

DARWIN PORT

TERMS AND CONDITIONS: COMMON USER FACILITIES

1 Introduction

- (a) These Terms and Conditions relate to all common user facilities operated by Darwin Port, including:
 - (i) East Arm Wharf bulk liquids berth, bulk loading system and common user berths;
 - (ii) East Arm Wharf general cargo and container yard and storage facilities;
 - (iii) Fort Hill Wharf cruise ship terminal;
 - (iv) Fort Hill Wharf common user berth; and
 - (v) General mooring facilities located in Darwin Harbour.
- (b) Where Darwin Port has published specific terms and conditions in respect of any of the Facilities (including without limitation, those contained in the Berth Application and Berth Permit Form) then these Terms and Conditions will still apply to the use of that Facility, but to the extent of any inconsistency, the specific terms and conditions in relation to that Facility will prevail.

2 Use of Facility

- (a) The User agrees to use the Facility in common with others and Darwin Port grants the use of the Facility, for the Term and otherwise in accordance with the Application and these Terms and Conditions.
- (b) Without limiting paragraph 2(a), the User will only use the Facility for the Permitted Use.
- (c) Darwin Port reserves the right to grant, refuse, withdraw or impose and change conditions in respect of access to or use of the Facility (or any part of it) when:
 - (i) the Facility or any part of it is unsuitable for use;
 - (ii) when necessary, for any other reason; or
 - (iii) in the sole discretion of Darwin Port.
- (d) Access to and use of the Facility or any part of it (including but not limited to withdrawal, change and the imposition of any conditions) is always subject to the directions of Darwin Port which may be given at any time.

3 Payment by User

- (a) The User will pay Darwin Port the charges as stated in Darwin Port Schedule of Port Charges, (available on the Website) for the use of the Facility without any deduction or right of set-off. Payment is to be made by the User within 14 days of receipt of an invoice from Darwin Port

without set-off, counterclaim or deduction.

- (b) The User will pay Darwin Port, or any relevant Utility Service provider, a charge for any Utility Services used by the User at the Facility at the rate applicable to use of those Utility Services from time to time.
- (c) The User must promptly provide Darwin Port with any and all documentation necessary to enable Darwin Port to accurately calculate any charges 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.
- (d) If the User does not pay any amount due within 14 days of the due date, in addition to any other rights of Darwin Port, interest will accrue at the rate set by Darwin Port's primary banking institution business overdraft indicator lending rate as set from time to time, plus an additional 5%, calculated and accruing each day from the due date to the date on which the monies are actually paid.
- (e) If at any time Darwin Port can demonstrate that an account previously sent to the 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 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 Terms and Conditions.
- (f) New Users will generally be required to set up a credit account with Darwin Port. Darwin Port's Application for Credit form is available on its website.
- (g) A guarantee and indemnity is also required given when making the credit application.
- (h) Users who do not have an approved credit account with Darwin Port will be treated as cash only customers. Approval is in the sole discretion of Darwin Port and may be revoked at any time.
- (i) The User is not granted any exclusive use of the Facility, and Darwin Port may allow access to the Facility at all times by any other person for any purpose, including without limitation, access by employees, officers, agents or contractors of Darwin Port. Darwin Port will require such persons to operate in accordance with any relevant work health and safety standards applicable to the Facility.
- (j) Subject to paragraph 3(k), berthing of Vessels at the Facility will generally be determined by the order of arrival of Vessels at the Port of Darwin pilot station.
- (k) Darwin Port may change the priority of the users berthing at the Facility for any reasonable purpose at its absolute discretion, including without limitation, due to the nature of the cargo held by any relevant Vessel, the estimated time that any Vessel may be at the Facility, the nature of any Vessel at any surrounding berths, or the weather conditions from time to time.

4 Obligations of User

- (a) Before using the Facility, the User must submit to Darwin Port a Notice

of Arrival or other request form as may be accepted by Darwin Port in its discretion from time to time.

