



# Property & Trade Licence Standard Terms

The party listed as Licensee in the Commercial Details (**Licensee**)

Port of Newcastle Operations Pty Ltd as trustee for the Port of Newcastle Unit Trust (ABN 97 539 122 070) (**Licensor**)

**This document does not constitute an offer by PON capable of acceptance. No right or licence to use a Licensed Area will be granted unless and until PON and the relevant party have executed the binding Commercial Details document, which forms part of the Property & Trade Licence.**

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# Property & Trade Licence

## Standard Terms

### Background

These Standard Terms form part of the terms of the Licence entered into between the Licensor and the Licensee in respect of the Licensed Area.

### Agreed terms

#### I. DEFINITIONS AND INTERPRETATION

##### I.1 Definitions

In this Licence:

**Administration Fee** means the fee set out in item 24 of the Commercial Details, if any.

**Asbestos** means the fibrous form of those mineral silicates that belong to the serpentine or amphibole groups of rock forming minerals, including actinolite, amosite (brown asbestos), anthophyllite, chrysotile (white asbestos), crocidolite (blue asbestos) and tremolite and any materials containing those substances.

**Associates** in relation to a party to this Licence means that party's officers, employees, subcontractors and authorised agents and, in the case of the Licensor, includes any Manager.

**Authorisation** means any licence, consent, approval, permit, registration, accreditation, certification or other authorisation.

**Authority** includes any governmental or semi-governmental or local government authority, administrative or judicial body or tribunal, department, commission, public authority, Minister, statutory corporation or instrumentality.

**Base Condition Report** means a report obtained at the Licensee's expense from an independent and appropriately qualified and experienced person being a member of the Australian Contaminated Land Consultants Association approved by the Licensor, which approval must not be unreasonably withheld, to undertake an inspection of the Licensed Area to identify and report as to any Contamination of the Licensed Area on or before the Starting Date.

**Business Day** means a day on which banks are open for general banking business in the City of Newcastle, but does not include Saturdays, Sundays or public holidays in the City of Newcastle.

**Claim** includes a claim, cause of action, notice, demand, action, proceeding, litigation, investigation, judgement, damage, loss, cost, expense or however arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort (including negligence), statute or otherwise and whether involving a third party or a party to this Licence.

**Cleanup** means

- (a) Where a Base Condition Report has been prepared the taking of all necessary action to remove any Contamination that was caused by the Licensee or persons under the Licensee's control for the purpose of restoring the Licensed Area as close as practical to the Base Date Condition; and
- (b) Where a Base Condition Report has not been obtained the taking of all necessary action to remove any Contamination for the purpose of restoring the Licensed Area as close as practical to the condition of the Licensed Area before it was affected by that Contamination.

**Commercial Details** means the "Commercial Details" as set out in the Property & Trade Licence.

**Contamination** means the presence in, on or under the land (including soil and groundwater) of a substance at a concentration that presents a significant risk of harm to human health or any other aspect of the Environment, is a breach of any Law or approval or results in an order, notice or direction being issued by, gives rise to a duty to notify under Environmental Law, or gives grounds for an order, notice or direction to be issued by any Authority or under any Law or approval and **Contaminate**, **Contaminant** and **Contaminated** each have a

corresponding meaning.

**CPI** means the Consumer Price Index Sydney All Groups for the quarter immediately preceding the Licence Fee Review Date (for example, if the Licence Fee Review Date is 1 January then the September quarter CPI applies), but if that index is discontinued the Licensor may substitute another index that, as nearly as practicable, serves the same purpose.

**CPI Review** means a review of the Licence Fee by CPI in accordance with clause 4(e).

**Defaulting Party** has the meaning in clause 16.3.

**Dilapidation Report** where required means a report on the condition of the Licensed Area at the Starting Date in the form required by the Licensor acting reasonably.

**Dispute** means any dispute, controversy or claim arising out of, relating to or in connection with this Licence, including any question regarding its existence, validity or termination.

**Dyke Point** means the Port's Dyke Point Storage Facility, the location of which is more particularly described in the Precinct Terms.

**Environment** means the components of the earth, including:

- (a) land, air and water;
- (b) any layer of the atmosphere;
- (c) any organic or inorganic matter and living organism; and
- (d) human-made or modified structures and areas.

**Environmental Law** means any Law relating to the Environment or the protection of the Environment and any other Law relating to Contamination or Pollution and includes, without limitation, "Environmental Protection Legislation" as defined in the POEO Act.

**Environmental Encumbrance** means a restraint under Environmental Laws on dealing with any property or a charge in force under Environmental Laws affecting any property as or in effect as security for the payment of the monetary obligation or the observance of any obligation.

**Environmental Hazard** means a state of danger or harm to human beings or the Environment, whether imminent or otherwise, resulting from the storage or handling of or exposure of any substance at the Licensed Area (whether a solid liquid or gas), having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous or harmful characteristics.

**Environmental Liability** means any of the following liabilities which arise, directly or indirectly, from the Licensee's occupation or use of the Licensed Area: all costs and expenses associated with undertaking any clean up or any remediation ordered or required by any Authority, on or in any land, building or waters;

- (a) all costs and expenses associated with complying with any notice, order or direction served by any Authority, on or in any land, building or waters;
- (b) without limiting (b), any liability or loss incurred or suffered by the Port Lessor or the Licensor as owner or occupier in complying with a notice, order or direction under section 91(1) of the POEO Act or substitute or successor legislation from time to time;
- (c) any compensation or other monies that any Authority requires to be paid to any person under any Environmental Law for any reason;
- (d) any fines or penalties incurred under Environmental Law;
- (e) all costs and expenses incurred in complying with any Environmental Law;
- (f) any form of financial assurance or guarantee funding required by any Authority including without limitation under section 14 of the *Contaminated Lands Management Act 1997* (NSW) or substitute or successor legislation from time to time; and
- (g) all other claims, demands, suits, proceedings, causes of action, losses (including consequential losses), damages, costs and expenses, legal or consulting fees and interest, payable under Environmental Law.

**Expiry Date** means the date in Item 8.

**Force Majeure Event** means each of the following, including their direct effects, to the extent they are beyond the reasonable control of the affected party and are not caused or contributed to by the affected party or any of its Associates:

- (a) confiscation by order of any Authority;
- (b) mass sickness or illness declared to be pandemic by the Commonwealth Government; and
- (c) earthquake, fire, flood, cyclone or hurricane.

**GST** means any form of goods and services tax or similar value added tax including notional GST payable by a State entity under the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW).

**GST Act** has the meaning given in clause 5.

**Harbour Master** means the person appointed to that position under section 85 of the *Marine Safety Act 1998* (NSW) for the Port.

**Head Lessor** means Port of Newcastle Investments Pty Limited as trustee for the Port of Newcastle Property Trust (ABN 24 254 046 054).

**Heavy Vehicle National Laws** means the *Heavy Vehicle (Adoption of National Law) Act 2013*, the *Heavy Vehicle (Adoption of National Law) Regulation 2013* as amended from time to time and all relevant legislation pertaining to Heavy Vehicle National Law or chain of responsibility requirements.

**Interest Rate** means 5% above the Commonwealth Bank of Australia interest rate on unsecured overdrafts in excess of \$100,000.

**Item** means an item in the Commercial Details.

**Land** means the land described in Item 5.

**Laws** means any law whether local, state or Commonwealth and whether statute law or common law or otherwise and including without limitation Environmental Law.

**Liability** includes all liabilities, losses, damages, costs and expenses, however arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort (including negligence), statute or otherwise including where arising under any Claim.

**Licence** means the terms comprised in the Property & Trade Licence and these Standard Terms.

**Licence Fee** means the amount in Item 9 and clause 4.

**Licence Fee Review Date** means the date specified in Item 10 and clause 4.

**Licence Fee Review Method** means the method of reviewing the Licence Fee as specified in Item 10 and clause 4, and if no method is specified then CPI.

**Licensed Area** means the area or areas which is the subject of this Licence referred to in Item 3.

**Licensee** means the party referred to in Item 2 and where relevant includes the administrators, successors and assigns of the Licensee and where not repugnant to the context includes the Licensee's Associates and Visitors.

