



OMS B Pty Ltd

Phone: 0475 972 235

Email: ops@omsb.com.au

[OMS B.COM.AU](http://OMSB.COM.AU)

OMS B PTY LTD

USER TERMS AND CONDITIONS

1.	INTERPRETATION	3
2.	NATURE OF AGREEMENT	12
3.	APPLICATION FOR BOOKING	13
4.	CANCELLATION OF ACCEPTED BOOKINGS	14
5.	DEPARTMENT OF TRANSPORT AUTHORITY AND LEASE	14
6.	NO USER RIGHT TO EXCLUSIVE USE	15
7.	USER OBLIGATIONS	15
8.	AUTHORITY NOTICES AND INCIDENTS	16
9.	FEES AND PAYMENT	16
10.	THE FACILITY	19
11.	HEALTH, SAFETY, SECURITY AND ENVIRONMENT	19
12.	INSURANCE	23
13.	FORCE MAJEURE	27
14.	DEFAULT	28
15.	TERMINATION	28
16.	INDEMNITY AND LIABILITY	29
17.	DISPUTE RESOLUTION	30
18.	ASSIGNMENT AND SUBCONTRACTING	31
19.	CONFIDENTIALITY AND PRIVACY	32
20.	GST	32
21.	NOTICES	32
22.	RELATIONSHIP BETWEEN THE PARTIES	33
23.	REPRESENTATIONS AND WARRANTIES	33
24.	ANTI-CORRUPTION	34
25.	PROPER LAW	34
26.	WAIVER	34
27.	AMENDMENT	34
28.	SEVERABILITY	34
29.	ENTIRE AGREEMENT	35
30.	SURVIVAL	35
31.	FURTHER ASSURANCE	35
32.	COSTS	35

1. INTERPRETATION

1.1 In the Agreement, unless a contrary intention appears:

Accepted Booking has the meaning given in clause 3.7;

Affected Party means a Party affected by a Force Majeure Event;

Agreement means:

- (a) these Terms and Conditions for Users;
- (b) the relevant User Application;
- (c) if applicable, the relevant Credit Application;
- (d) the OMSB Policies and Procedures; and
- (e) any other written agreement between the Parties relating to the Facility, the OMSB Equipment or the Services, which expressly incorporates the User Conditions and the OMSB Policies and Procedures;

Applicable Anti-Corruption Laws means the US Foreign Corrupt Practices Act, the UK Bribery Act and any other anti-corruption Legislative Requirements that are applicable to the User, OMSB or the Agreement;

Authority means any government department, local government council, government or statutory authority, court, tribunal or other body or instrumentality, which has a right to impose a requirement or whose approval is required with respect to or in connection with the Facility;

Authority Notice means any notice issued by an Authority to the User or to any of the User Personnel relating to the User's use of the Facility, the OMSB Equipment or the Services;

Business Day means any day except Saturdays, Sundays, or a public holiday in Onslow, Western Australia;

Channel means the harbour approach channel described in the Harbour User Handbook;

Claim means any claim, demand, cause of action, action, suit or proceeding of any kind (including under any written or unwritten law or in equity) arising under, out of or in connection with the Agreement which either Party may make or bring against the other Party, its officers, employees or agents including for the payment of money, cost, expense, loss or damage;

Connected Entity means, in relation to OMSB:

- (a) Strategic Infrastructure Services Pty Ltd (ACN 81 651 261 120);
- (b) Onslow Marine Support Base (ACN 59 167 963 715);
- (c) any associate or related body corporate of OMSB;

- (d) another person that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under the common control of, OMSB; and
- (a) a subsidiary of OMSB or a holding company of OMSB,

irrespective of whether any control is exercisable or interest is held in a fiduciary capacity or whether there is a legal obligation to exercise control for the benefit of another person;

Consequential Loss means loss of revenue, loss of profit or anticipated profit, loss of production, loss of use of any plant or facility, business interruption of any nature, loss of business opportunity, loss of business reputation, loss of contract, value of shares, wasted overheads, payment of liquidated sums, penalties or damages under any agreement (other than the Agreement or as expressly permitted by the Agreement) or any other indirect, remote, consequential, punitive, exemplary or special loss or damage, but does not include Loss:

- (a) arising from a Claim by a Third Party or by OMSB Personnel in respect of property damage, personal injury, nervous shock, illness or death;
- (b) which is covered by a policy of insurance required by the Agreement under which the User is an insured or would, but for any act or omission of the User, have been covered under that policy;
- (c) comprising any penalty or fine payable for breach of a Legislative Requirement;
- (d) in respect of any Gross Negligence, Wilful Misconduct, criminal act or fraudulent act of the User or of any person for whose acts or omissions the User is vicariously liable;
- (e) which may be recoverable by OMSB under clauses 16.2(c), 16.2(d), 16.2(e), 19 or 24;
- (f) in respect of Gross Negligence or Wilful Misconduct of the User; or
- (g) out of which, by law, the User cannot contract;

Credit Application means a duly completed application for a credit account in the form available on the OMSB Website and submitted by the User to OMSB;

Date for Commencement means the date of the User Application or otherwise stated in the Agreement;

Delivery Date means the date or dates, and if applicable, the times, for the uses of the Facility, Services or OMSB Equipment as stated in each Accepted Booking.

Department of Transport means the government Authority which has overall control over the Port of Onslow (Beadon Creek), including the Beadon Creek Maritime Facility, in accordance with the *Shipping and Pilotage Act 1967* (WA);

direction means a direction or instruction given in writing, and 'directed' has an equivalent meaning;

Dispute means a dispute or difference between the Parties arising out of or in

connection with the Agreement;

Dispute Notice means a written notice stating that it is given under clause 17.1 and that outlines the nature of the Dispute;

Environment has the meaning given to that term in the Environmental Protection Act;

Environmental harm has the meaning given to that term in the Environmental Protection Act;

Environmental Protection Act means the *Environmental Protection Act 1986 (WA)*;

Facility means, as the context so requires, the whole or any part of the marine support base facility at Beadon Creek, in the Port of Onslow (Beadon Creek), Western Australia and, if the context so requires, any other infrastructure or areas of land which are owned, leased or controlled by OMSB or any Connected Entity of OMSB from time to time;

Fees means the standard levies, fees and charges applicable to the use of the Channel, the Facility, the OMSB Equipment or the Services from time to time as published on the OMSB Website or as otherwise notified in writing by OMSB to the User, including:

- (a) port dues
- (b) berthage;
- (c) wharfage;
- (d) bunker fees;
- (e) pilotage fees;
- (f) tug fees;
- (g) fresh water fees;
- (h) layup fee;
- (i) cancellation fees;
- (j) land based charges (provision of reach stacker, forklifts, Personnel, laydown, fenders, cranes, documentation, gatehouse, operator, team leader etc); and
- (k) fees charged to OMSB by American Express, Visa, Mastercard, OMSB or any other financial institution for any credit or debit card payments made by a User to OMSB.

Force Majeure Event means any event or circumstance (or combination of events or circumstances) which:

- (a) is beyond the control of the Affected Party;

- (b) causes delay in, or prevention of, the performance by the Affected Party of any of its obligations under the Agreement;
- (c) could not have been reasonably foreseen; and
- (d) which cannot be prevented, overcome or remedied by the exercise by the Affected Party of a reasonable standard of care and diligence, proper precautions, the consideration of reasonable alternatives with the intention of avoiding the effects of the event or circumstance or the expenditure of a reasonable sum of money;
- (e) includes the following events:
 - (i) damage to or blockages or obstructions of the Channel or berths at the Facility or the Port;
 - (ii) act of God;
 - (iii) act of war, terrorism, riot, civil commotion or insurrection;
 - (iv) action by any protest or interest group which interferes with the User's access to the Facility or otherwise disrupts the Services;
 - (v) delays caused by a pandemic that has been declared by the World Health Organisation, including the coronavirus disease known as COVID-19 that was declared a pandemic by the World Health Organisation on 11 March 2020;
 - (vi) cyclones, hurricanes, floods, earthquakes or storms; or
 - (vii) ionising radiation or contamination by radioactivity; and
- (f) does not include the following events:
 - (i) industrial-related disputes including strikes, lockouts, industrial difficulties, labour difficulties, work bans, blockades or picketing but does not include any strike or industrial dispute solely affecting the User or User Personnel; or
 - (ii) any acts, omissions or breach by any of the User Personnel;