- (b) The User will promptly provide Darwin Port with all information reasonably desirable or necessary to enable the efficient use of the Facility and co-ordination with other users, including without limitation, any changes to the Time of Arrival or Time of Departure in the Particulars, and full details of any item or substance on the Vessel or which will be handled at the Facility of a hazardous, toxic or dangerous nature.
- (c) The User will ensure:
 - (i) it uses the Facility in a manner which prevents damage (including any environmental damage, contamination or pollution) to the Facility or the Port of Darwin; and
 - (ii) any Facilities used by it are kept and maintained in good condition (having regard to the Facilities age and general condition) and are left in a good, clean and operational condition after use.
- (d) Any damage to the Facility or its surrounds resulting from use of the Facility by the User must be immediately reported to the Darwin Port. Any repairs or remediation made by Darwin Port will be at the expense of the User. The User must pay to Darwin Port any costs incurred by Darwin Port in that regard (as a liquidated debt), within 14 days of receipt of an invoice from Darwin Port for those costs. Without limitation, this paragraph will apply to any damage to the environment in or around the Facility or the Port of Darwin resulting from or relating to damage, contamination or pollution caused by the Vessel or by any materials or liquids from the Vessel.
- (e) The User must leave the Facility clean of all rubbish and in the same condition as it was in prior to use by the User.
- (f) No improvements can be constructed on or made to the Facility by the User without the prior written consent of Darwin Port. If any improvements are made to the Facility by the User, it must remove those improvements upon request by Darwin Port and make good all damage arising from the improvements or the removal of the improvements.
- (g) If the User does not remove improvements or make good any damage as referred to in paragraph 4(f), Darwin Port may remove those improvements or repair that damage and the User will pay to Darwin Port any costs incurred by Darwin Port in that regard (as a liquidated debt) within 14 days of receipt of an invoice from Darwin Port for those costs.
- (h) The User must not operate or leave equipment at the Facility without obtaining a written permit to occupy from Darwin Port.
- (i) If the User leaves equipment at the Facility the equipment shall be entirely at the User's risk and the User hereby releases Darwin Port from any claim in relation to loss or damage to the equipment.

5 Use of Facility at risk of User

- (a) Subject to paragraph 5(b), the User will use the Facility at its own risk. Darwin Port will not be liable to the User, and the User releases Darwin Port in relation to any Claim or Loss that may be made against or incurred by the User at any time arising out of or in connection with,

directly or indirectly, the use of the Facility by the User, or otherwise arising out of these Terms and Conditions, including without limitation:

- (i) any Loss to any vessel, plant, equipment or other property;
 - (ii) any Loss arising from injury or damage done or suffered to any person, including death; or
 - (iii) any Loss arising from environmental damage, pollution or contamination.
- (b) Paragraph 5(a) does not apply to the extent any Loss is directly caused by the gross negligence or willful conduct of Darwin Port.

6 Indemnity by User

- (a) Subject to paragraph 6(c), the User indemnifies and will keep indemnified Darwin Port from and against all Claims and Loss that may be brought by any person against, or incurred by Darwin Port, directly or indirectly, in relation to or arising from the use by the User of the Facility, or under or in connection with these Terms and Conditions, including without limitation:
- (i) any Loss to any vessel, plant, equipment or other property, or in respect of any injury or damage done or suffered to any person, including death; or
 - (ii) any Loss arising from environmental damage, pollution or contamination.
- (b) The User acknowledges the existence at the Facility of equipment not owned by Darwin Port (including ship loaders and associated gantry equipment, shore cranes and associated equipment and cargo) ("**Equipment**"). Without limiting paragraph 6(c), the User indemnifies and will keep indemnified Darwin Port from and all Claims and Loss that may be brought by any person against, or incurred by Darwin Port, directly or indirectly in relation to or arising from the use of the Equipment by or on behalf of the User, or resulting from any damage to or destruction of the Equipment or any part of the Equipment caused directly or indirectly by the acts or omissions of the User or its agents, employees, licensees or invitees.
- (c) The indemnities in paragraphs 6(a) and 6(b) will not apply to the extent the relevant Claim or Loss is caused or contributed to by the negligence or willful default of Darwin Port.