**Licensee's Property** means all plant, equipment, fixtures and fittings and other property on the Licensed Area which is not Licensor's Property.

**Licensor** means the party referred to in Item 1 and where relevant includes the administrators, successors and assigns of the Licensor and where not repugnant to the context includes its Associates, contractors, invitees and other licensees.

**Licensor's Property** means all plant, equipment, fixtures and fittings and other property the Licensor provides in the Licensed Area.

**Manager** means the person named in Item 15 or any substitute manager the Licensor appoints and notifies to the Licensee. Where relevant, it includes the Manager's employees or any person the Manager authorises to act on behalf of the Manager.

**Mayfield** means the Port's Mayfield Cargo Storage Facility, the location of which is more particularly described in the Precinct Terms.

**Permitted Use** means the use referred to in Item 11.

**Phase II Condition Report** is a condition report which may include an intrusive investigation which collects original samples of soil, groundwater or building materials to analyse for quantitative values of various contaminants.

**POEO Act** means the *Protection of the Environment Operations Act 1997* (NSW).

**Pollution** has the meaning given to it in the POEO Act.

**Pollution Incident** has the meaning given to it in the POEO Act.

**Port** means the Port of Newcastle.

**Port Lessee** means Port of Newcastle Investments (Property) Pty Limited as trustee for the Port of Newcastle Investments (Property) Trust ABN 24 254 046 054.

**Port Lessor** means Port of Newcastle Lessor Ministerial Holding Corporation ABN 11 165 332 981.

**Port Sublease** means Registered Sublease A1631868 entered into on 30 May 2014 between Port Lessee and the Licensor.

**Precinct** means each of:

- (a) Mayfield;
- (b) Carrington ;
- (c) Walsh Point; and
- (d) such other precinct as notified by the Licensor to the Licensee from time to time.

**Precinct Terms** means the terms specified in Item 23 as amended from time to time or as notified by the Licensor to the Licensee from time to time applicable in respect of:

- (a) Mayfield;
- (b) Carrington ;
- (c) Walsh Point; and
- (d) such other precinct as determined by the Licensor in its absolute discretion.

**Private Utility Services** means those services set out at Item 19.

**Private Utility Services Contribution** means the reimbursement of the costs incurred by the Licensor for the Licensee's use of any Private Utility Services.

**Property & Trade Licence** means the document entitled "Property & Trade Licence" entered into by the Licensor and the Licensee in respect of the Licensed Area.

**Required Insurance** has the meaning given to that term in clause 14.1.

**Security Deposit** if required, means a deposit provided by the Licensee to the Licensor in its nominated bank account as security in accordance with clause 19 and in the amount specified in Item 18.

**Services** means the services provided to or for the benefit of the Licensed Area as set out in Item 20, or as otherwise agreed between the parties, which may include (subject to the location of the Licensed Area and availability) electricity, gas, water, sewerage, air-conditioning, sprinkler systems, fire protection and control, essential services, security equipment, rubbish storage and removal and telecommunication together with all plant and equipment relating to those services and includes services provided by the Licensor, authorities and others.

**Site Auditor** means a person for the time being accredited as a Site Auditor under Part 4 of the *Contaminated Land Management Act 1997* (NSW).

**Site Audit Statement** means a Site Audit Statement prepared by a Site Auditor in accordance with Part 4 of the *Contaminated Land Management Act 1997* (NSW) to secure compliance with a legal obligation arising under this Licence.

**Special Conditions** means the special conditions (if any) specified in Item 22 of the Commercial Details.

**Special Costs** means additional costs directly incurred by the Licensor arising from or in connection with the Licensee's use of the Licensed Area, as notified by the Licensor to the Licensee in accordance with clause 6.3(a)(ii).

**Standard Terms** means these terms incorporated into the Property Licence.

**Starting Date** means the date in Item 7.

**Term** means the period referred to in Item 6 and where the context permits includes any holding over pursuant to this Licence.

**Traffic Management Plan** means a detailed plan indicating how traffic on and around the Licensed Area will be managed during any period where the Licensee controls, manages and/or influences the movement of traffic on and around the Licensed Area so as to minimise traffic disruption, effectively manage health and safety risks and compliance with this Licence.

**Visitor** means in relation to a party including the Licensee:

- (a) that party's employees, agents or contractors; and
- (b) any other person whom that party allows, directs or invites to enter a Licensed Area.

**WHS Laws** means the *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulation 2017* (NSW), as amended from time to time.

## 1.2 Interpretation

In this Licence, unless the contrary intention appears:

- (a) words or expressions used in this Licence, which are defined in the GST Act, have the same meaning in this Licence;
- (b) headings are for ease of reference and do not affect the meaning of this Licence;
- (c) the singular includes the plural and vice versa and a gender includes another gender;
- (d) other grammatical forms of defined words have corresponding meanings;
- (e) a reference to the Commercial Details, a clause, paragraph, schedule, or annexure, is a reference to the Commercial Details, a clause, paragraph, schedule or annexure of this Licence.
- (f) a reference to this Licence includes the Commercial Details and any schedule or annexure to this Licence;
- (g) a reference to this Licence or any other document includes a reference to it as novated, amended, altered, updated or replaced;
- (h) a reference to anything is a reference to the whole and each part of it;
- (i) a reference to a party includes a reference to that party's executors, administrators, successors and permitted assigns;
- (j) words importing natural persons include partnerships, bodies corporate, associations, governments and governmental and local authorities and agencies;
- (k) a reference to a statute, ordinance, code or other Law or any particular provision of them includes the regulations and other instruments made under them and any consolidations, amendments, re-enactments or replacements of any of them;
- (l) a reference to "includes" or "including" is not a term of limitation and means "includes, but is not limited to" or "including, but not limited to";
- (m) a reference to \$ is to the currency of Australia; and
- (n) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Licence.

## 1.3 Trustee capacity

- (a) Port of Newcastle Operations as trustee for the Port of Newcastle Unit Trust (in this clause 1.3, the **Trustee**) is a party to this Licence only in its capacity as trustee for the Port of Newcastle Unit Trust (in this clause 1.3, the **Trust**).
- (b) A Liability arising under or in connection with this Licence 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) issue a Claim or commence proceedings against the Trustee in respect of any Liability under this Licence 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 this Licence against the Trustee in any capacity other than as trustee of the Trust.
- (d) The limitations of Liability and restrictions in this clause 1.3 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 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 this clause 1.3 applies despite any other provision in this Licence.

## **2. GRANT OF LICENCE**

- (a) The Licensor grants to the Licensee a non-exclusive licence to use the Licensed Area for the Term beginning on the Starting Date for the purposes of the Permitted Use, subject to the provisions of this Licence.
- (b) The Licensee may only access the Licensed Area during the Term during the periods of access set out in Item 17 (unless approved otherwise by the Licensor under clause 6.5).
- (c) Where required by the Licensor under Item 4, the Licensee will provide a Dilapidation Report to the Licensor prior to or on the Starting Date.

## **3. TERM**

### **3.1 Starting and ending**

- (a) The Term of this Licence begins on the Starting Date and ends at midnight on the Expiry Date.
- (b) Expiry or termination of this Licence does not affect:
  - (i) the Licensee's obligations:
    - (A) to make payments under this Licence for periods before or after the expiry or termination of this Licence; or
    - (B) to give information to the Licensor to enable it to calculate those payments; or
  - (ii) the Licensor's obligations to account to the Licensee for any overpayment made in advance.

### **3.2 Holding Over**

If the Licensee continues to occupy the Licensed Area with the permission of the Licensor after the Expiry Date, the holding over will be on the same terms as this Licence, except that:

- (a) the Licensor or the Licensee may end the licence on any day by giving written notice to the other, with the notice period being the period stated in Item 6; and
- (b) the Licensee will pay the holding over Licence Fee stated in Item 9.

### **3.3 Special Conditions**

The parties acknowledge that the Special Conditions bind the Licensor and the Licensee.

### **3.4 Order of Precedence**

If there is an inconsistency between:

- (a) the Commercial Details;
- (b) the Special Conditions;
- (c) the Standard Terms; and/or
- (d) the Precinct Terms;



then each will take precedence (to the extent of such inconsistency) in the order set out above.

