates a material safety issue or materially adversely affects Darwin Port's ability to provide access to the Facilities and services to other Users; or
 - (ii) the User breaches these Terms and Conditions and, if capable of remedy, but other than in the circumstances described in clause 11(a)(i), the User fails to remedy the breach within any reasonable time period notified by Darwin Port to the User; or
 - (iii) Darwin Port (acting reasonably) considers that an Event of Force Majeure is such that it will prevent Darwin Port from providing the Facilities or the Services to the User within the time period originally contemplated by the parties and Darwin Port, acting reasonably, does not consider that it is practicable to reschedule the provision of the Facilities or the Services until such time as the Event of Force Majeure ceases; or
 - (iv) the User has not arrived within, what Darwin Port considers to be, a reasonable time after the Time of Arrival and Darwin Port, acting reasonably, does not consider that it is practicable to reschedule the provision of the Facilities or the Services.
- (b) Darwin Port must notify the User of any termination or refusal to provide access to the Facilities or provision of the Services under this clause 11.
- (c) For the avoidance of doubt, where access to Facilities or Services has been terminated or refused under this clause 11 the User is entitled to submit a new application or Notice of Arrival.

12 Events of Force Majeure

If Darwin Port is prevented or delayed in providing use of the Facilities or the Services by an Event of Force Majeure then for so long as that situation continues, Darwin Port is excused from providing use of the Facilities and the Services to the extent that it is so prevented or delayed.

13 Assignment, novation and subcontracting

- (a) Darwin Port may subcontract any of its obligations under these Terms and Conditions.
- (b) Users must not assign or novate any rights or obligations under these Terms and Conditions without the prior written consent of Darwin Port, which may not be unreasonably withheld.
- (c) A User will be deemed to have assigned its rights or obligations under these Terms and Conditions if, without the prior written consent of Darwin Port, there is a Change in Control of the User.

14 Notices to Darwin Port

- (a) All notices and other communications to Darwin Port in relation to these Terms and Conditions must be in writing and sent to:

Address: Port Administration Building, Darwin Business Park,
Berrimah, N.T. 0828.
Mail Address: P.O. Box 390, Darwin N.T. 0801 Australia
Facsimile: +61 8 8922 0666
Email: darwinport@darwinport.com.au

or to such other address or persons specified on the Website from time to time.

- (b) Notices are deemed to be received by Darwin Port at the time when they are actually received by Darwin Port.

15 Safety, stevedores and other contractors

- (a) Users must, and must ensure that their staff, contractors, agents and representatives, maintain a safe environment at the Facilities at all times.
- (b) Users must ensure that their worksites at the Facilities are fit for purpose prior to undertaking any activities at the Facilities, including without limitation undertaking appropriate and adequate risk assessments and preparing an appropriate safety plan having regard to the Permitted Use and foreseeable risks ("**Safety Plan**"). A Safety Plan must include a consideration of, and risk mitigation strategies in respect of:
- (i) mooring and letting go of vessels;
 - (ii) stevedoring operations;
 - (iii) receiving and delivery of cargo;
 - (iv) appropriate numbers of suitably qualified and competent personnel to perform the activities intended to be carried out at the Facilities;
 - (v) site access and management of that access (including for contractors, invitees and agents);
 - (vi) stores to vessels; and
 - (vii) evacuation plans.
- (c) Users must, on request, provide their Safety Plan to Darwin Port.
- (d) Users must ensure that all stevedores and other contractors which they engage and who use the Facilities:
- (i) are reputable;
 - (ii) have sufficiently experienced personnel to properly undertake their duties at the Facilities; and
 - (iii) operate under the conditions of all applicable permits issued in relation to the User at the Port of Darwin and management plans relevant to their operations.

16 Pilotage services

This paragraph 16 applies where the Services provided, or to be provided, are pilotage services.