Gross Negligence means any act or failure to act (whether sole, joint or concurrent) that is so great as to cause harm to people, property or the environment and that:

- (a) seriously and substantially deviates from a diligent course of action; or
- (b) is in reckless disregard of or wanton indifference to a risk known or so obvious that it should have been known;

GST has the meaning given in the GST Act;

GST Act means *A New Tax System (Goods and Services) Act 1999 (Cth)*;

Harbour User Handbook means the port information handbook in respect of the Port of Onslow (Beadon Creek), the Channel and the Facility, as published on OMSB's Website (as amended from time to time);

Hazardous Substances means any substance with potential to cause harm to persons, property or the Environment because of the chemical, physical and/or biological properties of the substance;

Indemnified Parties means OMSB, OMSB Personnel and any of OMSB's Connected Entities;

Insolvency Event means any of the following events in relation to a Party:

- (a) the Party informs the other Party in writing or creditors generally or passes a resolution to the effect that the User is insolvent or is likely to become insolvent or the Party is deemed to be insolvent under any legislation;
- (b) the Party commits an act of bankruptcy, has a bankruptcy petition presented against it or is made or declared bankrupt;
- (c) the Party enters, or attempts or proposes to enter a scheme of arrangement or any other form of court sanctioned reconstruction (other than if the Party can demonstrate to the satisfaction of the other Party that it is to carry out a reconstruction or amalgamation while solvent);
- (d) the Party enters or attempts to enter or proposes to enter a compromise or other arrangement with creditors or any class of its creditors;
- (e) the Party has a liquidator, provisional liquidator, administrator, insolvency officer or any other similar official appointed to it or has a receiver, receiver and manager or other controller or similar official appointed over its property or part of its property;
- (f) the Party takes any steps to obtain protection or is granted protection from creditors under any Legislative Requirement;
- (g) any charge, mortgage, encumbrance or security interest is enforced or exercised against any asset of the Party;
- (h) the Party is taken to have failed to comply with a statutory demand or has an application made to the court for its winding up and such application is not withdrawn or dismissed within 10 Business Days;
- (i) the Party has a winding up order made against it, is deregistered, dissolved or has any steps taken against it to enforce a judgement of a court or an arbitral award; or
- (j) the Party has something having substantially similar effect to any of the events specified above occur in any jurisdiction under or in respect of any existing or future Legislative Requirement;

Interest Rate means 2% above the cash rate target published by the Reserve Bank of Australia on the date of the relevant invoice, calculated daily;

Landside Restricted Zone means an area of land or a structure within the boundaries of the Port of Onslow (Beadon Creek) which is established as a 'land-side restricted zone' (being a type of 'port security zone' as defined by section 10 of the MTOFSA) under the MTOFSA and MTOFSR;

Lease means the leases between the Minister for Transport and OMSB dated 31 March 2017 and 2 May 2018, as subsequently varied;

Legislative Requirements include statutes, regulations, by-laws, orders, awards, industrial agreements, registered workplace agreements, proclamations of the Commonwealth, Authority requirements, guidelines, certificates, licences, consents, permits, approvals (including conditions in respect of those consents, certificates, licences, permits and approvals) codes, standards and requirements or orders of organisations and Authorities having jurisdiction in connection with the carrying out of the Services, including any modification or re-enactment of a Legislative Requirement from time to time;

Loss means loss, damage, liquidated sum, charge, cost and expense of any kind;

Maritime Security Plan means the maritime security plan prepared and administered by OMSB in accordance with the MTOFSA and as amended from time to time;

MTOFSA means the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth), as amended from time to time;

MTOFSR means the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Cth), as amended from time to time;

OH&S Legislative Requirement means any applicable health and safety related Legislative Requirement, including a Legislative Requirement related to occupational health and safety, dangerous goods, chain of responsibility, mining, electrical health and safety, and any other industry specific Legislative Requirement, and any related codes of practice, standards, notices and directions issued by any Authority;

OMSB means OMSB Pty Ltd (ABN 40 657 345 385), or, as the context so requires, any Connected Entity of OMSB Pty Ltd (ABN 40 657 345 385);

OMSB Equipment means any plant, facilities or equipment used by OMSB in performing the Services, or provided by OMSB for use by the User in connection with the Services, including cranes, forklifts, trucks and other plant or any substituted equipment and all tools, accessories and spare parts supplied with the plant, facilities or equipment;

OMSB Personnel means OMSB's employees, subcontractors, agents and representatives involved either directly or indirectly in the provision of the Services and a reference to OMSB's 'Personnel' shall have an equivalent meaning;

OMSB Policies and Procedures means the policies, procedures, guidelines, standards, regulations or manuals in relation to the Facility or the Services introduced by OMSB from time to time, as published on the OMSB Website or as otherwise notified in writing by OMSB to the User, including:

- (k) the Harbour User Handbook; and
- (l) those relating to:
 - (i) the Environment;
 - (ii) traffic management;

- (iii) dust management;
- (iv) emergency response;
- (v) cyclone and management responses;
- (vi) workplace health and safety; and
- (vii) the security of the Facility;

OMSB Representative means the person stated in the User Application, or such other person as notified by OMSB from time to time, who shall represent OMSB for the purposes of the Agreement;

OMSB Website means www.onslowportservices.com.au;

Party means OMSB or the User, and **Parties** means both of them;

Permitted Uses means in respect of the Facility, the permitted use(s) under the Lease from time to time, which as at the date of this Agreement is maritime and fishing related purposes in accordance with both the vesting for the land and the Beadon Creek Maritime Facility Land Use Framework dated June 2014, with particular reference to the preferred land uses for precinct 1 set out in that framework, and specifically including:

- (a) light vessel maintenance activities;
- (b) vessel mobilisation and de-mobilisation;
- (c) vessel day mooring (jetty area);
- (d) small vessel and equipment storage;
- (e) general vehicle and plant parking;
- (f) workshop building;
- (g) site office and amenities building; and
- (h) lay-down yard

subject at all times to any restrictions or prohibitions contained in the Leases;

Personnel means the User Personnel and/or OMSB Personnel as appropriate in the context;

Pollution has the meaning given to that term in the Environmental Protection Act;

Port Harbourmaster means the harbourmaster, as defined in the *Shipping and Pilotage Act 1967 (WA)*, of the Port of Onslow (Beadon Creek);

Port of Onslow (Beadon Creek) means the area of water and land described as such in the *Shipping and Pilotage (Ports and Harbours) Regulations 1966 (WA)*;

PPSA means the *Personal Property Securities Act 2009 (Cth)*;

PPSA Security means a security interest or deemed security interest within the meaning of the PPSA;

Services means the services to be performed by OMSB for the User, which may but shall not necessarily including the provision of:

- (a) access by Vessels to the Channel and waters of the Port of Onslow (Beadon Creek);
- (b) access for Vessels to berth and be loaded and unloaded at the Facility;
- (c) the use of the Facility including for the User and the User's Personnel; and mobile or moveable plant and equipment, goods or materials owned, leased or in the lawful care and control of the User, in the manner set out in the relevant Accepted Booking;
- (d) access to fuel, water supply and other ancillary services as available (but excluding the actual supply of the commodity or service which is to be purchased directly from the supplier);
- (e) access to moorings within the Port of Onslow (Beadon Creek) owned or leased by OMSB or an OMSB Connected Entity but excluding:
 - I. tug moorings and tug pens; and
 - II. moorings on or from pontoons;
- (f) the provision of access to mobile or moveable loading or unloading equipment owned, leased or operated by OMSB or an OMSB Connected Entity;
- (g) the provision of pilotage services within the Port of Onslow (Beadon Creek);
- (h) storage or laydown of plant, equipment, materials or goods;
- (i) tug services;
- (j) fender services; and
- (k) forklift services.

