



## FLINDERS PORTS PTY LIMITED

### STANDARD TERMS AND CONDITIONS

#### (Use of Ports, Facilities and Services by Vessels)

## 1. DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In these Terms and Conditions:

**"Act"** means the *Harbors and Navigation Act 1993 (SA)* and all regulations made under that Act from time to time.

**"Application for Berth"** means Flinders Ports' Port MIS online form headed "*Voyage Application Request*", online form headed "*Application for use of port facilities*" or standard form headed "*Application for Use of Port Facilities*", as amended from time to time.

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

**"Contract"** means the contract between Flinders Ports and the Customer that is formed under clauses 2.1 or 2.2.

**"Customer"** means the Vessel's Owner, the Vessel's master and any person who has control of the operation of the Vessel including but not limited to the charterer of the Vessel.

**"Customer's Agent"** means the Vessel's agent (if any) specified in the Application for Berth or, if no agent is specified in the Application for Berth, the Vessel's agent (if any) who lodged the Application for Berth.

**"Customer's Associates"** means the:

- (a) Customer's officers, employees, contractors, invitees, agents or any persons claiming through or under them; and
- (b) Customer's Agent and any agents or contractors engaged by any of the Customer's Agents to carry out work or provide services in the Port in connection with the Customer, the Vessel or its cargo or crew.

**"Dangerous Cargo"** means goods or cargo defined as dangerous in the International Maritime Dangerous Goods Code published by the International maritime Organisation or in any other similar, equivalent or applicable laws or regulations relating to dangerous cargo, including without limitation the *Dangerous Substances Act 1979 (SA)*, from time to time;

**"Facilities"** means the land, buildings, berths, wharfs, jetties, lay down areas and any associated plant and equipment and other infrastructure of any kind that is owned, vested in, managed, leased or otherwise controlled by Flinders Ports to which the Customer or any of the Customer's Associates are given access to or use of by Flinders Ports in connection with the Vessel's visit to the Port.

**"Fees and Charges"** means the rates and charges set out in the Schedule of Port Charges and any other fees, rates or charges that are imposed by Flinders Ports from time to time on the Customer or any of the Customer's Associates for access to or use of any Facilities or Services in connection with the Vessel's visit to the Port.

**"Force Majeure Event"** means any event or situation that arises due to something beyond the reasonable control of Flinders Ports.

**"Flinders Ports"** means the Flinders Ports Pty Limited ACN 097 377 172.

**"Known Dangerous Cargo"** means cargo that:

- (a) has been declared by a consignor or consignee of cargo or their agents or representatives as Dangerous Cargo; or
- (b) the Customer knew or ought reasonably to have known is Dangerous Cargo.

**"Law"** means the common law and any legislation of an Australian State or Territory, the Commonwealth of Australia and all other local, government or regulatory authorities, including without limitation delegated legislation, regulations, statutory instruments, statutory notices and statutory directions.

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

**"Port"** means the Flinders Ports' port specified in the Application for Berth or the relevant Port Limits of the port which the Vessel enters.

**"Port Limits"** means the limits of the land and waters of the relevant Port as specified in the Harbors and Navigation Regulations under the Act.

**"Port MIS Terms"** means the terms and conditions of access to and use of Flinders Ports' internet website interface to various functional components of Flinders Ports' KleinPort management information system, together with the hardware, functional components and other related components used to operate it.

**"Port Rules"** means the Flinders Ports' relevant rules for access to and use of the relevant Port from time to time which are posted on the Flinders Ports' website at <http://www.flindersports.com.au/policies3.html>

**"Schedule of Port Charges"** means the schedule of Flinders Ports' rates, levies, Charges or other fees from time to time which are posted on the Flinders Ports website at <http://www.flindersports.com.au/portcharges1.html>

**"Services"** means any services that are provided by or arranged by Flinders Ports.

**"Terms"** means the terms and conditions set out in this document as varied from time to time by Flinders Ports.

**"Vessel"** means the vessel named in the Application for Berth or which enters the Port Limits.

**"Vessel's Owner"** means the owner of the Vessel and includes any charterer of the Vessel.

## 1.2 Interpretation

In these Terms:

- (a) words importing the singular will include the plural and vice versa and any word or expression defined in the singular has the corresponding meaning if used in the plural and vice versa;
- (b) a reference to any act or statute or regulation will include a reference to any amendment, re-enactment or extension thereof or any statutory or regulatory provision that may be substituted from time to time;
- (c) references to any deed, document, instrument or other writing will be deemed to include references to the deed, instrument or other writing as varied or supplemented from time to time;
- (d) where any party to the Contract is comprised of more than one person or entity then those people or entities will be bound jointly and each of them will be bound severally by the terms of the Contract;
- (e) headings are for ease of reference and do not affect the interpretation of the Contract;
- (f) a reference to a party includes a reference to that party's heirs, executors, administrators, successors and assigns;
- (g) words importing natural persons include partnerships, bodies corporate, associations, governments and governmental and local authorities and agencies;
- (h) a provision of the Contract must not be construed to the disadvantage of Flinders Ports merely because Flinders Ports was responsible for the preparation of it or its inclusion in the Contract.

## **2. APPLICATION OF THESE TERMS**

- 2.1 These Terms form part of the Contract that arises out of the submission of an Application for Berth to Flinders Ports.
- 2.2 A contract will automatically bind the Customer with respect to the Vessel's visit to the Port as soon as the Vessel enters the Port Limits and the contract will comprise the terms and details set out in the Customer's Application for Berth, the Port MIS Terms (where applicable), the Port Rules, these Terms and the Schedule of Port Charges.
- 2.3 Any variation to the details set out in the Application for Berth will operate as a variation to the Contract at the discretion of Flinders Ports.
- 2.4 After acceptance of an Application for Berth by Flinders Ports these Terms as at the date of acceptance of that Application for Berth cannot be varied unless the variation is agreed in writing and has been signed by authorised representatives of both the Customer and Flinders Ports.

## **3. HARBORS AND NAVIGATION ACT**

- 3.1 The Contract shall be in addition to Flinders Ports' rights, powers, defences, immunities or limitations of liability under the Act. Nothing in or arising out of these Terms or the Contract:
- (a) in any way diminishes Flinders Ports' rights, powers, defences, immunities, indemnities or limitations of liability under the Act; or
  - (b) in any way fetters any discretions that Flinders Ports has under the Act; or
  - (c) in any way diminishes or otherwise precludes Flinders Ports' from accessing, relying upon or using any of its rights, powers, defences, immunities, indemnities or limitations of liability under the Act in relation to any matter concerning the Port, the Customer or the Vessel or any matter arising out of the Contract.
- 3.2 If there is any inconsistency between anything in these Terms or the Contract and anything in the Act, then the Act will prevail to the extent of the inconsistency.

## **4. USE OF AND ACCESS TO FACILITIES AND SERVICES**

### **4.1 Allocation of Facilities and Services by Flinders Ports**

Flinders Ports agrees to allocate the Vessel a berth in the Port and give the Customer access to and use of the Facilities and Services under the terms and conditions of the Contract.

### **4.2 No interest in Facilities**

Nothing in these Terms will create any tenancy, estate or proprietary interest of any kind in or over the Facilities.

#### **4.3 Availability of requested Facilities and Services**

Notwithstanding any other provision of the Contract, entry into a Port, allocation of Facilities or Services requested by the Customer or the Customer's Associates will always be subject to availability (as determined by Flinders Ports in its absolute discretion) and suitability for the use intended by the Customer or the Customer's Associates.

#### **4.4 Additional Services or Facilities**

In addition to the use of any Facilities or Services requested by the Customer or any of the Customer's Associates, other or additional services and facilities shall be utilised (and paid for by the Customer) in circumstances where Flinders Ports considers the use of additional or alternative Services or Facilities is necessary to ensure, safety, security, Port operational efficiency, general expediency, compliance with the Act or compliance with any other laws or industry standards.