- (a) Users may not bring any Claim against a Pilot involved in the provision of Services, whether in tort, contract or otherwise.
- (b) Users, and not a Pilot or Darwin Port, are liable for any Loss caused by a vessel, or by a fault of the navigation of the vessel, whilst under pilotage.
- (c) Users are responsible for the safety and well-being of their Pilot during the provision of the Services.
- (d) Users must ensure that their Pilot is provided with safe access to their vessel and a safe operating environment while on their vessel. Without limiting this paragraph, Users must ensure that any equipment used by their Pilot in the provision of the Services is protected from all Losses.
- (e) Prior to a Pilot boarding a vessel, the User must provide to Darwin Port:
 - (i) complete and accurate information about the vessel requirements, its sailing condition, access, safety procedures or any other matters that may reasonably be expected to effect the provision of the Services; and
 - (ii) details of any vessel policy the User requires the Pilot to comply with, which compliance is subject to Darwin Port's prior approval.
- (f) Nothing in this clause 16 is intended to or operates to limit the protections in section 92 of the *Ports Management Act 2015*.

17 Limitation of liability

- (a) Darwin Port is a party to these Terms and Conditions in its capacity only as trustee for the Trust.
- (b) Notwithstanding any other clause in these Terms and Conditions but subject to this clause 17, Darwin Port's maximum liability under these Terms and Conditions for any Loss or Claim and under any contract formed upon the acceptance by a User of these Terms and Conditions is limited to two times the Service Fee payable by the User to Darwin Port for the provision of the Services to the User.
- (c) The limitation of liability in clause 17(b) does not apply to any Loss or Claim for which Darwin Port is entitled to claim indemnity under any relevant policy of insurance maintained by Darwin Port (the "**Policy**") but in such case, Darwin Port's maximum liability is limited to the greater of such amount received by Darwin Port under the Policy or which would have been received had:
 - (i) Darwin Port complied with the terms of the policy; and
 - (ii) Darwin Port promptly claimed under the policy and taken all reasonable steps to maximise recoveries under the policy.
- (d) The limitations of liability and restrictions in this clause 17 do not apply where and to the extent they would have the effect of enabling an insurer to deny indemnity under an insurance policy.

- (e) The limitation of liability in paragraph 17 applies despite any other provision in these Terms and Conditions.
- (f) The limitations in clause 17(b) and clause 17(c) do not apply where the liability arises due to fraud or dishonest or criminal acts of Darwin Port for which Darwin Port is responsible.

18 General

- (a) If a person is bound by these Terms and Conditions as agent, attorney or representative for the User (the Agent) they are not themselves the User, and they are not liable to carry out the obligations of the User under these Terms and Conditions. An Agent does however warrant to Darwin Port at all times that it has full authority to bind the User to these Terms and Conditions.
- (b) These Terms and Conditions constitute the entire agreement between the parties relating to the subject matter of these Terms and Conditions.
- (c) These Terms and Conditions are governed by and will be construed in accordance with the Laws of the Northern Territory. They are deemed to have been entered into in Darwin, Northern Territory. Any action relating to these Terms and Conditions may be instituted and heard in a court of competent jurisdiction in the Northern Territory, and each party irrevocably submits to the non-exclusive jurisdiction of such court for the purpose of any such action and irrevocably waives any objection to having such action brought in such court, or to Claim that the action has been brought in an inconvenient forum.
- (d) A variation or waiver of any provision of these Terms and Conditions will be of no effect unless it is in writing, signed by the parties or (in the case of a waiver) by the party giving it.
- (e) Where the User may be constituted by more than one party, the failure by one or more of those parties to perform these Terms and Conditions does not relieve any of the other parties who constitute the User of any of their obligations, and those other parties will be bound by these Terms and Conditions.
- (f) Any provision of these Terms and Conditions which is void, illegal or otherwise unenforceable, will be severed to the extent permitted by law without affecting any other provision and, if reasonably practicable, will be replaced by another provision of economic equivalence which is not so void, illegal or unenforceable.
- (g) If the doing of any act, matter or thing under these Terms and Conditions is dependent on the consent or approval of a party or is within the discretion of a party, the consent or approval may be given or the discretion may be exercised conditionally or unconditionally or withheld by the party in its absolute discretion unless express provision to the contrary has been made.