7 Environmental management and security at Facility

The User must comply with:

- (a) all Laws concerning the Environment and Security, including without limitation, the *Darwin Port Management Act* (NT), regulations and by-laws, the *Marine Act* (NT) and regulations, the *Marine Pollution Act* (NT) and the *Maritime Transport and Offshore Facilities Security Act* (Cth);
- (b) the Darwin Port Environmental Management Plans, Policies and Procedures;
- (c) all security arrangements, ancillary procedures and directions given by a representative of Darwin Port given pursuant to any Law or as developed by Darwin Port for the Facility from time to time; and

- (d) Darwin Port Induction System (DPIS) and conditions of entry to a Facility under any Law or policy of Darwin Port.

Copies of any relevant security arrangements or ancillary procedures for the Facility are available at the Website.

8 Safety at Facility

- (a) The User must ensure that it and its employees, contractors, agents and invitees maintain a safe environment at the Facility at all times.
- (b) The User must at all times ensure that it complies with the *Work Health and Safety (National Uniform Legislation) Act* and any and all other relevant Laws relating to occupational health and safety.
- (c) The User must report incidents in and about the Facility as soon as reasonably practicable via written notification:
 - (i) of a notifiable nature - to Darwin Port and any other relevant Government Authority and
 - (ii) all other incidents - to Darwin Port.
- (d) The User must ensure that its worksite at the Facility is fit for its intended purpose prior to undertaking any activities at the Facility. Without limiting the generality of the foregoing, the User must undertake an appropriate and fulsome risk assessment and prepare appropriate safety plans having regard to the intended use of the Facility and foreseeable risks ("**Safety Plan**").
- (e) The 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 Facility;
 - (v) site access and management of that access (including for contractors, invitees and agents);
 - (vi) stores to vessels; and
 - (vii) evacuation plans.
- (f) The User must, on request, provide a copy of its Safety Plan to Darwin Port.
- (g) The User must, in the event of emergency, accident or threat to security, must notify the emergency services by dialing 000 and contact Darwin Port's Control Tower Office on 8922 0710, or the East Arm Wharf Gatehouse on 8947 4205 or 0401 110 320. The User must provide Darwin Port and any emergency services with such access, assistance and information as either of them may lawfully and reasonably require.

9 Insurance

- (a) Prior to use of the Facility, the User must obtain and continuously maintain comprehensive public liability insurance for an amount of at least \$20 million. The insurance must be for any single event and cover all operations by the User on or about the Facility. The insurance policy must be with a reputable insurer and a copy of the policy and any other relevant documentation must be provided to Darwin Port upon request.
- (b) The User warrants that any stevedore or other contractor which it engages or uses in relation to the Facility has appropriate insurance with a reputable insurer Darwin Port in relation to the following:
 - (i) workers compensation or similar employee insurance as required by any Laws; and
 - (ii) damage caused by that stevedore or other contractor at the Facility, including damage arising from the use of vehicles, cranes or any other machinery.
- (c) The User will not do or allow anything which might:
 - (i) increase the rate of any insurance in relation to the Facility or the Port of Darwin effected by or on behalf of Darwin Port (Darwin Port's Insurance);
 - (ii) render void or voidable Darwin Port's Insurance; or
 - (iii) conflict with any requirements relating to Darwin Port's Insurance.

10 Compliance with Laws and Port Requirements

The User must comply with all Laws and Port Requirements relating to the use of the Facility or the Port of Darwin and obtain any relevant approvals required under any Laws or Port Requirements.