#### **4. LICENCE FEE, LICENCE FEE REVIEW AND OTHER AMOUNTS PAYABLE BY THE LICENSEE TO THE LICENSOR**

- (a) The Licensee must pay the Licence Fee (expressed monthly) to the Licensor as stated in Item 9. Unless Item 9 provides otherwise, the Licence Fee is to be paid monthly in advance on or before the first day of each month from the Starting Date.
- (b) If an instalment period is less than one month, the Licensee must pay the monthly Licence Fee in full for the relevant month, unless otherwise agreed by the Licensor.
- (c) The Licence Fee is non-refundable except under clause 12.2(c), 13 or 15(c).
- (d) The Licensee must pay the Licensor the Licence Fee, and any other money the Licensee owes the Licensor under this Licence, without deduction, counterclaim or set-off into the account nominated in Item 21 (or as otherwise nominated to the Licensee by the Licensor in writing) on the due dates provided for in this Licence.
- (e) If specified in Item 10, the Licence Fee will be reviewed on the Licence Fee Review Date using the Licence Fee Review Method. The Licence Fee must not decrease as a result of a review under this clause.
- (f) Without affecting the Licensor's other rights, if the Licensee fails to pay the Licence Fees or any other monies due by the Licensee under this Licence, the Licensor may refuse any further request by the Licensee for access to any Licensed Area while any Licence Fees or other monies remain due under this Licence and unpaid by the Licensee to the Licensor.
- (g) If any amounts payable by the Licensee to the Licensor under this Licence are not paid by the due date, the Licensee will pay to the Licensor, by way of liquidated damages, interest accruing daily at the Interest Rate on the amount outstanding calculated daily from the due date until payment is made in full. The Licensee shall indemnify the Licensor for all amounts, including legal fees and costs, on an indemnity basis, incurred by the Licensor in recovering any amounts owing by the Licensee to the Licensor under or in connection with this Licence. Such amounts are a debt due and payable to the Licensor.

#### **5. GOODS AND SERVICES TAX**

Unless expressly stated otherwise, all payments and all consideration to be provided under the Licence are exclusive of GST. If GST is payable on any supply made by the Licensor under this Licence, then unless the consideration for that supply is expressly stated to be inclusive of GST, the Licensee will pay to the Licensor an additional amount equal to the GST payable on the supply. The additional amount must be paid at the same time as the first part of any consideration is provided for that supply. The Licensor will issue a tax invoice in respect of any taxable supply it makes under the Licence. Words and expressions used in this clause 5 which have a defined meaning in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (**GST Act**) have the same meaning in this clause as in the GST Act.

#### **6. SERVICES AND OTHER COSTS**

##### **6.1 Provision of Services**

- (a) The Licensee must make all arrangements with the Licensor regarding any Services required for the Licensed Area. If the Licensee requires any additional Services or alterations to or removal of existing Services during the Term, the Licensee must notify the Licensor and obtain the Licensor's prior written consent.
- (b) If the Licensor consents to any additional Services or alterations to existing Services requested by the Licensee, the Services will, unless agreed otherwise by the Licensor, be provided at the Licensee's cost.

##### **6.2 Payment for Services**

The Licensee must pay all charges for Services to the Licensed Area as and when such charges are due. If the Licensee fails to make any such payments by the due date the Licensor may pay the relevant amount, however the Licensee must pay to the Licensor on demand as a debt due and payable the amount of any such payments made by the Licensor.

##### **6.3 Costs**

The Licensee acknowledges and agrees that the:

- (a) Licensor:
  - (i) may incur Special Costs from time to time;
  - (ii) will provide the Licensee with reasonable prior notice of any anticipated Special Costs; and
  - (iii) may issue a tax invoice to the Licensee in respect of any Special Costs incurred;
- (b) Licensee must pay the Licensor, on demand, the amount of any tax invoice for Special Costs issued under this clause 6.3; and
- (c) amount of any Special Costs is a debt due and payable by the Licensee to the Licensor.

#### **6.4 Private Utility Services**

The Licensee must pay the Licensor, without deduction or set off, the Private Utility Services Contribution. The Licensee must make the payments referred to in this clause 6.4 within 7 days of the receipt by the Licensee of a valid tax invoice from the Licensor for the relevant payment.

#### **6.5 After-hours access**

If the Licensee requires access to the Licensed Area outside the periods of access for the Licensed Area as set out in Item 17 (if applicable), the Licensee must:

- (a) provide a request in writing (which may be by email) to the Licensor (which the Licensor may accept or reject in its absolute discretion);
- (b) (if the Licensor approves the request) comply with all reasonable requirements of the Licensor in respect of such approved after-hours access; and
- (c) pay any additional Licence Fees as determined by the Licensor (acting reasonably) for such after- hours access.

#### **6.6 The Licensor's other costs**

The Licensee must, if applicable, pay on demand:

- (a) the Administration Fee, which represents the Licensor's reasonable costs of preparing and administering this Licence;
- (b) all stamp duty and survey fees relevant to this Licence or any other document arising out of it; and
- (c) the Licensor's reasonable costs of considering any Licensee request for approval or consent, including considering all relevant plans, designs and references.

### **7. THE LICENSEE'S OBLIGATIONS CONCERNING THE LICENSED AREA**

#### **7.1 Using the Licensed Area**

- (a) The Licensee may only use the Licensed Area for the Permitted Use.
- (b) The Licensee acknowledges and agrees that the Licensor and its Associates have not in any way warranted or represented that the Licensed Area is or will remain suitable or adequate for the Permitted Use or any other purposes of the Licensee and the Licensee will be deemed to have made all necessary enquiries and investigations in respect of, and to and have fully satisfied itself of, those matters prior to entering into this Licence.

#### **7.2 Only authorised personnel**

- (a) The Licensee:
  - (i) is solely responsible for the safety of all persons in the Licensed Area;
  - (ii) must ensure that to the extent required by Law all personnel undertaking 'high risk work' in the Licensed Area, as referred to in the WHS Laws, are appropriately licensed to carry out such work; and
  - (iii) must ensure all personnel have completed any induction requirements required by the Licensor as notified by the Licensor to the Licensee from time to time and pay to the Licensor such fees as the Licensor may prescribe from time to time for attendances at induction courses or briefings.

- (b) The Licensee must ensure that all personnel present in the Licensed Areas:
  - (i) are provided with appropriate information, instruction and supervision by the Licensee; and
  - (ii) comply with all requirements relating to entering and exiting the Licensed Area through designated entry/exit points.
- (c) The Licensee will have the sole responsibility for the safety of all persons proposing to enter or who are present in the Licensed Areas or undertake any work or other activities in connection with the activities and business conducted by the Licensee in the Licensed Area.

### **7.3 Period of access**

- (a) The Licensor consents to the Licensee using the Licensed Area during the access days and hours of the Licensed Area set out in Item 17 (if applicable).
- (b) The Licensee will comply with any requirements or directions of the Licensor or the Manager (if any) regarding the Licensed Area and identification of persons entering the Licensed Area.

### **7.4 Zoning and approvals**

- (a) The Licensee must satisfy itself that the Licensed Area may be used for the Licensee's purposes under the provisions of all relevant Commonwealth, state or local government environmental plans or policies or any Law relating to the use of the Licensed Area.
- (b) If the use of the Licensed Area by the Licensee requires any Authorisation of any Authority then the Licensee:
  - (i) warrants to the Licensor that it has, prior to entering into this Licence, obtained such Authorisation;
  - (ii) the Licensee will at its expense maintain such Authorisation as valid and operative during the Term of this Licence;
  - (iii) the Licensee will comply with all conditions attaching to any Authorisation; and
  - (iv) if requested by the Licensor, must provide the Licensor with a copy of any such Authorisation and evidence of compliance.

### **7.5 State of repair**

The Licensee warrants that it has inspected the Licensed Area and its general state of repair and is satisfied that the Licensed Area will be suitable for the Licensee's purposes (including the Permitted Use), and it will make no Claim against the Licensor regarding the state of repair or condition of the Licensed Area.