Definitions

The following definitions apply unless the context requires otherwise:

Access Policy means the access policy of Darwin Port Operations Pty Limited that is published on the Website from time to time.

Change in Control means that a change occurs in the persons or entities which directly or indirectly:

- (a) control the composition of the board of the User; or

- (b) are directly or indirectly in a position to cast, or control the casting of, more than one-half of the maximum number of votes that may be cast at a general meeting of the User; or
- (c) hold more than one-half of the issued share capital of the User (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital).

Claim means any claim, demand, action, suit or proceeding, whether under contract, tort or otherwise.

Darwin Port means:

- (a) in the case of pilotage services—Darwin Port Pilotage Pty Ltd as trustee for the Darwin Port Pilotage Trust ABN 98 744 318 229; and
- (b) otherwise—Darwin Port Operations Pty Limited as trustee for the Darwin Port Manager Trust ABN 60 269 541 845.

Event of Force Majeure means an event or circumstance beyond the reasonable control of Darwin Port, including without limitation:

- (a) war (declared or undeclared), civil commotion, military action, act of sabotage or vandalism;
- (b) an act or potential or threatened act of terrorism which could impact in any way on the Facilities or the Port of Darwin;
- (c) a strike, lockout, blockade, picketing action or industrial action, dispute or disturbance of any kind;
- (d) an act or omission of a Government Authority, including any change of Law;
- (e) an act of god;
- (f) storm, tempest, fire, flood, earthquake or other natural calamity; or
- (g) breakdown or failure of any plant, services, machinery or equipment, or unavailability of essential goods, supplies or services.

Facilities means the facilities required to provide a Service.

Fees means the fees and charges applicable to access to the Facilities and (if applicable) use of the Services stated in Darwin Port's Schedule of Port Charges, as published on the Website from time to time.

Government Authority means the Crown, a Minister, a government or government department, authority constituted for a public purpose, including the regional harbourmaster, a local authority or a court.

Laws means applicable international laws and requirements, statutes, regulations, requirements, by-laws, policies and ordinances of Government Authorities and principles of law or equity established by decisions of Australian Courts.

Loss means any damage, loss (including special, indirect or consequential loss, or loss of profits), liability, compensation, cost, charge, expense or other obligation whether arising under contract, tort or otherwise, and whether arising directly or indirectly.

Minimum Notice means:

- (a) in respect of inbound vessels, by 1500 hours (Australian Central Standard Time) on the day prior to the Time of Arrival nominated in the Notice of Arrival; or
- (b) in respect of outbound vessels, at least 2 hours' notice prior to the Time of Departure.

or such other reasonable minimum notice published on the Website from time to time.

Notice of Arrival means a notice of arrival form available on the Website.

Payment Terms and Conditions means the payment terms and conditions forming part of the Access Policy.

Permitted Use means the purpose of using the Facilities and (if applicable) the Services specified by a User in their Notice of Arrival.

Pilot means the licensed pilot providing the pilotage services.

Port of Darwin means the port of Darwin as defined from time to time by the Laws of the Northern Territory.

Port Requirements means any port notices or other direction or notice issued by Darwin Port pursuant to the *Ports Management Act 2015* or its regulations or any other notices, directions or regulations issued by the regional harbourmaster or any other Government Authority having jurisdiction over the Port or its facilities.

Prequalified User means a user who has, within the last 12 months, been assessed by Darwin Port as satisfying the Prudential Requirements as defined in the Access Policy.

Priority Principles has the same meaning in the Access Policy and includes the Priority principles in clause 5.7, the Berthing Scheduling Principles and Pilotage Scheduling Principles in clauses 5.8 and 5.9 of the Access Policy.