Specified Person means a director, partner, shareholder or officer of the User, who may or may not provide a guarantee and indemnity from time to time in connection with the User's liabilities to OMSB;

Third Party means a person not being OMSB, the User, the User's Personnel or OMSB's Personnel;

User means the person stated in the Agreement or the User Application and includes its successors, substitutes (including persons taking by way of novation), assigns and permitted assigns;

User Application means a duly completed application in the form available on the OMSB Website and submitted by the User to OMSB in respect of each Vessel and each occasion of the User's proposed use of the Facility, Services and/or OMSB Equipment;

User Personnel means any of the User's employees, subcontractors, agents, servants, representatives, visitors and invitees, and when used in relation to a Vessel includes not only the owner, but also the charterer and/or the master of the Vessel and/or any other person who acts as agent of the owner, charterer or master and a reference to the User's 'Personnel' shall have an equivalent meaning;

User Representative means the person stated in the User Application, who shall represent the User for the purposes of the Agreement;

Vessel means any craft or other contrivance used, or capable of being used, as a means of transportation on water;

Waterside Restricted Zone means an area of water within the Port of Onslow (Beadon Creek) which is established as a 'water-side restricted zone' (being a type of 'port security zone' as defined by section 10 of the MTOFSA) under the MTOFSA and MTOFSR; and

Wilful Misconduct means a deliberate act or omission, the consequences of which were foreseen or foreseeable, and that was intended to cause harm to people, property or the environment.

1.2 In interpreting the Agreement, unless stated or the context otherwise requires:

- (a) reference to a clause is a reference to a clause of the Agreement;
- (b) reference to a clause is a reference to the whole of the clause unless the reference is to a specified sub-clause;
- (c) clause headings are for convenience only and will not be used in the interpretation of the Agreement;
- (d) words in the singular include the plural and vice versa, as the context requires;
- (e) where a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (f) monetary amounts or rates stated in the Agreement and all payments due under the Agreement will be in Australian currency;
- (g) all lump sums and rates and prices stated in the Agreement will be deemed to exclude GST unless stated otherwise;
- (h) reference to a person or party includes a body corporate, trust, partnership, joint venture, unincorporated association and vice versa;
- (i) reference to a Party includes the Party's officers, employees, agents, executors, administrators, successors, substitutes (including persons taking by way of novation), assigns and permitted assignees;
- (j) where the User comprises two or more parties, those parties will be bound under the Agreement jointly and severally and will act only jointly in relation to the exercise by the User of its rights under the Agreement;
- (k) 'including' is not a word of limitation;

- (l) reference to 'approved' or 'approval' means 'approved in writing' or 'approval in writing';
- (m) a provision of the Agreement will not be construed to the disadvantage of OMSB merely because OMSB was responsible for the preparation of the Agreement or the inclusion of the provision in the Agreement;
- (n) no provision of the Agreement constitutes a stipulation for the benefit of a Third Party, save to the extent expressly provided in the Agreement;
- (o) where the User is required under the Agreement to perform an obligation, matter or thing, or discharge a Liability, the User must do so at its own cost, unless expressly provided otherwise in the Agreement;
- (p) where a period of time is specified and runs from the day of a specified event, the period is to be calculated exclusive of that day;
- (q) 'promptly' means as soon as practicable in the relevant circumstances;
- (r) measurements of physical quantities will be in legal units of measurement of Australia;
- (s) reference to a day or month means a calendar day or calendar month;
- (t) reference to any Legislative Requirement includes any statutory instrument issued under it and any amendment, consolidation, re-enactment or replacement to or of it; and
- (u) the terms "associate" and "related body corporate" have the meanings given to those terms in the *Corporations Act 2001* (Cth).

2. NATURE OF AGREEMENT

- 2.1 Where the Agreement refers to all or part of another document not physically included with the Agreement then the User will be deemed to have obtained a copy of that other document or the relevant part thereof from OMSB or from the relevant source.
- 2.2 The documents and other information which constitute the Agreement will be taken as mutually explanatory and anything contained in one but not in another will be equally binding as if contained in all.
- 2.3 If there is any ambiguity, inconsistency or conflict between any of the provisions of the documents comprising the Agreement, then:
 - (a) the provision that imposes the most onerous requirement on the User will prevail; and
 - (b) otherwise, the documents take precedence the following order:
 - (i) these User Terms;
 - (ii) the OMSB Policies and Procedures; and
 - (iii) the User Application.

3. APPLICATION FOR BOOKING

- 3.1 If, from time to time, the User seeks to use the Services, OMSB Equipment or the Facility, it shall submit a duly completed User Application to OMSB which:
- (a) is submitted promptly and at least 36 hours prior to the Delivery Date;
 - (b) is submitted in the manner set out in the User Application from time to time.
- 3.2 If the User does not pre-pay all Fees in accordance with clause 9.4, prior to the User's first use of the Services, OMSB Equipment or the Facility, the User shall submit a duly completed Credit Application to OMSB, containing the requisite details and submitted in the manner set out on the Credit Application form. Unless otherwise advised by OMSB, the provision of a duly completed Credit Application will not be required for the User's subsequent use the Services, OMSB Equipment or the Facility.
- 3.3 The User shall ensure that the information in each User Application and, if applicable, the Credit Application, is complete, accurate and not misleading.
- 3.4 The User shall promptly provide any additional information in connection with each User Application and, if applicable, the Credit Application as may be requested by OMSB from time to time.
- 3.5 Notwithstanding any other provision of this Agreement to the contrary, OMSB may:
- (a) accept or reject a User Application or Credit Application at any time (even if it has previously accepted a similar User Application or the Credit Application); and
 - (b) provide any, all or none of the Services or OMSB Equipment requested in any User Application,
- at OMSB's sole and absolute discretion.
- 3.6 Notwithstanding any other provision of this Agreement to the contrary, the User acknowledges and agrees that OMSB is not liable for, and the User shall have no Claim against OMSB in respect of, any Loss in connection with OMSB:
- (a) rejecting a Credit Application or User Application; or
 - (b) electing to not provide any or all of the Services or OMSB Equipment requested in the Application.
- 3.7 Subject to clause 4, if OMSB confirms in writing to the User that it has accepted a relevant User Application (or parts thereof) and a Credit Application or has received pre-payment of all Fees in accordance with clause 9.4 (**Accepted Booking**):
- (a) OMSB may:
 - (i) perform or provide the Services;
 - (ii) permit the User to access the Facility for the Permitted Uses; and
 - (iii) permit the User to use the OMSB Equipment,

in the manner (including the duration and use) set out in the Accepted Booking on the terms of this Agreement, including the OMSB Policies and Procedures.

- (b) the User must:
 - (i) pay the Fees for the use of the Services, the Facility and the OMSB Equipment as detailed in the Accepted Booking;
 - (ii) only use the Services, the Facility and the OMSB Equipment as detailed in the Accepted Booking and in a manner which is consistent with the Permitted Uses; and
 - (iii) comply with the terms of the Agreement, including the OMSB Policies and Procedures.

4. CANCELLATION OF ACCEPTED BOOKINGS

4.1 OMSB may cancel or (with the agreement of the User, vary) an Accepted Booking at any time by giving written notice to the User.

4.2 The User may revoke a User Application and cancel an Accepted Booking by:

- (a) giving OMSB not less than 15 Business Days written notice prior to the relevant Delivery Date, at no penalty;
- (b) giving OMSB less than 15 Business Days but not less than five Business Days written notice prior to the relevant Delivery Date, provided that the User pays OMSB 50% of the Fees which would be payable for the Accepted Booking; and
- (c) giving less than five Business Days written notice prior to the relevant Delivery Date, provided that the User pays OMSB 95% of the Fees which would be payable for the Accepted Booking.

4.3 If the User revokes a User Application or cancels an Accepted Booking, the User will be liable for all Loss incurred by OMSB in connection with that User Application in addition to the amounts payable under clause 4.2 above.

4.4 Notwithstanding this clause 4, OMSB may, at its discretion, agree with the User to re-schedule an Accepted Booking for an alternative day or time, or otherwise vary an Accepted Booking, which agreement may be made subject to such conditions (including any payments) as OMSB may require.

5. DEPARTMENT OF TRANSPORT AUTHORITY AND LEASE

5.1 The User acknowledges and agrees that:

- (a) the Facility is located within the Port of Onslow (Beadon Creek) and that the Port of Onslow (Beadon Creek) is subject to the overall authority of the Department of Transport;
- (b) the Agreement depends on the existence and continuance of the Lease; and
- (c) the Agreement will terminate immediately if the Lease is terminated for any reason.