#### **4.5 Withdrawal, suspension, reallocation and termination of access and use**

If Flinders Ports considers it necessary to do so for any reason then Flinders Ports may at any time withdraw, suspend, reallocate, terminate or otherwise vary or modify any usage or access rights that are granted to the Customer. If Flinders Ports exercises any of its rights under this clause then nothing will relieve the Customer or the Customer's Agent from liability to pay any Fees and Charges or other amount payable under the Contract already accrued or incurred and nothing will entitle the Customer to any compensation for any Claim, Loss, damage, demurrage, delay or inconvenience suffered.

### **5. INTEREST**

#### **5.1 Interest on outstanding Fees and Charges**

The Customer shall pay Flinders Ports interest on all Fees and Charges or other amount payable under the Contract that are not paid to Flinders Ports by the date that they are due for payment. Interest on all outstanding amounts shall accrue daily at the interest rate per annum equal to, from time to time, the sum of three per cent (3%) and of the business indicator rate, from time to time, applicable to variable business loans less than one hundred thousand dollars (\$100,000.00) as published monthly in the Reserve Bank of Australia Bulletin. Interest may be capitalised by Flinders Ports on the last day of each month and Interest shall be payable by the Customer to Flinders Ports on demand.

### **6. OTHER OBLIGATIONS**

#### **6.1 Maintenance and repair**

The Customer shall ensure that any Facilities used by the Customer or any of the Customer's Associates are kept and maintained in good condition (having regard to their age and general condition) and the Customer shall ensure that any Facilities used are left in a good, clean and operational condition after use.

**6.2 Flinders Ports may rectify**

If any Facilities are not left in the condition required under clause 6.1, Flinders Ports may carry out any work necessary to put the Facilities into the condition required under clause 6.1 and the costs of the work shall be paid by the Customer on demand.

**6.3 Port Security**

The Customer shall ensure that it and the Customer's Associates comply with Flinders Ports' security procedures and requirements relating to cargo, Vessels, Facilities and access to and from the Port when such procedures and requirements are communicated to them. For the purposes of this clause 6.3, where Flinders Ports places the relevant procedures and requirements on its website, it shall be deemed to have communicated those procedures and requirements to the Customer and Customer's Associates. Flinders Ports will endeavour to provide Shipping Australia Limited with written notification of Flinders Ports' variations to its applicable and relevant security procedures and requirements, emergencies excepted.

**6.4 Professional standards**

The Customer shall ensure that all shipping activities and work carried out by it or any of the Customer's Associates in or around the Port in connection with the Vessel's visit:

- (a) is carried out by personnel who are fit for work and have the appropriate training, experience and qualifications to do the work; and
- (b) is carried out with a high degree of skill, competence and professionalism at all times.

**6.5 No damage**

The Customer shall ensure that neither it nor any of the Customer's Associates causes any damage to the Facilities or anything else in the Port.

**6.6 No interference with other users**

The Customer shall ensure that neither it nor any of the Customer's Associates obstructs or causes any interference to Flinders Ports or anyone else lawfully using the Port.

**6.7 Comply with all Laws**

The Customer shall ensure that it and the Customer's Associates comply with all aspects of the Act and all other Laws relating to the Vessel or the use of or access to the Port, the Services or the Facilities by the Customer or any of the Customer's Associates, including without limitation the Act, the *Environment Protection Act 1993(SA)* and *Adelaide Dolphin Sanctuary Act 2005(SA)*.

## 6.8 **Not to cause spills or pollute**

The Customer shall ensure that neither it nor any of the Customer's Associates causes any spills, pollution or contamination of any kind in the Port.

## 6.9 **Comply with directions etc.**

The Customer shall ensure that it and the Customer's Associates:

- (a) comply with all directions given by Flinders Ports in connection with the Vessel's visit to the Port;
- (b) comply with all directions given by anyone working with the Australian Quarantine Services, the Australian Customs Services or any relevant regulatory authority in connection with the Vessel's visit to the Port; and
- (c) comply with all occupational health, safety and environmental requirements and associated policies and procedures of Flinders Ports (including without limitation the Port Rules) that are advised to the Customer or any of the Customer's Associates or published on Flinders Ports' website from time to time.

## 6.10 **Induction**

The Customer shall ensure that it and the Customer's Associates undertake any Port induction briefings or courses as and when required by Flinders Ports in relation to anything connected with the Vessel's visit to the Port.