Regional Harbourmaster means the regional harbourmaster appointed for the Port of Darwin from time to time.

Services means those Services the User has requested and Darwin Port has accepted in accordance with clause 2 of these Terms and Conditions.

Standard Services has the meaning given to that term in the Access Policy.

Time of Arrival or **Time of Departure** means the date and time of arrival or departure (as applicable) specified by the User in a Notice of Arrival.

Terms and Conditions means these standard services terms and conditions (but excluding the Schedule).

Trust means:

- (a) in the case of pilotage services—the Darwin Port Pilotage Trust ABN 98 744 318 229; and
- (b) otherwise—the Darwin Port Manager Trust ABN 60 269 541 845.

User means each user of the Facilities and (if applicable) the Services.

Utility Services means any utility services provided at the Facilities including water, electricity, gas, telephone or computer connections.

Website means www.darwinport.com.au

19 Interpretation

The following rules apply unless the context requires otherwise:

- (a) Headings are for convenience only and do not affect interpretation.
- (b) The singular includes the plural and conversely.
- (c) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them.
- (e) A reference to an agreement or document (including, without limitation, a reference to these Terms and Conditions) is to the agreement or document as amended, varied, supplemented, novated or replaced, except to the extent prohibited by these Terms and Conditions or that other agreement or document.
- (f) A reference to a party to these Terms and Conditions or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
- (g) 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.
- (h) A reference to dollars and \$ is to Australian currency.
- (i) The meaning of general words is not limited by specific examples introduced by "including", "for example" or similar expressions.
- (j) Nothing in these Terms and Conditions is to be interpreted against a party solely on the ground that the party put forward these Terms and Conditions or any part of them.

APPENDIX C:

APPROVED STANDARD SERVICE PAYMENT TERMS

DATED 15 MAY 2017

DARWIN PORT

PAYMENT TERMS AND CONDITIONS

1 Introduction and scope of Payment Terms and Conditions

- (a) These Payment Terms and Conditions apply to payments by Users for the Standard Services provided by Darwin Port (as defined in the Access Policy for the Port of Darwin).
- (b) Where Darwin Port has agreed in writing alternative arrangements with a particular User, then these Payment Terms and Conditions will still apply to payments by that User, but to the extent of any inconsistency, the specific terms and conditions agreed with that User will prevail.

2 Payments to Darwin Port

- (a) Users must pay Darwin Port within 14 days of receipt of an invoice from Darwin Port without set-off, counterclaim or deduction.
- (b) Users must promptly provide Darwin Port with all documentation necessary to enable Darwin Port to accurately calculate the Fees payable by the User.

Without limitation, the User will provide manifests for vessels loading or unloading cargo within 5 Business Days from loading/discharge, and those manifests must include both weight and volume for non-containerised cargoes.

- (c) If a User does not pay an amount within 14 days of the due date, in addition to any other rights of Darwin Port, interest will accrue on the unpaid amount at the rate of 5% above the 60-day Bank Bill Swap Reference Rate, calculated and accruing each day from the due date for payment and ending on the date when the unpaid amount is received by Darwin Port in full.
- (d) If at any time Darwin Port can demonstrate that an account previously sent to a User was incorrectly calculated, or based on incorrect information, Darwin Port may calculate and send to the User a further account in accordance with these Payment Terms and Conditions. The parties will make such reimbursements or additional payments as are necessary to ensure that payment is made by the User of the correct amount due under these Payment Terms and Conditions.
- (e) Where a User disputes any amount payable under an invoice, the User must pay the invoiced amount in full in accordance with paragraph 2(a) and inform Darwin Port in writing of the portion of the payment that is disputed and the basis for such dispute. The User and Darwin Port shall use reasonable endeavors to resolve such dispute as quickly as possible. If the resolution of the dispute determines that Darwin Port is to pay an amount to the User (Repayment Amount), Darwin Port will pay the User the Repayment Amount plus interest on the Repayment Amount at a rate of 2% above the 60-day Bank Bill Swap Reference Rate, calculated and accruing each day from the date of payment by the User to Darwin Port and ending on the date when the incorrectly paid amount is reimbursed to the User.