6. NO USER RIGHT TO EXCLUSIVE USE

6.1 Nothing in the Agreement grants to the User any exclusive right to use the Facility (including berths), the OMSB Equipment or the Services to the User.

6.2 The User acknowledges that OMSB:

- (a) makes no representation and gives no warranty or undertaking to the User; and
- (b) will have no liability to the User for any Loss or Claim (including, but not limited to, in respect of demurrage or delay in the docking and loading of any Vessel at the Facility or arising in any way from Vessel congestion or traffic in the Port of Onslow (Beadon Creek)),

arising out of or in connection with the timing of access to or the availability of the Facility, OMSB Equipment or Services (including at the times or for the period requested by the User) and that access and order of allocation will be determined by OMSB in its absolute discretion and typically in accordance with the procedures set out in the OMSB Policies and Procedures.

6.3 Notwithstanding any other provision of the Agreement:

- (a) OMSB may allow access to the Facility at all times by any other person for any purpose; and
- (b) entry into and use of the Facility or the OMSB Equipment (including berths) or the provision of the Services is subject to availability, as determined by OMSB in its sole and absolute discretion.

7. USER OBLIGATIONS

7.1 The User must, and must ensure that all User Personnel, at all times:

- (a) only use the Facility for the Permitted Uses, and not do anything contrary to the Permitted Uses;
- (b) comply with the OMSB Policies and Procedures;
- (c) comply with all lawful directions, instructions or notices of OMSB, the OMSB Representative, the Port Harbourmaster, the Department of Transport and any other Authority;
- (d) comply with all Legislative Requirements; and
- (e) do not do anything to cause OMSB to breach the Lease,

applicable to the User or the User Personnel's access to, or use of, the Facility, the OMSB Equipment or the Services;

7.2 The User must ensure that:

- (a) all User Personnel:
 - (i) complete any induction required by OMSB before entering the Facility;

- (ii) wear appropriate personal protective equipment; and
 - (iii) behave in a lawful, responsible and appropriate manner.
- (b) any OMSB Equipment used by the User or by any User Personnel is used in accordance with its operating instructions, kept and maintained in good condition (having regard to its age and general condition prior to the User's use) and left in good, clean and operational condition after use;
 - (c) no damage is caused by the User or by User Personnel to the Facility, the OMSB Equipment or the Port of Onslow (Beadon Creek);
 - (d) it does not interfere with any of OMSB's activities or the activities of any Third Party at or around the Facility;
 - (e) the User and the User Personnel do not act in a manner which disrupts or adversely affects OMSB's operations and activities at or around the Facility; and
 - (f) any Vessel, tools, equipment, material or other things brought to the Facility by the User or the User Personnel are kept safe from theft, loss or damage.
- 7.3 OMSB may refuse entry to the Facility to any User Personnel who has not satisfied or completed any induction requirements or procedures.

8. AUTHORITY NOTICES AND INCIDENTS

- 8.1 The User must notify OMSB by written notice to the OMSB Representative immediately upon becoming aware of:
- (a) the occurrence of any Pollution or discharge, escape or leak of any quantity into the Facility of garbage, sewage, oil, oily mixture or other noxious substance from packaged goods or the Vessel, and provide (at the User's cost) any details necessary to enable OMSB to prepare a pollution report to submit to any Authority or other relevant third parties;
 - (b) any complaint made against the User or any of the User Personnel to any Authority;
 - (c) any proceedings commenced against the User or any of the User Personnel, relating to any alleged failure by the User or any of the User Personnel to comply with a Legislative Requirement in relation to the performance by the User of its obligations under the Agreement; or
 - (d) any Authority Notice.

8.2 The User must, at its cost, comply with any Authority Notice.

9. FEES AND PAYMENT

Fees

- 9.1 OMSB may review and vary the Fees from time to time, at any time. The User acknowledges and agrees that OMSB can add to or vary the Fees at any time and the User will be automatically bound by the additional Fees and variations regardless of whether or not OMSB has notified or otherwise informed the User of the changes.

In this regard, the User acknowledges that it is responsible for checking the Fees from time to time to ascertain whether or not additions or variations have been made to them.

- 9.2 Subject to clause 9.3, OMSB will publish any variation to the Fees on the OMSB Website at least 10 Business Days prior to the date on which the variation is to become effective.
- 9.3 Where a change to any Legislative Requirements causes an increase in OMSB's costs, OMSB may vary the Fees immediately to account for that increase without giving prior notice to the User.

Payments

- 9.4 If the User does not have an approved Credit Application with OMSB in respect of a particular User Application, or if required by OMSB for any reason whatsoever at any time at its sole and absolute direction, the User must pay all anticipated Fees (based on the information in the User Application) to OMSB:
- (a) at the time of, or within 24 hours of, submitting the User Application, as required by OMSB; and
 - (b) prior to and as a precondition of the Accepted Booking.
- 9.5 If the User has an approved Credit Application with OMSB (which OMSB has not cancelled or revoked at its sole and absolute discretion), OMSB will issue a tax invoice to the User for all Fees payable by the User to OMSB under the Agreement.
- 9.6 The User will pay each and every tax invoice:
- (a) promptly, and, unless otherwise stated on the tax invoice, within 7 Business Days of issue of the tax invoice; and
 - (b) into the bank account nominated by OMSB or in such other manner stated on the tax invoice.
- 9.7 Notwithstanding clauses 9.4, 9.5 and 9.6, and the contents of any accepted Credit Application, OMSB may at its sole and absolute discretion from time to time require that:
- (a) the User makes an immediate payment or a pre-payment to OMSB in respect of part or all of the Fees or other amounts which are or will become payable to OMSB under this Agreement;
 - (b) the User provides a purchase order number, credit card details (with an authority to charge) or other information which enables OMSB to more easily recover payment for any Fees or other charges payable to OMSB under this Agreement; and/or
 - (c) the User or a third party provides a bond, guarantee or other form of security in connection with any amounts which are or may become payable by the User under this Agreement.
- 9.8 The User must:

- (a) if the User disputes all or part of the invoice, give a Dispute Notice to OMSB in respect of the disputed amount, within 7 Business Days of the date of issue of the invoice;
- (b) pay the amount of the invoice not disputed by the User in accordance with clause 9.8(a), within 7 Business Days of the date of issue of the invoice; and
- (c) pay any charges that are levied by the Department of Transport in connection with the User, directly to the Department of Transport.

9.9 If the User fails to make a payment that is due and payable in accordance with the Agreement:

- (a) the User must pay OMSB interest on any overdue payment at the Interest Rate, calculated daily and compounded monthly from the date payment is due until payment is made;
- (b) the User indemnifies OMSB in respect of all costs, legal expenses, commissions and any other miscellaneous costs incurred in collection of outstanding monies;
- (c) OMSB is empowered to detain any Vessel or hold any goods of the User until payment has been received or an agreement for payment has been agreed in writing to the satisfaction of OMSB;
- (d) OMSB may cancel any approved Credit Application;

9.10 Each User acknowledges that:

- (a) OMSB has a lien on its Vessel, including any fittings and all property situated in or relevant to that Vessel, in respect of which a Fee for Services or use of the Facility is due and payable (the "Lien");
- (b) the Lien granted to OMSB takes priority over all other liens of that User, other than any liens mandatorily preferred by law;
- (c) if the User fails to pay an amount payable by it which is secured by the Lien, the Lien is immediately enforceable without the need for any demand or notice to be given to the User by OMSB;
- (d) after the Lien has become enforceable, the User must take all action required by OMSB, a receiver or OMSB's agent or attorney to recover the amount owing to OMSB, including executing any transfer and assignment in respect of a Vessel;
- (e) in enforcement proceedings taken by OMSB, a written statement produced by a representative of OMSB as to amounts owing to OMSB is sufficient evidence against it, except in the case of manifest error;
- (f) OMSB may register a PPSA Security in respect of its interest relating to the User's Vessel, fittings and contents;
- (g) the parties contract out of each provision of the PPSA which section 115 permits (other than sections 117, 118, 123, 126, 128, 129, 134 and 135 and any other provision of the PPSA notified by OMSB to the User);

- (h) in respect of any security interest or deemed security interest relevant to these Terms and Conditions, the User waives its right to receive:
 - (i) each notice which section 157 of the PPSA permits to be waived and, to the extent capable of being waived, notice under any other provision of the PPSA; and
 - (ii) anything from OMSB as secured party under section 275 of the PPSA and agrees not to make any request of OMSB as a secured party under that section.