### **7.6 Maintaining the Licensed Area, the Licensee's Property and the Licensor's Property**

- (a) The Licensee must keep the Licensed Area clean and tidy and in at least as good a condition as at the Starting Date, except for fair wear and tear, including but not limited to:
  - (i) carrying out any repairs and fixing any damage (excluding fair wear and tear) to the Licensed Area or any Licensor's Property caused or contributed to by the Licensee, its Associates or Visitors;
  - (ii) removing and disposing of all Contaminants which have been introduced to the Licensed Area by the Licensee, its Associates or Visitors as required by Law or directed by the Licensor; and
  - (iii) leaving the Licensed Areas clean and tidy and free from Contaminants.
- (b) The obligations of the Licensee under this clause also extend beyond the Licensed Area to adjoining premises, which may become unclean, untidy or damaged as a result of the Licensee's activities or use of the Licensed Area.
- (c) The Licensee must maintain, repair and keep the Licensee's Property, the Licensor's Property and
- (d) any floors, doors, locks and windows forming part of and servicing the Licensed Area, in good repair and working order at the Licensee's cost.
- (e) The Licensee must promptly notify the Licensor of any damage to the Licensor's Property or any Licensed Area.

- (f) If the Licensee, its Associates or Visitors cause or contribute to any damage (excluding fair wear and tear) to the Licensor's Property or any Licensed Area, the Licensor may, in its absolute discretion:
  - (i) direct the Licensee to rectify the damage; or
  - (ii) have the damage rectified and recover as a debt due and payable from the Licensee all costs (including administration costs), loss, damage or Liability suffered or incurred by the Licensor.
- (g) The Licensor must promptly comply, at its cost, with any direction given by the Licensor under clause 7.6(f)(i).
- (h) The Licensee must not remove any of the Licensor's Property from the Licensed Area without the Licensor's prior written consent.

#### **7.7 Altering the Licensed Area**

- (a) The Licensee must not make any improvements, alterations or additions to the Licensed Area or install any equipment in or do any building work in the Licensed Area without the prior written consent of the Licensor.
- (b) The Licensor does not owe the Licensee any duty of care arising from any written consent provided under clause 7.7(a).
- (c) Any written consent provided by the Licensor under clause 7.7(a) will not:
  - (i) relieve the Licensee from its obligations under this Licence;
  - (ii) constitute approval by the Licensor or any Authority of any works performed by the Licensee under clause 7.7(a); or
  - (iii) prejudice the Licensor's rights against the Licensee whether under this Licence or otherwise at law.

#### **7.8 Licensee's works**

The Licensee must ensure that any work performed by the Licensee at the Licensed Area, including work under clause 7.7, is performed:

- (a) by properly qualified contractors notified to the Licensor;
- (b) in a proper and workmanlike manner;
- (c) in accordance with any plans, specifications and schedule of finishes required and approved by the Licensor;
- (d) in accordance with all Laws and the requirements of relevant Authorities; and
- (e) in accordance with the Licensor's reasonable requirements and directions.

#### **7.9 When this Licence ends**

- (a) Upon the expiry of the Term, the Licensee must (at its own cost):
  - (i) vacate the Licensed Area;
  - (ii) remove or demolish all of Licensee's Property in, on or under the Licensed Area, unless otherwise agreed by the parties in writing;
  - (iii) rectify and make good any damage to the Licensed Area arising from the Licensee's use of the Licensed Area or the Licensee's Property (including its removal or demolition of the Licensee's Property); and
  - (iv) remove or demolish any other items in, on or under the Licensed Area as the Licensor may specify (acting reasonably) and any damage caused by removing or demolishing such items is to be made good at the Licensee's cost.
- (b) If the Licensee does not comply with clause 7.9(a) the Licensor may:
  - (i) remove all or part of the Licensee's Property and anything else in, on or under the Licensed Area, in its absolute discretion as it thinks fit and at the Licensee's cost; and/or
  - (ii) treat all or part of the Licensee's Property and anything else in, on or under the Licensed Area

as if the Licensee had abandoned its interest in them and deal with them in such manner as the Licensor thinks fit, including treating them as belonging to the Licensor at no cost,

and any costs incurred by the Licensor in relation to this clause 7.9 (b) must be paid for by the Licensee on demand by the Licensor as a debt due and payable to the Licensor.

- (c) Until such time as the removal and making good required by clause 7.9(a) so as to enable the re-licensing, alternative use or sale of the Licensed Area is completed by the Licensee or by the Licensor upon the Licensee's default:
  - (i) the Licensee shall pay a sum equivalent to the Licence Fee payable under Item 9 for the period until the Licensed Area is made fit for re-letting, alternative use or sale; and
  - (ii) the Licensor will take all reasonable action to mitigate any loss suffered or incurred by the Licensor.

#### **7.10 Licensee's signage**

The Licensee must not without the prior written approval of the Licensor erect, display, affix or exhibit any sign, advertisement, name, notice or hoarding on the Licensed Area including any safety or directional signs.

#### **7.11 Dangerous material**

- (a) The Licensee must not, without the prior written consent of the Licensor, use, sell, store or allow to be used, sold or stored at the Licensed Area any acetylene gas, alcohol, fuel or any flammable liquids or any other dangerous fluids or chemicals.
- (b) Should the Licensor provide such consent, the Licensee shall obtain any Authorisations required by Law for the use, sale or storage of the relevant dangerous material and must, as soon as such Authorisation is received, provide a copy of the Authorisation to the Licensor.

#### **7.12 Roadways and entrances**

- (a) All roadways and entrances to adjoining premises must be kept clear by the Licensee at all times to the satisfaction of the Licensor in its absolute discretion.
- (b) The Licensee acknowledges and agrees that the Licensor may impose conditions of use on heavy vehicles accessing the Licensed Area including heavy vehicle route plans to be followed when accessing the Licensed Area. The Licensee must communicate such heavy vehicle route plans to heavy vehicle operators engaged by the Licensee.
- (c) If requested by the Licensor or if specified in item 25, the Licensee must prepare a Traffic Management Plan for approval by the Licensor. The Licensee must ensure that during any periods of access to the Licensed Area, all Traffic Management Plans approved by the Licensor, and marked traffic access routes for the Licensed Area, are followed by transport operators engaged or employed by the Licensee.

#### **7.13 Environmental Issues**

The Licensee must not bring onto the Licensed Area any substance, including fuel, which may Contaminate the Licensed Area. The Licensee indemnifies the Licensor against all Liability which the Licensor sustains as a result of Contamination arising out of or in connection with any act or omission of the Licensee. The indemnity includes the cost incurred by the Licensor, including without limitation any Environmental Liability, in cleaning up and remediating the Licensed Area to a standard satisfactory for the legal use of the Land as zoned, in accordance with all relevant Australian Standards and Laws, and complying with the requirements of all Laws for the removal, storage, transportation and disposal of contaminated material.

#### **7.14 Department of Agriculture**

If the Licensed Area is located within a Department of Agriculture mosquito vector monitoring area, the Licensee must procure that no water holding plant, equipment or items are left in positions where they can hold standing water for any length of time, including tyres, plant, equipment and receptacles capable of holding water. The Licensee must, if requested, provide access to Department of Agriculture inspectors or other designated officials to undertake vector monitoring and inspections within the Licensed Area. If requested, the Licensee must comply with any reasonable directions and/or recommendations from Department of Agriculture inspectors or other designated officials to control vector sites within the Licensed Area.

#### **7.15 Precincts**

The Licensee acknowledges and agrees that:

- (a) if the Licensed Area contains all or part of a Precinct, the Licensee must comply with the Precinct Terms;
- (b) the Licensor may, from time to time, issue new or amended Precinct Terms to the Licensee;
- (c) the Licensee must, at its cost, comply, and ensure that its Associates comply, with any Precinct Terms; and
- (d) the Precinct Terms form part of this Licence.