3 GST

- (a) In paragraph 3:

- (i) **GST** means the goods and services tax imposed by the GST Law together with any related interest, penalties, fines or other charges.
 - (ii) **GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of that Taxable Supply.
 - (iii) **GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999*.
 - (iv) Capitalised words in paragraph 3 which are not defined have the meaning in the GST Law.
- (b) Unless otherwise expressly referred to in these Payment Terms and Conditions, if GST is payable by a party on a Taxable Supply made under, by reference to or in connection with these Payment Terms and Conditions or any other Term, then the party paying the Consideration must also pay the GST Amount.
- (c) The GST Amount is payable on the earlier of:
- (i) the first date on which all or any part of the Consideration for the Taxable Supply is provided; and
 - (ii) the date 14 Business Days after the date on which an Invoice is issued in relation to the Taxable Supply.

4 Assignment and novation by Users

Users must not assign or novate any rights or obligations under these Payment Terms and Conditions without the prior written consent of Darwin Port, which may not be unreasonably withheld.

5 Notices to Darwin Port

- (a) All notices and other communications to Darwin Port in relation to these Payment Terms and Conditions must be in writing and sent to:
- | | |
|---------------|---|
| Address: | Port Administration Building, Darwin Business Park,
Berrimah
N.T. 0828. |
| Mail Address: | P.O. Box 390, Darwin N.T. 0801 Australia |
| Facsimile: | +61 8 8922 0666 |
| Email: | finance@darwinport.com.au |
- or to such other address or persons specified on the Website from time to time.
- (b) Notices are deemed to be received by Darwin Port at the time when they are actually received by Darwin Port.

6 Limitation of liability

- (a) Darwin Port is a party to these Payment Terms and Conditions in its capacity only as trustee for the Trust.
- (b) A liability arising under or in connection with these Payment Terms and Conditions is limited to and can be enforced against Darwin Port only to the extent to which it can be satisfied out of the property of the Trust out of which Darwin Port is actually indemnified for the liability.

- (c) No person will be entitled to:
 - (i) Claim from or commence proceedings against Darwin Port in respect of any liability under these Payment Terms and Conditions in any capacity other than as trustee for the Trust;
 - (ii) seek the appointment of a receiver, receiver and manager, liquidator, an administrator or any similar office-holder to any property of Darwin Port, or prove in any liquidation, administration or arrangement of or affecting Darwin Port, except in relation to the property of the Trust; or
 - (iii) enforce or seek to enforce any judgment in respect of a liability under these Payment Terms and Conditions against Darwin Port in any capacity other than as trustee of the Trust.
 - (d) The limitations of liability and restrictions in paragraph 6 will not apply in respect of any obligation or liability of Darwin Port to the extent that it is not satisfied because under the agreement governing the Trust or by operation of Law there is a reduction in the extent of the indemnification of Darwin Port out of the assets of the Trust as a result of fraud, negligence or breach of trust of Darwin Port or Darwin Port waiving or agreeing to amend the rights of indemnification it would otherwise have out of the assets of the Trust.
 - (e) The limitation of liability in paragraph 6 applies despite any other provision in these Payment Terms and Conditions.
-