11 Details of Facility

Darwin Port makes no representation or warranty as to the following matters, and the User will make its own enquiries in that regard:

- (a) the Utility Services that may be available at the Facility;
- (b) the access to, or the physical or other specifications of the Facility; or
- (c) the stevedoring or other services that may be available at the Facility.

12 Use of stevedores and other contractors

- (a) The User must use best endeavors to ensure that all stevedores and other contractors which it engages or uses at the Facility are reputable and have sufficiently experienced personnel to properly undertake their duties at the Facility.
- (b) The User must use best endeavors to ensure that all stevedores and other contractors which it engages or uses at the Facility operate under any Conditions of a Development Permit and any management plans relevant to the operations.

13 Directions of Darwin Port

The User must promptly comply with all reasonable directions from Darwin Port and its agents, employees, contractors and agents from time to time in relation to use of the Facility.

14 Impact on other persons

The User must:

- (a) not create any unnecessary interference, or any obstruction or danger to any other user of the Facility;
- (b) not interfere in any way with users of any area, wharf or other facilities within the Port of Darwin;
- (c) prevent nuisance and unreasonable noise and disturbance in using the Facility; and
- (d) ensure that it co-ordinates its activities and consults with other users of the Facility and the Port of Darwin.

15 Change of Facility

- (a) Subject to paragraph 15(b), Darwin Port may at any time change the Facility to be used by the User by giving reasonable notice to the User.
- (b) Darwin Port may only change the Facility if the alternative facility has substantially the same features (relevant to the User's proposed use) as the Facility originally proposed for use by the User.

16 Termination

- (a) Darwin Port may terminate the use by the User of the Facility at any time by written notice given to the User if the User is in material breach of these Terms and Conditions.
- (b) Darwin Port may terminate the use by the User of the Facility at any time if it considers that an Event of Force Majeure is such that it will prevent Darwin Port from providing the Facility for use by the User within the time period originally contemplated by the parties.
- (c) Darwin Port may terminate the use by the User of the Facility at any time by notice given to the User if the User has not arrived within a reasonable time after the Time of Arrival.
- (d) The User will have no Claim against Darwin Port including without limitation, for any Loss which may be suffered by the User, as a result of a termination by Darwin Port.

17 Force Majeure

- (a) If Darwin Port is prevented or delayed in providing use of the Facility by an Event of Force Majeure then for so long as that situation continues, Darwin Port is excused from providing use of the Facility to the extent that it is so prevented or delayed.
- (b) The User will have no Claim against Darwin Port including without limitation, for any Loss which may be suffered by the User, as a result of any delay.

18 GST

- (a) In paragraph 18:
 - (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) Words defined in paragraph 18 which are not defined in these Terms and Conditions will have the meaning given in the GST Law.
- (b) Unless otherwise expressly referred to in these Terms and Conditions, if GST is payable by a party on a Taxable Supply made under, by reference to or in connection with these Terms and Conditions, 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.

19 Assignment and subcontracting

- (a) Darwin Port may assign or novate all or part of its rights or obligations under these Terms and Conditions to any person in its discretion.
- (b) Darwin Port may subcontract any of its obligations under these Terms and Conditions.
- (c) The User must not assign or novate any of its rights or obligations under these Terms and Conditions without the prior written consent of Darwin Port which may be arbitrarily withheld.

20 Notices to Darwin Port

All notices and other communications to Darwin Port in relation to these Terms and Conditions must be in writing and sent by mail with postage prepaid, by personal delivery or by facsimile transmission as follows:

Name: Darwin Port Darwin Port
Address: Port Administration Building, Darwin Business Park, Berrimah N.T. 0828.
Postal Address: P.O. Box 390, Darwin N.T. 0801
Facsimile: (08) 89220666

or to such other address or person as Darwin Port may specify by notice in writing to the User from time to time.