## 6.11 **Notification of Safety Incidents**

As soon as the Customer or any of the Customer's Associates become aware of any accident, incident, damage, spill, pollution or contamination in or to the Port or Facilities, injury to any person or any circumstances presenting a risk of damage or injury during the Vessel's visit to the Port ("Safety Incidents"):

- (a) the Customer shall ensure that Flinders Ports is immediately informed of the Safety Incident; and
- (b) if requested by Flinders Ports, the Customer or the Vessel's Master shall provide a detailed written report to Flinders Ports in respect of the Safety Incident or other event giving rise to the damage, injury or any other consequence. Any such report shall be provided to Flinders Ports within 48 hours of a request being made or upon request in the event of an emergency.

For the purpose of this clause:

**"accident"** means any event where damage of any kind is caused to any Vessel, person or property; and

**"incident"** means any event occurring, which gives rise to a hazardous or potentially hazardous situation.

## 6.12 **Flinders Ports access**

The Customer shall ensure that Flinders Ports is given prompt access to the Facilities, the Vessel and any information that is reasonably required by Flinders Ports in order for Flinders Ports to check and monitor the Customer's compliance with its obligations under these Terms.

## 6.13 **Cargo**

The Customer undertakes not to enter a Port with any Known Dangerous Cargo without previously:

- (a) giving written notice of the details and nature of the Known Dangerous Cargo to Flinders Ports and as required by any Laws; and
- (b) ensuring that the Known Dangerous Cargo and its container or other outside covering is appropriately marked as required by any Laws and indicating that it requires special care by any person or stevedore who moves or handles it.

## **7. LIMITATION OF LIABILITY**

### **7.1 Release of Flinders Ports**

- (a) The Customer will use the Port, Services and Facilities at its own risk. Flinders Ports will not be liable to the Customer, and the Customer releases Flinders Ports in relation to any Claim or Loss that may be made by or against or incurred by the Customer at any time arising out of, contributed to or in connection with, directly or indirectly, the Contract, or otherwise arising out of these Terms, including without limitation:
  - (i) any Claim or Loss to any vessel, plant, equipment or other property;
  - (ii) any Claim or Loss arising from injury or damage done or suffered to any person, including death; or
  - (iii) any Claim or Loss arising from environmental damage, pollution or contamination.
- (b) Paragraph (a) above does not apply to the extent any Loss is directly caused or contributed to by the negligence or wilful default of Flinders Ports.

### **7.2 Indemnity by Customer**

- (a) Subject to paragraph (c) below, the Customer indemnifies and will keep Flinders Ports indemnified from and against all Claims and Loss that may be brought by any person against, or incurred by Flinders Ports, directly or indirectly, in relation to or arising from the use by the Customer or Customer's Associates of the Port, Services and Facilities, or under or in connection with these Terms, including without limitation:

- (i) any Loss to any property, or in respect of any injury or death to any person; or
  - (ii) any Loss arising from environmental damage, pollution or contamination.
- (b) The Customer acknowledges the existence at the Facilities of equipment not owned by Flinders Ports (including ship loaders and associated gantry equipment, shore cranes and associated equipment and cargo (“Equipment”). Without limiting paragraph (a) above, the Customer indemnifies and will keep indemnified Flinders Ports from and against all Claims and Loss that may be brought by any person against, or incurred by Flinders Ports, directly or indirectly in relation to or arising from the use of the Equipment by or on behalf of the Customer or Customer’s Associates or resulting from any damage to or destruction of the Equipment or any part of the Equipment caused directly or indirectly by the acts or omissions of the Customer or its agents, officers, employees, licensees, invitees or Customer’s Associates.
- (c) The indemnities in paragraphs (a) and (b) above will not apply to the extent the relevant Claim or Loss is directly caused or contributed to by the negligence or wilful default of Flinders Ports.

7.3 Except to the extent that any rights or warranties cannot be excluded or limited as a matter of law or pursuant to clauses 3, 7.1 and 7.2, the liability of Flinders Ports to the Customer for anything arising out of the Contract shall be strictly limited to either of the following remedies as elected by Flinders Ports:

- (a) the re-supply of equivalent Services or Facilities; or
- (b) the payment of the costs necessary to have the Services or Facilities supplied again.