7 General

- (a) If a person is bound by these Payment Terms and Conditions as agent, attorney or representative for the User (the Agent) they are not themselves the User, and they are not liable to carry out the obligations of the User under these Payment Terms and Conditions. An Agent does however warrant to Darwin Port at all times that it has full authority to bind the User to these Payment Terms and Conditions.
- (b) These Payment Terms and Conditions constitute the entire agreement between the parties relating to the subject matter of these Payment Terms and Conditions.
- (c) These Payment Terms and Conditions are governed by and will be construed in accordance with the Laws of the Northern Territory. They are deemed to have been entered into in Darwin, Northern Territory. Any action relating to these Payment Terms and Conditions may be instituted and heard in a court of competent jurisdiction in the Northern Territory, and each party irrevocably submits to the non-exclusive jurisdiction of such court for the purpose of any such action and irrevocably waives any objection to having such action brought in such court, or to Claim that the action has been brought in an inconvenient forum.
- (d) A variation or waiver of any provision of these Payment Terms and Conditions will be of no effect unless it is in writing, signed by the parties or (in the case of a waiver) by the party giving it.
- (e) Where the User may be constituted by more than one party, the failure by one or more of those parties to perform these Payment Terms and Conditions does not relieve any of the other parties who constitute the User of any of their obligations, and those other parties will be bound by these Payment Terms and Conditions.

- (f) Any provision of these Payment Terms and Conditions which is void, illegal or otherwise unenforceable, will be severed to the extent permitted by law without affecting any other provision and, if reasonably practicable, will be replaced by another provision of economic equivalence which is not so void, illegal or unenforceable.
- (g) If the doing of any act, matter or thing under these Payment Terms and Conditions is dependent on the consent or approval of a party or is within the discretion of a party, the consent or approval may be given or the discretion may be exercised conditionally or unconditionally or withheld by the party in its absolute discretion unless express provision to the contrary has been made. A party is not liable for any Loss arising in connection with the exercise or attempted exercise of, failure to exercise, or delay in exercising, a consent or approval under these Payment Terms and Conditions.

8 Definitions and Interpretation

The following definitions apply unless the context requires otherwise.

Access Policy means the access policy of Darwin Port Operations Pty Limited that is published on the Website from time to time.

Business Day means a day other than a Saturday, Sunday or public holiday in Darwin.

Claim means any claim, demand, action, suit or proceeding, whether under contract, tort or otherwise.

Darwin Port means (as applicable):

- (a) Darwin Port Operations Pty Limited as trustee for the Darwin Port Manager Trust ABN 60 269 541 845; or
- (b) Darwin Port Pilotage Pty Ltd as trustee for the Darwin Port Pilotage Trust ABN 98 744 318 229,

and its associated entities.

Facilities has the same meaning in the Standard Terms.

Government Authority means the Crown, a Minister, a government or government department, authority constituted for a public purpose, a local authority, a court and any officer, employee or agent of those entities.

Laws means applicable statutes, regulations, requirements, by-laws, policies and ordinances of Government Authorities any principles of law or equity established by decisions of Australian Courts.

Payment Terms and Conditions means these payment terms and conditions.

Port of Darwin means the port of Darwin as defined from time to time by the Laws of the Northern Territory.

Services has the meaning in the Standard Terms.

Standard Terms means the terms and conditions for access to the Standard Services (as defined in the Access Policy) approved by the Regulator in accordance with the Act.

Trust means (as applicable):

- (a) Darwin Port Manager Trust ABN 60 269 541 845; or
- (b) Darwin Port Pilotage Trust ABN 98 744 318 229.

User means each user of the Facilities or the Services.

Website means www.darwinport.com.au

9 Interpretation

The following rules apply unless the context requires otherwise:

- (a) Headings are for convenience only and do not affect interpretation.
- (b) The singular includes the plural and conversely.
- (c) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them.
- (e) A reference to an agreement or document (including, without limitation, a reference to these Payment Terms and Conditions) is to the agreement or document as amended, varied, supplemented, novated or replaced, except to the extent prohibited by these Payment Terms and Conditions or that other agreement or document.
- (f) A reference to a party to these Payment Terms and Conditions or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
- (g) 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.
- (h) A reference to dollars and \$ is to Australian currency.
- (i) The meaning of general words is not limited by specific examples introduced by "including", "for example" or similar expressions.
- (j) Nothing in these Payment Terms and Conditions is to be interpreted against a party solely on the ground that the party put forward these Payment Terms and Conditions or any part of them.