## **8. LICENSEE'S OBLIGATIONS GENERALLY**

### **8.1 The Licensee must comply with the Law**

The Licensee must:

- (a) comply with any Law that requires the Licensee to do, or to refrain from doing, anything concerning the Licensed Area, the Licensee's use of the Licensed Area, or this Licence;
- (b) obtain and keep current all Authorisations required by any Authority or pursuant to any Law for the lawful conduct of the business and activities conducted by the Licensee in the Licensed Area;
- (c) comply with and observe the provisions of all Laws affecting the Licensed Area (or any fixtures or fittings installed by the Licensee therein) including but not limited to Environmental Law, WHS Laws and maritime security Laws;
- (d) comply with the Licensee's own safe operating procedures having regard to applicable Law, guidelines provided by the Licensor or an applicable Authority, Australian Standards and relevant codes of practice;
- (e) comply with the Licensor's operating procedures from time to time relating to or relevant to the use and operation of the Licensed Area, which the Licensor may from time to time amend, update or replace by serving upon the Licensee (including by email) and posting on the Licensor's website at <https://www.portofnewcastle.com.au/>;
- (f) comply with notices received whether by the Licensor or the Licensee from any Authority relating to the Licensed Area, to the extent the requirements set out in such notices are necessitated or required by reason of the nature of the activities carried on upon the Licensed Area by the Licensee; and
- (g) comply with the requirements of the Insurance Council of Australia or any Authority or other body concerning liability which may arise from any accident, damage or injury occurring to any person or property on or about the Licensed Area.

### **8.2 Licensee's behaviour**

The Licensee must not do anything that is, or may be, dangerous, annoying or offensive to any occupant of the Licensed Area, the Land or adjoining premises.

### **8.3 Cleaning and washing**

- (a) The Licensee must obtain the Licensor's approval in writing prior to carrying out any cleaning of grease or oil or washing in any Licensed Area.
- (b) If approved by the Licensor, any cleaning of grease or oil or washing in the Licensed Areas must be undertaken by the Licensee in accordance with the terms of any approval by the Licensor and the requirements of any relevant Authority or applicable Laws.

### **8.4 Damage or accident**

If there is an accident, damage, leakage, spillage, seepage, pollution, overflows or otherwise of any material, substances or liquid occurring on the Licensed Area (**Incident**), the Licensee must:

- (a) promptly notify the Licensor and Manager (if any) of the nature and extent of the Incident;
- (b) promptly take all measures reasonably necessary, at its own cost and using its best endeavours, to avoid any damage to the Licensed Area, Roads and Maritime Services land, Port of Newcastle land, the groundwater and the waters of the Port of Newcastle; and
- (c) use equipment fit for the purpose to limit and remediate any damage.

### **8.5 Reporting and copy notices**

The Licensee must promptly report to the Licensor and Manager (if any):

- (a) any damage to or accident in the Licensed Area;
- (b) any circumstances likely to cause any damage to or accident in the Licensed Area; and
- (c) any faulty Service in the Licensed Area,

of which the Licensee is aware or ought reasonably to be aware and give the Licensor a copy of any notice or report affecting the Licensed Area given to the Licensee by any Authority.

#### **8.6 Notice of fines, infringements and court proceedings**

The Licensee must promptly notify the Licensor of the nature of any fines, infringements or court proceedings arising out of matters, accidents or other incidents or circumstances arising from or directly relevant to the Licensee's occupation or use of the Licensed Area and provide the Licensor with a copy of such fine, infringement or court notice.

#### **8.7 Safe conditions and fencing**

- (a) The Licensee must ensure that its occupation of and activities undertaken at the Licensed Area are conducted and carried out safely and in accordance with all Laws.
- (b) If required by the Licensor, the Licensee must, at the Licensee's cost, adequately fence or mark out the Licensed Area with temporary fencing or other means suitable to the Permitted Use. Any fencing erected or marking out must be removed as directed by the Licensor at the Licensee's expense.

#### **8.8 Security**

The Licensee will be responsible for all security associated with the Licensee's use of the Licensed Area at the Licensee's cost. The Licensee must, at the Licensee's cost, comply with the Licensor's reasonable security requirements for the Licensed Area, including any special requirements that the Licensor may notify for or in respect of the Licensed Area. The Licensee must at all times comply with the *Maritime Transport & Offshore Facility Security Act 2003* (Cth).

#### **8.9 Inductions**

The Licensee's Associates who access the Licensed Area must hold a current PON access induction card. All inductions required by this clause must be arranged by the Licensee by following the link on PON's website **at** <https://www.portofnewcastle.com.au/> or by emailing PON at **inductions@portofnewcastle.com.au** and providing all necessary documentation.

### **9. WORK HEALTH AND SAFETY**

The Licensee will ensure that the Licensed Area is kept, maintained, used and accessed in the manner which complies with the Licensee's duties and obligations under WHS Laws (including Heavy Vehicle National Laws), including that all plant, cargo or substances used, moved or stored therein are kept safe and are managed, used, operated and maintained safely and without risks to health or safety when properly used.

### **10. ENVIRONMENT**

#### **10.1 Obligations prior to the Starting Date**

- (a) Where specified as required in item 26 on or before the Starting Date, or where otherwise requested by the Licensor in writing during the term of the Licence, the Licensee must provide the Licensor with an Environmental risk assessment in a form reasonably acceptable to the Licensor which must include an assessment of the risk of:
  - (i) Contamination arising from the Licensee's Use of Licensed Area; and
  - (ii) Exacerbation of existing Contamination (if any) arising from the Licensee's Use of Licensed Area.
- (b) The Licensor will promptly advise the Licensee if they are required to obtain a Base Condition Report.
- (c) If the Licensee is required to obtain a Base Condition Report in accordance with clause 10.1(b) the Licensee must, as soon as practicable after the Starting Date of this Licence and not more than one month after the Starting Date:
  - (i) at its cost promptly commission an experienced independent environmental consultant



approved by the Licensor (acting reasonably) to prepare a Base Condition Report, or a Phase II Condition Report, or both; and

- (ii) engage a Site Auditor approved by the Licensor (acting reasonably) to review the Base Condition Report and provide Site Audit Statements.

## **10.2 Base Date Condition**

Where specified as required in item 27 on or before the Starting Date, or where otherwise requested by the Licensor in writing during the term of the Licence, the Licensee must obtain a Base Condition Report. The Licensee and the Licensor acknowledge that as at the date of the Base Condition Report (if any is obtained) the Licensed Area is in the Base Date Condition. The Licensee acknowledges that the use of the Licensed Area by the Licensee may cause Contamination above the Base Date Condition during the Licensees occupation of the Licensed Area during the Term.

## **10.3 Cleanup on Expiration or Termination of the Licence**

If the Licensor requires the Licensee to obtain a Base Condition Report pursuant to clause 10.210.2, or in the Licensor's opinion Contamination of the Licensed Area caused by the Licensees Use of Licensed Area may have occurred during the Term then:

- (a) Without limiting the effect of this Licence, before the Licensee is required to vacate the Licensed Area in accordance with the Terms of this Licence or as soon as reasonably possible after the Termination of this Licence, the Licensee must, at the Licensee's expense engage an independent and appropriately qualified and experienced person being a member of the Australian Contaminated Land Consultants Association approved by the Licensor, which approval must not be unreasonably withheld, to undertake an inspection of the Licensed Area to identify and report as to any Contamination of the Licensed Area and to specify what Cleanup is required (if any).
- (b) The Licensee must, at its cost, undertake a Cleanup of the Licensed Area in accordance with the expert's report as soon as reasonably possible after the completion of the expert's report and provide to the Licensor a certificate (in the form approved by the Licensor acting reasonably) from an appropriately qualified and experienced person being a member of the Australian Contaminated Land Consultants Association approved by the Licensor, which approval must not be unreasonably withheld, that the Cleanup of the Licensed Area has occurred.
- (c) The Licensee and any representatives of the Licensee may enter the Licensed Area at any time and do all things reasonably necessary to undertake:
  - (i) the inspection and report referred to in clause 10.3(a), and
  - (ii) any Cleanup required under clause 10.3(b),

despite that this Licence may have expired or may have otherwise come to an end, provided the Licensee gives the Licensor prior notice. In such circumstances the Licensee must comply with the terms of the Licence as if such Licence were still on foot.
- (d) For avoidance of doubt the Licensee is not required to undertake a Cleanup if the report prepared in accordance with clause 10.3(a) states that the Contamination was not caused by the Licensee or persons under the Licensee's control.
- (e) If as part of undertaking a Cleanup it is necessary to remediate Contamination which was caused by the Licensor or persons under the Licensor's control, the costs of the Cleanup must be appropriately apportioned between the Licensee and the Licensor as certified by the environmental consultant referred to in clause 10.3(a).