9.11 The User agrees that, if requested by OMSB, it will provide any information connected to the charging of the Fees (such as declarations of cargo and loading quantities), and that such information will be complete and accurate.

10. THE FACILITY

10.1 Nothing in the Agreement provides the User with any possessory, proprietary or other interest in the Facility or any OMSB Equipment.

10.2 At all times, OMSB retains possession and overriding control of the OMSB Equipment, the Facility and all persons within the Facility.

10.3 The User must not cause any damage to the Facility and must keep the Facility clean and tidy, including by removal of all its rubbish. The User must, at its own cost, dispose of all waste at disposal areas as directed by the OMSB Representative. If the User fails to comply with this clause 10.3, OMSB may repair any damage (which may include replacement of any item or works) caused by the User and dispose of any waste not disposed of by the User. The cost of any such repair, replacement or disposal shall be a liquidated debt payable by the User to OMSB immediately on demand.

10.4 OMSB is entitled to procure the raising, removal or destruction of any Vessel sunk, stranded or abandoned in, presenting a danger to, or obstructing access to, the Channel, the Facility or any of the OMSB Equipment, the cost of which shall be a liquidated debt payable by the User to OMSB immediately on demand.

11. HEALTH, SAFETY, SECURITY AND ENVIRONMENT

Hazardous Substances

11.1 The User must not (and must ensure that the User Personnel do not), without OMSB's prior written consent, cause or allow any Hazardous Substances to be brought onto, produced on, transported to or from, treated, stored or disposed of at the Facility.

11.2 The User shall be liable for any costs incurred by OMSB (including costs for labour, special insurance or handling procedures required by Legislative Requirements or reasonably necessary in accordance with good industry practices) in connection with any Hazardous Substances brought by the User or any of the User Personnel to the Facility.

Pollution, Contamination and Environmental Harm

11.3 When accessing the Facility, the User must ensure that it and the User Personnel do so in a manner that does not cause or threaten to cause Pollution, contamination or

Environmental Harm of, or, under or outside the Facility, including ensuring that:

- (a) environmental impacts caused by the User or the User's Personnel at the Facility are within the guidelines or conditions set out in any relevant approvals of Authorities;
 - (b) it and the User Personnel take all necessary precautions to minimise or abate noise, dust, vibration and other nuisances emanating from the Facility;
 - (c) it and the User Personnel take all necessary and reasonable precautions to avoid damage and disturbance to flora and fauna on or in the vicinity of the Facility;
 - (d) it and the User Personnel do not allow any part of the Facility to be used for any purpose not connected with the Facility; and
 - (e) it and the User Personnel do not bring, handle, store or use any explosives on the Facility without obtaining OMSB's prior written consent.
- 11.4 If the User or any of the User Personnel cause, allow or contribute to any release or threatened release of any Hazardous Substances or any spill, Pollution, contamination or Environmental Harm on the Facility or its surrounds, the User must, at its cost, as soon as practicable and to OMSB's absolute satisfaction, remediate the release, contamination or harm or threatened release in such a way as to prevent, mitigate and rectify any damage or potential damage resulting from the release or threatened release.

Safety

- 11.5 The User must ensure that in using the Facility or the Services, it and the User Personnel (at the User's cost):
- (a) comply with all OH&S Legislative Requirements;
 - (b) do all things necessary to assist OMSB and the OMSB Personnel to discharge their obligations under any OH&S Legislative Requirements;
 - (c) immediately comply with all lawful directions, instructions and notices published or given by OMSB or any Authority in respect of health and safety; and
 - (d) take all reasonable and necessary reasonable precautions to protect the safety and health of all persons within the Facility and its surrounds;
 - (e) take all reasonable and necessary reasonable precautions to protect property and the Environment at or around the Facility;
- 11.6 Except with the prior written consent of OMSB (which OMSB may withhold at its absolute discretion), the User must not arrange for or allow any person other than the User Personnel to enter the Facility.
- 11.7 The User must immediately report to OMSB any incident or hazardous or potentially hazardous situation which causes, might cause or could have caused:

- (a) injury or death to any User Personnel or any person within the Facility or its surrounds;
- (b) loss of or damage to any Vessel or property of the User or any Third Party; or
- (c) any Environmental Harm

(Hazardous Situation).

- 11.8 Within 48 hours of any request by OMSB, the User must provide a detailed report of a Hazardous Situation.
- 11.9 The User must, at its cost:
- (a) permit OMSB and any person authorised by OMSB to carry out inspections, conduct interviews and take statements from any of the User Personnel; and
 - (b) comply with the requirements of any Authority,
- regarding the investigation and determination of the cause and effect of a Hazardous Situation.
- 11.10 The User must notify OMSB immediately where the User is approached by any statutory inspectors requesting entry to the Facility.

Security

- 11.11 The User:
- (a) acknowledges that:
 - (i) the Port of Onslow (Beadon Creek) is a security regulated port under the MTOFSA;
 - (ii) security measures in place at the Port of Onslow (Beadon Creek) will be audited by various Commonwealth agencies from time to time, including but not limited to, Authorities and/or the Department of Home Affairs and their representatives and appointees;
 - (b) must, in connection with its use of the Facility, ensure that all User Personnel:
 - (i) understand and comply with the security requirements of OMSB, including but not limited to the Maritime Security Plan;
 - (ii) understand and comply with their obligations under MTOFSA; and
 - (iii) comply with all directions of OMSB and OMSB's Personnel in connection with the security of the Facility.
- 11.12 The User must cooperate wherever possible with OMSB and other users of the Facility, at least to the extent that such cooperation is necessary to ensure compliance with all Legislative Requirements, including, but not limited to, the MTOFSA.

Urgent action

- 11.13 If urgent action is necessary to protect any part of the Facility, other property or people and the User fails to comply with any of its obligations under clauses 11.4 or 11.5, OMSB may take any action which it, at its absolute discretion, deems necessary or desirable. If action taken by OMSB was action which the User should have taken at the User's expense the Loss incurred by OMSB in taking such action will be a debt due and payable by the User to OMSB upon demand.

Compliance

- 11.14 If any of the User Personnel:
- (a) fails to comply with any of the OMSB Policies or Procedures;
 - (b) fails to comply with any of the User's obligations under the Agreement relating to health, safety or the Environment;
 - (c) commits Gross Negligence, Wilful Misconduct, a criminal act or fraudulent act;
 - (d) fails to comply with a lawful direction, instruction or notice of OMSB, the OMSB Representative, the Port Harbourmaster, the Department of Transport or any other Authority; or
 - (e) otherwise engages in any activity which is contrary or detrimental to the interests of OMSB,
- then:
- (f) the OMSB Representative may, without limiting any other rights or remedies of OMSB under the Agreement, direct the User to remove the relevant member of the User Personnel from the Facility and to ensure that the member does not return to the Facility; and
 - (g) OMSB may remove the relevant member from, or refuse the relevant member entry to, the Facility.

Compliance with Restricted Areas

- 11.15 The User acknowledges that it is an offence under the MTOFSA for:
- (a) an unauthorised person to enter or remain in a Landside Restricted Zone;
 - (b) for an unauthorised vehicle to enter or remain in a Landside Restricted Zone; and
 - (c) for an unauthorised Vessel to enter or remain in a Waterside Restricted Zone.
- 11.16 The User and all User Personnel shall:
- (a) not cause or permit an unauthorised person or vehicle to enter or remain on or in a Landside Restricted Zone;

- (b) take all necessary steps to ensure that an unauthorised person or vehicle does not enter or remain on or in a Landside Restricted Zone;
- (c) not cause or permit an unauthorised Vessel to enter or remain in a Waterside Restricted Zone; and
- (d) take all necessary steps to ensure that an unauthorised Vessel does not enter or remain in a Waterside Restricted Zone.

Suspension

11.17 Without limiting any other right under this Agreement or otherwise available to OMSB under Legislative Requirements, OMSB may suspend access to the Facility or the provision of any Services or OMSB Equipment when:

- (a) the Channel or any part of the Facility are unsuitable or unsafe for use, to be determined in OMSB's sole and absolute discretion;
- (b) required under the Maritime Security Plan, the MTOFSA, the MTOFSR or any other Legislative Requirement; or
- (c) a direction is given by the Port Harbourmaster that requires suspension of the User's access to the Facility or provision of any Services or OMSB Equipment.