21 Limitation of liability

- (a) Darwin Port (in paragraph 21, the Trustee) is a party to these Terms and

Conditions in its capacity only as trustee for the Darwin Port Manager Trust (in paragraph 21, the Trust).

- (b) A liability arising under or in connection with these Terms and Conditions is limited to and can be enforced against the Trustee only to the extent to which it can be satisfied out of the property of the Trust out of which the Trustee is actually indemnified for the liability.
- (c) No person will be entitled to:
 - (i) claim from or commence proceedings against the Trustee in respect of any liability under these 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 the Trustee, or prove in any liquidation, administration or arrangement of or affecting the Trustee, 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 Terms and Conditions against the Trustee in any capacity other than as trustee of the Trust.
- (d) The limitations of liability and restrictions in paragraph 21 will not apply in respect of any obligation or liability of the Trustee 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 the Trustee out of the assets of the Trust as a result of fraud, negligence or breach of trust of the Trustee or the Trustee 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 21 applies despite any other provision in these Terms and Conditions.

22 General

- (a) For the avoidance of doubt, if a person signs 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 that as at the date of signing that person had full authority to execute the Terms and Conditions and bind the User to these Terms and Conditions.
- (b) These Terms and Conditions constitute the entire agreement between the parties relating in any way 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 Darwin, 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 by deed 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 execute 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.

23 Definitions and Interpretation

The following definitions apply unless the context requires otherwise.

Application means any application made by a User to use a Facility, including (but not limited to) a Notice of Arrival.

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

Darwin Port means Darwin Port Operations Pty Limited as trustee for the Darwin Port Manager Trust ABN 60 269 541 845.

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

Darwin Port Environmental Management Plans, Policies and Procedures means the Darwin Port's environmental management policies, plans, procedures and similar documents as notified by Darwin Port from time to time with respect to the environmental management of the Port of Darwin and surrounding land and includes any environmental management plan posted on the Website.

Equipment has the meaning in paragraph 6(b).

Event of Force Majeure means the occurrence of any 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) act or potential or threatened act of terrorism which could impact in any way on the Facility or the Port of Darwin;
- (c) strike, lockout, blockade, picketing action or industrial action, dispute or disturbance of any kind;
- (d) act or omission of a Government Authority, including any change of Law;
- (e) act of God;

- (f) storm, tempest, fire, flood, earthquake or other natural calamity;
- (g) breakdown or failure of any plant, services, machinery or equipment, or unavailability of essential goods, supplies or services; or
- (h) any event resulting in an inability to allow use of the Facility, or resulting in an interruption or delay in permitting use of the Facility.

Facility means one of the facilities named in paragraph 1(a), being the specific facility referred to in the Application.

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

Laws means any statutes, regulations, by-laws, policies or ordinances of any relevant Government, (Territory, State and/or Commonwealth), any principles of law or equity established by decisions of Australian Courts, and any requirements of Darwin Port or any Government Authority made or arising pursuant to any Law.

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.

Notice of Arrival means the Notice of Arrival form available at the Website.

Permitted Use means the berthing of the Vessel (including where relevant, the storage and loading of cargo).

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 policies, rules, regulations or notices relating to the use of the Facility or the Port of Darwin, enacted or published from time to time by any Government Authority, by Darwin Port, or by any other entity with any control or authority in relation to all or part of the Facility or the Port of Darwin, including all procedures published by the Harbourmaster.

Safety Plan has the meaning in paragraph 8(d).

Term means the period of time the User is permitted to use the Facility, as expressed in the Application.

Time of Arrival means the date and time of arrival specified by the User in the Notice of Arrival.

Terms and Conditions means these Common User Port Facility Terms and Conditions.

User means each user of the Facility.

Utility Services means any utility services provided at the Facility including without limitation water, electricity, gas, telephone or computer connections.

Website means www.darwinport.nt.gov.au

24 Interpretation

- (a) Headings are for convenience only and do not affect interpretation. The

following rules apply unless the context requires otherwise.

- (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.