## **10.4 Environmental Compliance**

- (a) The Licensee must ensure that Licensee's occupation and use of the Licensed Area complies with Environmental Laws to the extent that such laws are applicable to the Licensee's use and occupation of the Licensed Area.
- (b) Without limiting clause (a) the Licensee must:
  - (i) take all practicable and reasonable steps, measures and precautions that can be adopted so that:
    - (A) all aspects of the Licensee's occupation and use of the Licensed Area complies



with Environmental Laws, and

- (B) if there is any non-compliance with Environmental Laws by the Licensee or person under its control, the impact on the Environment is so far as possible minimised; and
  - (C) the Licensee or any person under its control do not cause or contribute to any Contamination of the Licensed Area or any adjacent land or waters except that which is expressly permitted by lawful authority;
- (ii) comply with the reasonable requirements of the Licensor concerning compliance with Environmental Laws in relation to the Licensed Area.
  - (iii) Immediately undertake a Cleanup if any Contamination of the Licensed Area occurs that the Licensee is aware of or that the Licensee is made aware of by notice in writing from the Licensor.
- (c) The Licensee must provide a written report to the Licensor's satisfaction as to content, structure and detail on request (and at least once every 3 months) reporting on the Licensee's compliance with all environmental obligations in this Licence including the Environmental Laws.
  - (d) The Licensor may at any time and at the Licensor's expense, conduct audits of the use of the Licensed Area to audit the Licensee's compliance with Environmental Laws.

#### **10.5 Licensee's breach**

If the Licensor considers that there has been or may have been a breach by the Licensee of its obligations under clause 10.4 and notifies the Licensee accordingly, the Licensee must within fourteen (14) days give to the Licensor such information as the Licensor reasonably requires to enable the Licensor to ascertain whether or not there has in fact been any breach.

#### **10.6 Licensor to be informed of Complaints and Notices**

The Licensee must give immediate notice in writing to the Licensor if complaint is made or proceedings are instituted by any person or organisation or a notice, order or directive is issued against the Licensee in connection with issues relating to the Environment or any non-compliance with Environmental Laws in respect of the Licensed Area or in connection with the Licensee's use or occupation of the Licensed Area.

#### **10.7 Environmental Liabilities**

Despite any other provision of this Licence the Licensee indemnifies the Licensor to the maximum extent permitted by law against all environmental Liabilities incurred by the Licensor (whether arising before or after the expiration or Termination of this Licence) to the extent such Environmental Liabilities are a result of the Licensee's use or occupation of the Licensed Area (unless such liability arises due to the fault of the Licensor or its agents). It is not necessary for the Licensor to incur expenses or make any payment before enforcing this right of indemnity.

#### **10.8 Environmental Encumbrance**

The Licensee must ensure that any Environmental Encumbrance having effect in respect of the Licensed Area, to the extent such Environmental Encumbrance is a result of the Licensee's use or occupation of the Licensed Area, is:

- (a) notified to the Licensor as soon as practicable; and
- (b) discharged or removed as soon as reasonably possible.

#### **10.9 Licensor's release and indemnity**

- (a) To the extent permitted by law the Licensor releases the Licensee from any Claims arising from or in respect of any breach by the Licensor of any Environmental Law.
- (b) The Licensor indemnifies and must keep indemnified the Licensee to the maximum extent permitted by law against any Claims suffered by or made against the Licensee by reason of any breach by the Licensor of any Environmental Law.

- (c) It is not necessary for the Licensee to incur expenses or make any payment before enforcing this right of indemnity.

#### **10.10 Clean up order against Head Lessor or Licensor**

Without limiting the operation of any other condition of this Licence, in the event of a notice, order or direction on Head Lessor or Licensor as owner or occupier pursuant to s 91(1) of the *Protection of the Environment Operations Act 1997* (NSW) or substitute or replacement legislation, under which the Head Lessor or Licensor is required to take action to the extent that the notice, order or direction relates to, or is in connection with, an obligation or liability of the Lessee's use or occupation of the Licensed Area under this Licence or at Laws:

- (a) the Licensee will provide access to the Head Lessor or Licensor to complete the work in accordance with the notice, order or direction;
- (b) the Licensor will, or will procure that the Head Lessor, take all reasonably practicable steps to minimise interference with the Licensee's business during that access;
- (c) the Licensee will not be entitled to any compensation or other reimbursement from the Head Lessor or Licensor for any loss of business or other loss including consequential loss suffered by the Licensee during that access, nor as the consequence of any changes to the way the Licensed Area is to be used as the consequence of compliance with the notice, order or direction;
- (d) the Licensor is entitled to apply any bond, bank guarantee or other security held by it under this Licence towards the liabilities of the Head Lessor or Licensor in compliance with the notice, order or direction and irrespective of the party named to have the benefit of the bond, bank guarantee to other security;
- (e) the liabilities incurred by the Head Lessor or Licensor in compliance with the notice, order or direction will constitute a liability recoverable from the Licensee by the Licensor under this Licence even if the Licensee disputes the notice, order or direction; and
- (f) the obligations on the Licensee set out in this clause 10 survive the end of this Licence.

#### **11. THE LICENSOR'S RIGHTS AND OBLIGATIONS**

- (a) The Licensor may inspect or carry out maintenance, repairs or building work on the Licensed Area at any time after giving reasonable notice to the Licensee and, wherever practicable, in the presence of an officer of the Licensee. If there is an emergency, the Licensor may enter the Licensed Area at any time without giving the Licensee notice and without an officer of the Licensee being present.
- (b) The Licensor may carry out any of the Licensee's obligations under this Licence on the Licensee's behalf if the Licensee does not carry out the Licensee's obligations in a timely manner (for example if the Licensee does not do repairs) and the Licensor has given the Licensee notice of the Licensor's intention to do so. The Licensee must promptly reimburse the Licensor's costs of doing so, the amount of which is a debt due and payable to the Licensor.
- (c) Unless this Licence expressly provides otherwise, if the Licensee is required to obtain the Licensor's consent or approval for anything under this Licence, the Licensor may give, give conditionally or withhold its consent or approval at its absolute discretion.
- (d) The Licensor may exclude any person including the Licensee from the Licensed Area if required by Law, or for safety or security reasons, or when it is reasonable for the Licensor to do so having regard to the nature of the Licensed Area, the Permitted Use and previous customary access arrangements for the Licensed Area.

#### **12. REPAIRS OR BUILDING WORK**

##### **12.1 The Licensor may do any repairs or building work**

- (a) The Licensor may do any repairs or maintenance to the Licensed Area.
- (b) The Licensor may do any building work to extend, improve or change the Licensed Area.

##### **12.2 Relocation and demolition**

- (a) If the Licensor carries out building work to extend, improve or change the Licensed Area and the Licensor considers that such work will materially affect the Licensed Area, the Licensor may direct the Licensee to move to an alternative licensed area that is suitable for the Permitted Use and, subject to clause 12.2(c), the conditions of this Licence will apply to that alternative area.

- (b) Subject to clause 11.2(c), the Licensee must comply with the Licensor's direction under clause 12.2(a) and do all things reasonably required to effect its relocation in a timely manner.
- (c) If, in the reasonable opinion of the Licensee, the alternative area nominated in accordance with clause 11.2(a) is unsuitable for the Permitted Use, the Licensee may terminate this License by giving the Licensor at least 7 days prior written notice to this effect, in which case the:
  - (i) Licensor must refund to the Licensee the portion of the License Fee that has been paid in advance of the termination date; and
  - (ii) Licensee must promptly vacate the Licensed Area and comply with clause 7.9.

Any such termination is without prejudice to the rights of either party for any antecedent breach, matter or thing.

### 12.3 Subdivision and easements

The Licensor may subdivide the Land or grant easements over the Land so long as in doing so the Licensor does not substantially or permanently reduce the Licensee's enjoyment of the Licensed Area.