11.18 If OMSB suspends access to the Facility or the provision of any Services or OMSB Equipment in accordance with clause 11.17, OMSB shall refund to the User any Fees paid in advance by the User in respect of the period when access to the Facility or provision of the relevant Services is suspended.

11.19 Notwithstanding any other provision of this Agreement to the contrary, the User acknowledges and agrees that OMSB is not liable for, and the User shall have no Claim against OMSB in respect of, any Loss in connection with the suspension of access to the Facility or the provision of any Services or OMSB Equipment by OMSB except to the extent due to OMSB's acts of negligence or negligent omission.

12. INSURANCE

12.1 The User must:

- (a) at the User's cost, take out and maintain the following insurances while using the Facility, the OMSB Equipment or the Services:

- (i) public liability, products liability and pollution liability insurance:

- A extended to indemnify OMSB as principal for any claims or liability arising out of the acts or omissions of the User or the User Personnel or contractors during any of the User's or the User Personnel's or contractors' activities on the Facility including the User's use and occupation of and access to the Facility;

- B covering legal liability for loss of or damage to and loss of use of any property and personal injury, death or illness to any person (other than liability required under workers'

compensation law) arising out of or in connection with all of its activities on the Facility including the User's use and occupation of and access to the Facility;

- C for an amount not less than \$50,000,000 for any one occurrence and unlimited as to the number of occurrences;
- D extended to:
 - 1 cover the performance of Services if such activities are carried out at any time by or on behalf of the User (other than where provided by OMSB or on behalf of OMSB);
 - 2 carry a sub-limit of liability for OMSB and third party property in the care, custody or control of the User for an amount of not less than \$5,000,000; and
 - 3 cover sudden and accidental discharge, seepage and escape of contaminants, gases and pollutants caused by any activity of the User on the Facility; and

(ii) motor vehicle and mobile plant insurance:

- A covering legal liability for:
 - 1 material loss or damage to the User's motor vehicles and mobile plant on a 'market value' basis of indemnity; and
 - 2 property loss or damage and bodily injury to or death of persons (other than compulsory third party motor vehicle insurance) caused by motor vehicles and mobile plant used by the User or the User's personnel on the Facility; and
 - 3 for an amount not less than \$30,000,000 for any one occurrence or accident;

(iii) property insurance (fixed assets) covering loss of and damage to all of the User's plant, equipment and premises used or operated on the Facility for its full replacement value; and

(iv) workers' compensation and employers' liability insurance:

- A covering all claims and liabilities under any statute and at common law for the death or disability of any person employed by the User who accesses or carries out work in connection with the Facility for an amount not less than \$50,000,000;
- B extended to indemnify OMSB as principal for any claims or liability arising from the legislation and at common law; and

C where permitted by law, provide a waiver of subrogation in favour of OMSB for liability under legislation and at common law;

(v) any other insurances appropriate in relation to the Facilities, or in accordance with any Legislative Requirements, and any additional insurances which OMSB reasonably requires to be effected;

(b) use its reasonable endeavours to ensure that the owners of any Vessels engaged by the User and its contractors using the Facility procure, maintain and keep current throughout the relevant visit to the Facility and during the Vessel's use in connection with the User's activities at the Facility, marine hulls insurance in accordance with the International Hull clauses (01/11/03) and protection and indemnity insurance with an International Group P&I Club or in accordance with the Institute Protection and Indemnity Clauses Hulls - Time (20/7/87):

(i) for each Vessel to be for any purposes connected with the User's business or activities at the Facility;

(ii) including coverage for 4/4ths collision liability, pollution, spillage and wreck removal; and

(iii) for an amount not less than \$50,000,000 for each and every occurrence.

For the purposes of this clause "owners" includes Vessel owners, Vessel charterers, Agents, Vessel managers and includes the User or any of its contractors in any of those capacities.

12.2 Each of the insurance policies required to be effected by the User under this Agreement must:

(a) be effected with a reputable insurer with a Standard and Poor's rating of at least A- or an equivalent rating from another internationally recognised rating agency to the satisfaction of OMSB;

(b) be effected prior to the commencement of the Agreement;

(c) as to the insurances required to be held under this clause 12 and if requested by OMSB, be endorsed to note OMSB as an additional insured;

(d) if the User comprises two or more persons, be effected jointly by those persons and name each person comprising the User as an insured;

(e) provide that the insurances are primary with respect to the interests of the User and any other insurance arrangements maintained by OMSB are excess to and not contributory with the insurance policy;

(f) to the maximum extent permitted by law, to:

(i) cover OMSB for its vicarious liability arising out of the carrying out of the Services;

(ii) contain a waiver of all express or implied rights of subrogation against OMSB and its directors, officers and employees;

- (iii) name OMSB as an insured party;
 - (iv) contain a cross liability clause noting that each of the parties comprising the insured will be considered as a separate entity, and the insurance applies as if a separate policy had been issued to each insured;
 - (v) contain a clause that provides that a breach of a condition or term of insurance by one insured will not prejudice or diminish any rights of, or adversely affect the cover provided to, another insured under the policy;
 - (vi) provide that a notice of claim under the policy must be accepted by the insurer as a notice of a claim given by OMSB; and
 - (vii) ensure that the insurer does not require an insured party to exhaust a claim under any indemnity before the insurer considers or pays a claim under the relevant insurance policy; and
- (g) not exclude any contractual liability of the User to indemnify OMSB under the Agreement.
- 12.3 Before accessing the Facility or using the Services, and at any other time required by OMSB, the User must provide OMSB with evidence that it holds the insurances required by the Agreement, including by providing (at OMSB's request) certified copies of all cover notes, certificates or currency, renewal certificates and endorsement slips.
- 12.4 The User must notify OMSB in writing as soon as possible after any injury, death, damage or liability covered under an insurance policy required to be held by the User in accordance with this Agreement occurs including the details of the injury, death, damage or liability incurred;
- 12.5 If the User makes a claim on any insurance policy effected under this Agreement for any liability, loss or damage (in this clause, **Insured Loss**), any payment made by the insurer to the User for that Insured Loss must be applied to the rectification, reinstatement or paying for the Insured Loss or to OMSB if OMSB has carried out any rectification, reinstatement or payments relating to the Insured Loss.
- 12.6 If the User is requested to do so by OMSB in writing, it must promptly make and pursue a claim under its insurance policies in circumstances where:
- (a) OMSB has suffered liability, loss or damage as a result of a tortious or otherwise wrongful act or omission on the part the User or any of the User Personnel (in this clause, **Loss or Damage**) and the Loss of Damage or the User's liability for that Loss or Damage is covered under any of the User's insurance policies;
 - (b) there are reasonable prospects of the claim succeeding; and
 - (c) some or all of the proceeds from a successful claim could be applied towards any Loss or Damage,
- however this clause 12.6 does not apply in circumstances where the User is ready, willing and able to pay for the Loss or Damage on its own account.
- 12.7 The User must pay any excess or deductible payable in relation to any claim on any

insurance policy effected by the User under this Agreement.

- 12.8 The User must not do or omit to do any act or thing or bring or keep anything on or to the Facility which might render any insurance held by the User or OMSB void or voidable or which might cause the rate of premium for any such insurance to be increased.
- 12.9 Without limiting any other rights or remedies that OMSB may have under the Agreement, if the User fails to effect and maintain any of the insurances as required by this clause 12, OMSB may notify the User requiring the User to rectify the failure within 3 Business Days, failing which OMSB will be entitled to suspend all Services and direct any relevant Vessel to immediately depart from the Facility and the User and the Vessel must comply with that direction.