7.4 Notwithstanding any other provision of the Contract, Flinders Ports will not be liable or responsible to the Customer or Customer’s Associates for any Claims or Loss arising directly or indirectly or related to the:

- (a) availability of or inability to use a Port; or
- (b) failure to perform or delay in providing any Services or Facilities;

arising directly or indirectly as a consequence of any:

- (i) interruption to the supply of electricity, gas or water to the Customer. Flinders Ports will be under no obligation to have available any auxiliary supplies.
- (ii) strikes, riots, civil commotions, lockouts, stoppages or restraints of labour, whether or not involving the employees of Flinders Ports.

- (iii) war, civil war, hostilities or the acts of terrorists, insurgents or similar disturbances.
- (iv) adverse or unusual conditions of the sea or weather, earthquakes, flood or fire.
- (v) acts, orders, regulations, or requirements of any lawful authority or any person purporting to act on behalf of any such authority.
- (vi) any other cause that Flinders Ports could not prevent or avoid by the exercise of reasonable diligence.

## **8. TERMINATION**

### **8.1 Flinders Ports may terminate**

Without prejudice to any other rights or remedies Flinders Ports may have under these Terms or at law or in equity, Flinders Ports may terminate the Contract with immediate effect if the Customer is in breach of its obligations at any time.

### **8.2 No release**

On termination of the Contract:

- (a) nothing will release or discharge the Customer from liability to Flinders Ports in relation to anything occurring prior the date of termination; and
- (b) nothing will release or discharge the Customer's Agent or Customer from liability for any Fees and Charges or other amount payable under the Contract imposed by Flinders Ports in relation to anything occurring prior the date of termination.

## **9. GOODS AND SERVICES TAX**

### **9.1 GST provisions**

For the purpose of this clause unless the context otherwise requires:

- (a) **"GST Legislation"** means *A New Tax System (Goods and Services Tax) Act 1999* and any related tax imposition act (whether imposing tax as a duty or customs excise or otherwise) and includes any legislation which is enacted to validate recapture or recoup the tax imposed by any of such acts; and
- (b) where any other term is used in this clause, which is defined in the GST legislation, it will have the meaning which it bears in the GST Legislation.

### **9.2 Amounts in Schedule of Port Charges are GST inclusive**

Every item in the Schedule of Rates and Charges payable under these Terms and Conditions shall be expressed as being inclusive of GST, unless otherwise stated.

### 9.3 **Tax invoices**

Flinders Ports will provide the Customer or the Customer's Agent with tax invoices and adjustment notes with respect to the Fees and Charges (but will not be obliged or required to create tax invoices for amounts in excess of amounts received from the Customer). The tax invoices and adjustment notes will show the Fees and Charges exclusive of GST and the relevant GST amount payable on those Fees and Charges.

## 10. **FORCE MAJEURE**

Despite anything to the contrary contained elsewhere in these Terms, Flinders Ports will not be in breach of any obligation it may have in circumstances where Flinders Ports' ability to reasonably comply was interfered with, obstructed, delayed or prevented by a Force Majeure Event.

## 11. **MISCELLANEOUS**

### 11.1 **No assignment**

The rights and entitlements under the Contract are not capable of being assigned, novated or transferred by the Customer.

### 11.2 **Severance**

If any term or part contained in these Terms or elsewhere in the Contract is declared or becomes unenforceable, invalid or illegal for any reason then that term or part will be severed and the other terms and parts will remain in full force and effect.

### 11.3 **Governing law and jurisdiction**

The Contract is governed by and will be construed in accordance with the laws of South Australia and the Customer irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of South Australia.

### 11.4 **Website**

Flinders Ports undertakes to place these Terms on its website, so that the Customer can have easy access to them.

### 11.5 **Variation**

Flinders Ports undertakes to:

- (a) consult with Shipping Australia Limited prior to varying these Terms; and
- (b) notify Customers and the Customer's Agents of any variation by placing the varied Terms on its website immediately following any determination by Flinders Ports to vary these Terms.