### 13. IF THE LICENSED AREA IS DAMAGED, DESTROYED OR RESUMED

- (a) If the Licensed Area is damaged or destroyed, and as a result the Licensee cannot use or access the Licensed Area for the Permitted Use, either party may, within fourteen (14) days of the damage or destruction, terminate this Licence without compensation to the other by giving at least fourteen (14) days' written notice to the other (and the Licensor will refund to the Licensee a pro rata share of any amount of Licence Fee paid in advance). Any such termination will be without prejudice to the rights of either party for any antecedent breach, matter or thing.
- (b) Despite clause 13(a), the Licensee cannot terminate this Licence and must continue to pay the Licence Fee and all other money up to the end of the Term if the Licensor's insurer is not legally required to pay for the rebuilding/reinstatement because the Licensee caused or contributed to the damage or destruction.
- (c) If a competent Authority resumes occupation of the Licensed Area and this makes it unfit for the Permitted Use:
  - (i) the Licensor may terminate the Licence on giving seven (7) days' written notice to the Licensee; and
  - (ii) if this Licence is terminated pursuant to clause 13(c)(i), the Licensor must refund to the Licensee the portion of the License Fee that has been paid in advance of the termination date.

### 14. RISKS AND INSURANCES

#### 14.1 The Licensee must have insurance

- (a) The Licensee must at the Licensee's expense take out, maintain and keep current each of the following:
  - (i) public liability insurance for the amount specified in Item 12;
  - (ii) workers compensation insurance with appropriate coverage in accordance with the requirements of WHS Laws for all workers for whom the Licensee may at any time be responsible to pay workers compensation (including voluntary workers);
  - (iii) insurance for all additions to the Licensed Area carried out by the Licensee and all the Licensee's Property against loss or damage by or in consequence of theft, explosion, fire, flood, lightning, storm and tempest (and other usual and necessary risks against which a Licensee can and does ordinarily insure) to their full replacement value; and
  - (iv) any other insurances which are required by Law, (together, the **Required Insurances**).
- (b) The Licensee must:
  - (i) note the interests of the Licensor, the Port Lessee and the Port Lessor as indemnified principals and note any other person nominated by the Licensor, on the Required Insurance;
  - (ii) give the Licensor evidence of the policies, by way of certificate of currency, of the Required Insurance prior to the first entry by the Licensee onto the Licensed Area, on 1 July in each year and whenever the Licensor so requests; and

- (iii) notify the Licensor promptly if any of the policies of the Required Insurance is cancelled or an event occurs which may allow a Claim or affect rights under any of the policies of the Required Insurance in connection with the Licensed Area or property in them.
- (c) The Licensee must not do anything that may make the Licensor's insurances invalid or able to be cancelled.

#### **14.2 Licensee may insure under master policy**

The Licensee may meet its obligations under clause 14.1 by producing a master policy to the Licensor which:

- (a) shows the Required Insurances and conditions set out in clause 14.1 are covered by appropriate endorsement; and
- (b) notes the Licensor's, the Port Lessor's and the Port Lessee's interest and those of any other person nominated by the Licensor as required by clause 14.1(c)(i).

#### **14.3 Insurance to provide full indemnity**

Despite any other provisions of this Licence, any insurance that the Licensee must keep current under this Licence, must provide the Licensor with full indemnity for each specified risk and the Licensee must take all reasonable steps to ensure that full indemnity is achieved for each specified risk.

#### **14.4 Indemnity**

- (a) The Licensee occupies and uses the Licensed Area at the Licensee's own risk. The Licensee also carries out building work in the Licensed Area at the Licensee's own risk.
- (b) To the maximum extent permitted by Law, the Licensee indemnifies the Licensor from and against any Claim or Liability it suffers or incurs or for which it becomes liable arising out of or in connection with:
  - (i) any:
    - (A) loss of, loss of use or access to (whether total or partial), or any destruction or damage to any real or personal property; or
    - (B) personal injury, disease, illness or death of any person, arising out of or in connection with any act or omission (including negligence) of the Licensee, any Associate of the Licensee or any Visitor in connection with any activities of the Licensee, use of the Licensor's Property or any breach by the Licensee of this Licence;
  - (ii) the use or occupation of any Licensed Area by the Licensee, its Associates or Visitors, or in any other way arising out of this Licence;
  - (iii) any wilful, unlawful or negligent act or omission of the Licensee or its Associates or Visitors;
  - (iv) any occurrence in or near any Licensed Area to any person using or property used on or near any Licensed Area occupied or used by the Licensee arising in any way from the use or occupation of any Licensed Area or their surrounds by the Licensee, its Associates or Visitors;
  - (v) the overflow, leakage or spillage of water (including rainwater), pollutants, chemicals or other hazardous substances on, in or from a Licensed Area to any property adjacent to or near a Licensed Area that is caused, contributed to or exacerbated by the Licensee, its Associates or Visitors; or
  - (vi) any loss, damage, Claim, costs, penalties, Environmental Liabilities or associated expenses resulting from a Pollution Incident where the Pollution Incident occurred as a result of the acts or omissions of the Licensee or the Licensee's Associates or Visitors.
- (c) The Licensor may demand as a debt due and immediately payable under this Licence any amount in respect of which the Licensee has indemnified the Licensor under this Licence.
- (d) The liability of the Licensee under this clause 14.4 will be reduced to the extent that any such Claim or Liability is directly caused or contributed to by the breach, negligence or wilful misconduct of the Licensor or an Associate of the Licensor.

#### **14.5 Re-supply of access or Services**

Without limiting the remainder of this clause 14, to the extent that any rights or warranties cannot be excluded or limited as a matter of Law, the Liability of the Licensor to the Licensee for any failure to provide, or default in providing access to any Licensed Area or providing any Services in accordance with this Licence is strictly limited to either of the following remedies as elected by the Licensor:

- (a) the re-supply of:
  - (i) access to a site that is equivalent to the Licensed Area; and/or
  - (ii) equivalent Services; or
- (b) the payment by the Licensor of the costs necessary to have:
  - (i) the access to the Licensed Area; and/or
  - (ii) the Services, supplied again.

#### **14.6 Further limitations**

- (a) Notwithstanding any other provision of this Licence, the Licensor will not be liable or responsible to the Licensee or its Associates for any Claim or Liability arising directly or indirectly or related to the:
  - (i) availability of a Licensed Area;
  - (ii) availability of any Services; or
  - (iii) failure to perform or delay in providing:
    - (A) access to any Licensed Area;
    - (B) any Services,

arising directly or indirectly as a consequence of any:

- (iv) protests, strikes, riots, civil commotions, lockouts, stoppages or restraints of labour, whether or not involving the employees of the Licensor or any of its Associates;
  - (v) war, civil war, hostilities or the acts of terrorists, insurgents or similar disturbances;
  - (vi) adverse or unusual conditions of the sea or weather, earthquakes, flood or fire;
  - (vii) acts, orders, regulations or requirements of any Authority, the Harbour Master or any person purporting to act on behalf of the Harbour Master or any such Authority; or
  - (viii) Force Majeure Event.
- (b) Without limiting the above limitations of liability and with the exception of the Licensee's liability under the indemnities included in clause 14.4, in no circumstances will either party be liable for any of the following types of loss or damage under or arising out of this Licence:
    - (i) loss of revenue, use, production, goodwill, profit, business, contract or anticipated savings;
    - (ii) financing or increased operating costs; or
    - (iii) other purely financial or economic or special or indirect loss or damage.

#### **15. ASSIGNMENT**

- (a) The Licensee must not part with possession of the Licensed Area during the Term, nor assign any rights or obligations under this Licence without the prior written consent of the Licensor.
- (b) Subject to clause 15(c), the Licensor must not assign or novate its interests and rights and liabilities in respect of this Licence without the prior consent of the Licensee.
- (c) If the Licensor sells or transfers its interest in the Land under the Port Sublease it may terminate this Licence or assign the benefit and the burden of this Licence to the transferee of its interest in the land and, in either case, the:
  - (i) Licensor will be released from all obligations under this Licence as from the date of such transfer; and
  - (ii) Licensee cannot make any Claim against the Licensor in relation to any such assignment or

termination other than for the reimbursement of any Licence Fee paid in advance.