13. FORCE MAJEURE

- 13.1 If a Force Majeure Event occurs:
- (a) the Affected Party may give the other Party a notice within 5 Business Days of the commencement of the Force Majeure Event containing full particulars of the Force Majeure Event (including its nature and likely duration), the obligations of the Affected Party affected (**Affected Obligations**) and the nature and extent of the effects of the Force Majeure Event on the Affected Obligations;
 - (b) the obligation of the User to make a payment when it falls due under the Agreement is not an Affected Obligation; and
 - (c) the performance of the Affected Obligations will be suspended, to the extent that they are affected by the Force Majeure Event, from the date of the notice under clause 13.1(a) until the impact of the Force Majeure Event has ceased.
- 13.2 On cessation of the Force Majeure Event which is the subject of a notice given under clause 13.1(a), the Affected Party must within a reasonable time, give notice to the other Party of the cessation of the Force Majeure Event and resume performance of the Affected Obligations.
- 13.3 The Affected Party must:
- (a) at its cost, use reasonable endeavours to remove the effect of the Force Majeure Event which is the subject of a notice given under clause 13.1(a) (but this clause 13.3 does not require the Affected Party to settle strikes or industrial disputes which constitute Force Majeure Events on terms which are not commercially acceptable to the Affected Party);
 - (b) take all action reasonably possible to mitigate any Loss incurred as a result of the Force Majeure Event; and
 - (c) inform the other Party in writing every 10 Business Days (or any other period agreed in writing by the Parties) after the date of notification of the Force Majeure Event of the ongoing effect of, and the steps taken to remove the effects of, the Force Majeure Event.
- 13.4 The suspension of the performance of Affected Obligations in accordance with this

clause 13 does not:

- (a) constitute a default entitling a Party to terminate the Agreement; or
- (b) result in the Affected Party being liable to the other Party for any Claim or Loss arising out of the Force Majeure Event.

14. DEFAULT

- 14.1 Nothing in this clause 14 prejudices a Party's rights to recover damages or to exercise any other right under the Agreement.
- 14.2 If the User fails to make a payment when it is due under the Agreement and that failure is not remedied within 5 Business Days of being notified by OMSB, then:
- (a) OMSB may suspend access to the Facility or the provision of any Services until payment (including any applicable interest) is received; or
 - (b) terminate the Agreement by giving further written notice to the User.
- 14.3 If the User fails to perform any other obligation of this agreement other than the obligation to make payment, OMSB may give the User written notice of the default stating:
- (a) details of the default;
 - (b) the steps the User must take to remedy the default; and
 - (c) the time by which the User must remedy the default, which shall be not less than 3 Business Days.
- 14.4 If the User does not remedy the default by the time stated in the relevant notice of default, then OMSB may exercise the rights stated in clause 14.2(a) or 14.2(b)

15. TERMINATION

- 15.1 If a Party suffers an Insolvency Event, the other Party may terminate the Agreement immediately by giving written notice to the first mentioned Party.
- 15.2 OMSB may at any time and for any reason, in its sole and absolute discretion, terminate the Agreement by giving the User 10 Business days' prior written notice of its intention to do so.
- 15.3 If for any reason a purported termination of the Agreement by OMSB under clause 14.2, 14.3 or 15.1 is ineffective, the purported termination is not a breach or repudiation of the Agreement and is deemed to have been effected under clause 15.2.
- 15.4 On termination of the Agreement, including the User purporting to cancel or reschedule a request for Services made in any User Application, the User must:
- (a) pay for the Services provided by OMSB to the User as at the effective date of termination which have not previously been paid for by the User;
 - (b) take any other action reasonably required by OMSB in relation to the termination; and

- (c) immediately return to OMSB any property of OMSB or any of the OMSB Personnel in the User's possession, custody or control and which is not already located at the Facility.

15.5 Termination of the Agreement does not release or discharge a Party from liability in relation to anything occurring prior to the effective date of the termination.

16. INDEMNITY AND LIABILITY

16.1 The User enters, uses and departs from the Facility at its own risk. The Indemnified Parties will not be liable to the User, and the User releases the Indemnified Parties in relation to any Claim or Loss that may be made against or incurred by the User or any of the User Personnel at any time arising from in connection with the use of the Facility, the OMSB Equipment or the Services, including:

- (a) any loss of or damage to any Vessel, plant, equipment or other property of the User, the User Personnel or any Third Party;
- (b) any Loss arising from injury, illness, disease or damage done or suffered to any person, including death; or
- (c) any Loss arising from Environmental Harm, Pollution or contamination.

16.2 The User will be liable for, and agrees to indemnify and keep indemnified the Indemnified Parties against all Losses and Claims arising from or in connection with:

- (a) the performance or non-performance of the User's obligations under the Agreement, any Legislative Requirement, any unwritten law or in equity;
- (b) the use by the User or the User Personnel of the Facility, the OMSB Equipment and the Services,

including any Loss or Claim in respect of any:

- (c) loss of or damage to any property of any of the Indemnified Parties or the Department of Transport, including the Facility and the OMSB Equipment;
- (d) Claim by or on behalf of any Third Party against any of the Indemnified Parties or the Department of Transport in respect of:
 - (i) loss of or damage to any property;
 - (ii) personal injury, illness or death of any person; or
 - (iii) death, injury or occupational disease of any person;
- (e) Claim by or on behalf of any Third Party in relation to any operation to raise, remove or destroy any Vessel or part of a Vessel; or
- (f) Loss or Claim arising out of or in connection with any failure by the User to carry out its obligations under the Agreement in such manner and within such a time so as to permit OMSB to comply with OMSB's obligations under the Lease.

16.3 The indemnities in clause 16.1 and clause 16.2 do not apply to the Extent that any Claim or Loss is caused directly by the negligence or Wilful Misconduct of any of the

Indemnified Parties.

- 16.4 Each indemnity in the Agreement is a continuing obligation and survives termination of the Agreement.
- 16.5 OMSB need not incur any cost or make any payment before enforcing any right of indemnity under clause 16.2.
- 16.6 To the extent permitted by law and notwithstanding any other provision of the Agreement, OMSB's liability to the User arising out of or in connection with the Facility, the Services or the Agreement is limited to:
- (a) in respect of any Claim or Loss for which OMSB is entitled to be indemnified under any insurance effected pursuant to the Agreement, the proceeds of insurance actually received by OMSB in respect of that Claim or Loss; and
 - (b) in respect of any Claim or Loss for which OMSB is not entitled to be indemnified under any insurance effected pursuant to the Agreement, the total amount of Fees paid by the User to OMSB under the Agreement in the 12 months preceding the month in which the User first notified OMSB of the Claim or Loss.
- 16.7 Notwithstanding any other provision of the Agreement, neither Party will be liable to the other for Consequential Loss, including in the event that OMSB terminates the Agreement under clause 15.2.
- 16.8 The Parties agree that the operation of Part 1F of the *Civil Liability Act 2002 (WA)* is expressly excluded.

17. DISPUTE RESOLUTION

Dispute Notice

- 17.1 If a Dispute arises then either Party may serve the other Party with a Dispute Notice, which must:
- (a) state that the Dispute Notice is given under this clause 17;
 - (b) describe the nature of the Dispute in detail; and
 - (c) nominate a representative of the Party who is authorised to negotiate and settle the Dispute on that Party's behalf.
- 17.2 Within 5 Business Days of receipt of a Dispute Notice, the other Party must nominate a representative authorised to negotiate and settle the Dispute on its behalf.

Conferral

- 17.3 Within 15 Business Days of the date of service of the Dispute Notice, the nominated representatives of the Parties must confer and negotiate in good faith to attempt to resolve the Dispute, which conferral will be confidential and 'without prejudice'.
- 17.4 If the Dispute is not resolved within 15 Business Days of the date of service of the Dispute Notice, the General Manager (or their equivalent) of the Parties will confer for the same purpose as the Parties' representatives, which conferral will be confidential and 'without prejudice'.

- 17.5 If the Dispute is not resolved by the General Managers (or their equivalent) of the Parties within 10 Business Days of the Dispute being referred to them, then either Party may refer the Dispute to arbitration by giving written notice to the other Party (**Arbitration Notice**).