## **16. TERMINATION**

### **16.1 Licensor may terminate Licence immediately**

The Licensor may terminate this Licence immediately if the:

- (a) Licensor forms the view (acting reasonably) that the Licensee's actions are likely to cause an unacceptable risk to human health, safety or the environment; or
- (b) Licensee repudiates this Licence.

### **16.2 Termination for convenience**

- (a) The Licensor may terminate this Licence for its convenience by giving no less than 10 Business Days' prior written notice to the Licensee.
- (b) If this Licence is terminated pursuant to clause 16.2(a), the Licensor must refund to the Licensee the portion of the License Fee that has been paid in advance of the termination date as the Licensee's exclusive remedy in respect of such termination.

### **16.3 Notice of breach**

Subject to clause 16.4(b), if a party is in breach of this Licence (**Defaulting Party**), the other party may give a written notice to the Defaulting Party directing it to remedy the breach and stating:

- (a) that it is a notice under this clause 15.3;
- (b) the breach relied upon; and
- (c) that the breach must be remedied by the end of the reasonable period stated in the notice, which must be no less than 10 Business Days of receipt of such notice.

### **16.4 Failure to remedy the breach**

If a Defaulting Party:

- (a) does not remedy a breach the subject of a notice under clause 16.3 16.3 by the end of the period stated in the notice; or
- (b) commits a breach that is incapable of remedy or multiple breaches that are together incapable of remedy, the other party may immediately terminate this Licence by written notice to the Defaulting Party.

## **17. DISPUTE RESOLUTION**

- (a) A party to this Licence must not begin legal proceedings in connection with a Dispute (unless the proceedings are for urgent interlocutory relief) unless that party complies with this clause 17.
- (b) If a party wishes to raise a Dispute it must give the other party a notice containing particulars of the Dispute, any remedy sought and requiring the Dispute to be considered by the parties in accordance with this clause 17 (**Notice of Dispute**).
- (c) Notwithstanding the existence of a Dispute, each party must continue to perform its obligations under this Licence.
- (d) Within 10 Business Days after issue of the Notice of Dispute, senior managers of the parties with authority to resolve the Dispute must meet and negotiate in an attempt to resolve the Dispute.
- (e) If the Dispute is not resolved within 20 Business Days after issue of the Notice of Dispute, then either party may commence legal proceedings.

## **18. NOTICES**

- (a) A notice, consent or approval required by this Licence must be given in writing.
- (b) The Licensor may only serve a notice on the Licensee by giving it to the Licensee personally, or leaving it at, or posting or emailing it to the address as specified in Item 14 of the Commercial Details.
- (c) The Licensee may only serve a notice on the Licensor by leaving it at, or posting it or emailing it to, the addresses specified in Item 13 of the Commercial Details.

- (d) The Licensor and the Licensee may only change an address for the service of notices under this Licence by written notice to the other party.
- (e) A notice is taken to be received by the party to whom the notice is given in the case of:
  - (i) delivery by hand, on delivery;
  - (ii) post, on the third Business Day after posting (if sent by pre-paid mail);
  - (iii) email, on the first to occur of:
    - (A) receipt by the sender of an email acknowledgement of delivery from the intended recipient's information system;
    - (B) the time that communication enters an information system which is under the control of the intended recipient; or
    - (C) the time that communication is first opened or read by an employee or officer of the intended recipient.

## **19. SECURITY**

### **19.1 Provision of security**

As security for the performance of its obligations under this Licence, the Licensee must give to the Licensor on or before the Starting Date a Security Deposit.

### **19.2 Security Deposit**

- (a) If:
  - (i) the Licensor has incurred Liability which is required to be indemnified by the Licensee under this Licence;
  - (ii) there is any debt due and payable under this Licence by the Licensee to the Licensor; or
  - (iii) the Licensor considers, acting bona fide, that it will be entitled to recover the relevant amount from the Licensee under this Licence, whether under an indemnity or as a debt due and payable,

the Licensor may, without prior notice to the Licensee, demand payment under and have recourse to the Security Deposit for the amount necessary to indemnify the Licensor for all amounts due and payable to the Licensor.
- (b) The Licensor may have recourse to and use so much of the Security Deposit as the Licensor considers necessary.
- (c) If the Licensor has recourse to part or all of the Security Deposit, the Licensee must within 7 days of receipt of notice from the Licensor specifying the amount used, lodge further money with the Licensor to make up the Security Deposit into the account nominated in Item 21 to the amount in Item 18.
- (d) If the Licensee continues to occupy the Licensed Area with the permission of the Licensor after the Expiry Date in accordance with clause 3.2, the Licensor reserves the right to direct the Licensee to increase the Security Deposit to the amount in Item 18.
- (e) The rights of the Licensor pursuant to this clause will not derogate from the other rights and remedies available to the Licensor under this Licence, at Law and in equity in relation to any default by the Licensee of the terms of this Licence.
- (f) Subject to the Licensor's rights to have recourse to the Security Deposit, the Licensor will release the Security Deposit on the later of 14 days after the end of the Term, or 14 days after the last of the Licensee's obligations under this Licence have been discharged to the satisfaction of the Licensor.

## **20. PROPORTIONATE LIABILITY**

### **20.1 Exclusion of Civil Liability Act 2002 (NSW)**

To the extent permitted by Law, Part 4 of the *Civil Liability Act 2002* (NSW) (and any equivalent statutory provision in any other state or territory) are excluded in relation to all and any rights, obligations or liabilities of any party under this Licence or any Claim, demand or cause of action under this Licence whether those rights, obligations or

liabilities are sought to be enforced in contract, tort or otherwise.

## **20.2 Contract prevails**

Without limiting clause 20.1, the rights, obligations and liabilities of the parties under this Licence or in relation to any Claim under this Licence with respect to proportionate liability are as specified in this Licence and not otherwise, whether those rights, obligations or liabilities are sought to be enforced by a Claim in contract, in tort or otherwise.

## **21. FORCE MAJEURE**

Where a party is unable, wholly or in part, by reason of a Force Majeure Event, to perform an obligation under this Licence and that party:

- (a) provides the other party within fourteen (14) days after becoming affected by the relevant Force Majeure Event with full details of the event, all affected obligations and, to the extent known, likely extent to which it will be unable to perform or be delayed in performing such obligations;
- (b) uses reasonable endeavours to avoid and mitigate the effects of the Force Majeure Event; and
- (c) has not caused or contributed to the relevant Force Majeure Event,

all affected obligations (excluding payment obligations) are suspended to the extent they are adversely affected by the Force Majeure Event.

## **22. OTHER MATTERS**

- (a) The Laws of New South Wales govern this Licence.
- (b) This Licence does not give to the Licensee any interest in the Land, and does not entitle the Licensee to exclusive possession of the Licensed Area.
- (c) This Licence (including the Commercial Details) comprises the entire agreement between the Licensor and the Licensee. The Licensee agrees that no matter was discussed or circumstance represented by the Licensor about the Licensed Area or this Licence that is not included in this Licence.
- (d) If any provision of this Licence is void, voidable, unenforceable or illegal, then it is to be severed from this Licence and the remainder of this Licence will continue with full force and effect.
- (e) A variation of this Licence must be in writing and signed by the parties.
- (f) No right under this Licence is waived or deemed to be waived, except by notice signed by the party waiving the right, or its authorised officer.
- (g) An obligation of two (2) or more persons under this Licence binds them jointly and severally.
- (h) The Licensee will permit entry to the Licensed Area by those with an interest in the Land superior to that of the Licensor.
- (i) Provisions of this Licence survive termination or expiry of the Licence which, by their nature, are intended to survive.
- (j) Without limiting paragraph (i), the obligations of the parties under clauses 1.3, 3.1(b), 3.2, 4, 5, 6.2, 6.3, 6.4, 6.6, 7.5, 7.9, 13, 14, 16, 17, 20 and 22 and any obligations which are expressed to survive termination or expiry of this Licence, will survive the frustration, rescission, termination or expiration of this Licence.
- (k) Each party must take all necessary further action and do and execute all things and all documents necessary to give full effect to this Licence.
- (l) The Licensee must pay all stamp duty payable in respect of this Licence.
- (m) This agreement may be executed in any number of counterparts, each of which, when executed, is an original. Those counterparts together make one instrument.