Arbitration

- 17.6 If the Parties have not agreed on an arbitrator within 5 Business Days of the service of the Arbitration Notice, the arbitrator shall be the person appointed by the Chair of the Western Australian chapter of Resolution Institute. The arbitrator shall be listed in the Resolution Institute register of practising arbitrators and graded as Grade 1 or Grade 2.
- 17.7 Each Party and the proposed arbitrator shall disclose to the other Party any business, personal or other relationship or affiliation that may exist between such Party and the proposed Arbitrator within 5 Business Days following the nomination of the arbitrator and either Party may disapprove of such proposed arbitrator on the basis of such relationship or affiliation.
- 17.8 The arbitration shall be conducted:
- (a) by a single arbitrator;
 - (b) in Perth, Western Australia; and
 - (c) in accordance with the then current Resolution Institute Arbitration Rules.
- 17.9 The arbitrator shall deliver detailed, written reasons for decision. The arbitrator's decision shall be final, non-appealable and binding upon the Parties and may be enforced in any court of competent jurisdiction.
- 17.10 Unless a Party is required to enforce the award of the arbitrator in a court of competent jurisdiction or otherwise required by legal authorities with competent jurisdiction, all materials, information, testimony and evidence produced or introduced during the arbitration proceedings, including all rulings and decisions rendered by the arbitrator, shall be kept confidential and shall not be disclosed without the prior written consent of the Parties.
- 17.11 Notwithstanding the existence of a dispute, the Parties shall continue to perform the Agreement.

Bar to Proceedings

- 17.12 Neither party may commence legal proceedings (except for urgent interlocutory relief) in relation to any Dispute unless the procedure referred to in this clause 17 has been strictly complied with.

18. ASSIGNMENT AND SUBCONTRACTING

- 18.1 The User must not novate or assign the whole or any part of the Agreement or any payment or any other right, benefit or interest under the Agreement without OMSB's prior written approval.
- 18.2 OMSB may assign or subcontract any of its rights or obligations under the Agreement

19. CONFIDENTIALITY AND PRIVACY

Confidentiality

- 19.1 The Parties must keep confidential all Confidential Information and must not disclose or permit the disclosure of such information to any other person. This obligation will apply except to the extent:
- (a) the Parties consent in writing to the disclosure;
 - (b) the Confidential Information is already in the public domain;
 - (c) disclosure is necessary for a Party to perform its obligations under the Agreement;
 - (d) disclosure is to a professional adviser in order for a Party to obtain advice in relation to matters arising under the Agreement; or
 - (e) disclosure is required by any Legislative Requirement, the Department of Transport or the rules of any stock exchange.

Privacy

- 19.2 OMSB will only use or disclose personal information about a User or Specified Person in accordance with the *Privacy Act 1988 (Cth)* and OMSB's privacy policy, a copy of which can be obtained on request via email to admin@omsb.com.au.
- 19.3 The User or Specified Person may obtain a copy of the information held about them by OMSB by requesting the same via email to admin@omsb.com.au.
- 19.4 Notwithstanding clause 19.1, the User may share Confidential Information and any other information about a User or Specified Person to associated entities or to third parties (including credit and collection agencies) engaged by OMSB to provide any services to OMSB or at the Facility.

20. GST

- 20.1 If the Fees are stated to be exclusive of GST, then the User must pay the Fee plus the applicable GST.
- 20.2 If GST is payable, OMSB will give the User a tax invoice for the supply that attracts GST.

21. NOTICES

- 21.1 Any notice, consent or communication required by the Agreement must be in writing, signed and delivered to the Party's address set out in the Agreement or as last notified by the Party, by hand, pre-paid mail, facsimile or as an attachment to an email;
- 21.2 A notice or claim given under the Agreement will be deemed to have been given:
- (a) if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;

- (b) if transmitted by a facsimile to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day;
- (c) if sent by pre-paid mail, 4 Business Days after it is posted; or
- (d) if sent by email, at the time shown in the delivery confirmation report generated by the sender's email system which indicates that the email was sent to the recipient's email address, unless the sender receives a delivery failure notification.

22. RELATIONSHIP BETWEEN THE PARTIES

- 22.1 At all times in the performance of the obligations under the Agreement, the relationship between the Parties is one of independent contractors. Neither Party will act as, or be regarded as, an agent or employee of the other Party.
- 22.2 Nothing in the Agreement is or will be taken as constituting a partnership or joint venture between the Parties or otherwise giving rise to sharing risks or rewards or appointing one Party the agent, servant, employee or representative of the other Party.

23. REPRESENTATIONS AND WARRANTIES

- 23.1 The User acknowledges and warrants that in entering into the Agreement, it has:
 - (a) relied solely on its own inspection, inquiry, perusal and opinion;
 - (b) not relied on the completeness, accuracy or suitability of any information given by or on behalf of OMSB to the User; and
 - (c) not relied on any promise, representation, warranty, condition, undertaking or other conduct that may have been given by or on behalf of OMSB or any person purporting to act on behalf of OMSB (except to the extent expressly stated in the Agreement),

in relation to the suitability of the Facility, the OMSB Equipment, the Services and the Port of Onslow (Beadon Creek), and all warranties (if any) implied by law are excluded.
- 23.2 The User acknowledges that it is aware that OMSB has entered into the Agreement relying upon the warranties given by the User in clause 23.1.
- 23.3 To the extent permitted by law, OMSB will not be liable to the User (whether in contract, tort or otherwise) in respect of any information provided by or on behalf of OMSB to the User or, where relevant, OMSB's failure to provide information to the User, in relation to the suitability of the Facility, the OMSB Equipment, the Services and the Port of Onslow (Beadon Creek).
- 23.4 Each Party warrants and represents that:
 - (a) it has the power and authority to enter into the Agreement and to perform its obligations under the Agreement, and that the execution of the Agreement has been properly authorised by the Party;

- (b) the Agreement constitutes a legal, valid and binding obligation on it, enforceable in accordance with its terms; and
- (c) it has and will maintain all licences, authorisations, consents, approvals and permits required by applicable laws and regulatory requirements in order to perform its obligations under the Agreement.

24. ANTI-CORRUPTION

24.1 Each Party warrants and represents that, as at the date of the Agreement and on each subsequent occasion it performs its obligations under the Agreement:

- (a) neither it nor any of its Personnel or related bodies corporate has engaged in any behaviour in relation to the potential or actual terms and conditions of the Agreement that would contravene the Applicable Anti-Corruption Laws;
- (b) the Party and its Personnel and related bodies corporate have complied with the Applicable Anti-Corruption Laws; and
- (c) the Party and its Personnel and related bodies corporate will continue to comply with the Applicable Anti-Corruption Laws.

25. PROPER LAW

25.1 The Agreement will be governed by and construed with reference to the laws of Western Australia.

25.2 The Parties irrevocably submit to the non-exclusive jurisdiction of the courts of Western Australia.

26. WAIVER

26.1 A Party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.

26.2 The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.

26.3 A waiver by OMSB is not effective unless it is in writing, signed by OMSB.

26.4 Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

27. AMENDMENT

27.1 No amendment or variation of the Agreement is valid or binding on OMSB unless made in writing and signed by OMSB and the User.

28. SEVERABILITY

28.1 If any clause or part of any clause is prohibited or unenforceable or invalid in any jurisdiction, that clause or part is to be treated as severed as to that jurisdiction to the extent of the prohibition, unenforceability or invalidity unless such severance may result in the unenforceability of the remaining provisions of the Agreement.

28.2 The severance of a clause or part of any clause in one jurisdiction does not invalidate

the remaining provisions of the Agreement nor does it affect the validity or enforceability of that provision in any other jurisdiction.

- 28.3 Where a provision is prohibited or unenforceable, OMSB and the User will negotiate in good faith to replace the invalid provision by a provision which is in accordance with the applicable law and which will be as close as possible to the Parties' original intent and appropriate consequential amendments (if any) will be made to the Agreement.

29. ENTIRE AGREEMENT

- 29.1 This Agreement contains the entire agreement between the parties and supersedes any prior communications, negotiations, understandings, representations and documents between the parties, except to the extent reproduced in the Agreement. The User acknowledges and agrees that it does not rely on any document or other information, other than as expressly included or referred to in the Agreement. OMSB shall have no obligations of good faith or fair dealing except as expressly stated in the Agreement.

30. SURVIVAL

- 30.1 Clauses 1, 3, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28 and 31 inclusive survive the expiry or termination of the Agreement for any reason.

31. FURTHER ASSURANCE

- 31.1 Each Party will promptly at its own cost do all things (including executing all documents) necessary or desirable to give full effect to the Agreement.

32. COSTS

- 32.1 Each Party will bear its own costs arising out of the negotiation, preparation and execution of the Agreement.
- 32.2 The User must bear any duty which may be payable in connection with the Agreement.