

# Agility Onslow Marine Supply Base

## Terms and Conditions

June 2017

### 1. DEFINITIONS AND INTERPRETATION

#### 1.1 Definitions

The following definitions apply in these Terms and Conditions:

**Agility** means Agility Project Logistics Pty Ltd (ACN 082 751 460) of 28-32 Sky Road, Melbourne Airport, Victoria, Australia 3045.

**Agility Equipment** means any plant or equipment used by Agility in performing Services, or provided for use by the Customer.

**Agility Handbook** means the document which provides directions and instructions applicable to the use of the Agility OMSB and may include from time to time Agility OMSB Plans and Policies.

**Agility OMSB** means the **Agility Onslow Marine Supply Base** located on premises sub-leased by Agility from Onslow Marine Support Base Pty Ltd and located within the Beadon Creek Maritime Facility in the Port of Onslow, comprising around 25,789 square metres of land lease and 3600 square metres of seabed lease and is the portion of Reserve 30711 also known as Lot 561 on DP174170.

**Agility OMSB Indemnified Parties** means Agility, Agility's Personnel and any associated entities or Related Body Corporate.

**Agility OMSB Plans and Policies** means Agility's policies, procedures, guidelines, standards, regulations, manuals, plans or procedures in relation to the Agility OMSB or the Agility OMSB's operation, as amended from time to time, including those relating to:

- (a) Environment;
- (b) occupational health and safety;
- (c) site security; and
- (d) information collection and privacy, as published on the Agility OMSB Website.

**Agility OMSB Website** means the website with the Uniform Resource Locator (*URL*) of <http://www.agilityonslow.com>

**Agility Personnel** means any and all of Agility's employees, subcontractors, agents and representatives involved either directly or indirectly in the provision of the Services under this Agreement.

**Agility Representative** means the officer nominated in writing by and representing Agility for the purposes of this Agreement from time to time.

**Agreement** means

- (a) The Agility OMSB Terms and Conditions; and
- (b) Any other agreement in writing between the Parties relating to the Agility OMSB, that incorporates the Agility OMSB Terms and Conditions

**Anti-Bribery Laws and Obligations** means:

- (a) for all parties the laws relating to combating bribery and corruption, and/or the principles described in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on December 17, 1997, which entered into force on February 15, 1999, and the Convention's Commentaries; and
- (b) for each party the laws relating to combating bribery and corruption in the countries of such party's place of incorporation, principal place of business, and/or place of registration as an issuer of securities, and/or in the countries of such party's ultimate parent company's place of incorporation, principal place of business, and/or place of registration as an issuer of securities.

**Application for Berth** means submission of an Agility OMSB Application for Berth, as contained in Appendix C of the Agility Handbook and located on the Agility OMSB Website

**Beadon Creek Maritime Facility** means a State owned marine facility developed in 1964 and managed by the Department of Transport. It covers an area of 15.29 ha and supports growing commercial and industrial activities associated with the offshore oil and gas industry in the region, as well as limited recreational and fishing charter activities.

**Business Day** means a day other than a Saturday, Sunday or public holiday in Perth, Western Australia.

**Claims** includes any demand, application, claim, action, suit and/or proceeding of any kind.

**Confidential Information** means any information (in whatever form) or documentation of a confidential nature (or which the recipient or, in the case of Agility, the Agility Personnel and in the case of the Customer, the Customer Personnel ought reasonably expect to be confidential) that relates to the business, affairs or activities of the disclosing party.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Customer** means:

- (a) Persons and/or Vessels who seek access to and use the Agility OMSB ;
- (b) Service providers who seek access to the Agility OMSB for the purposes of providing Third Party Services to other Customer at the Agility OMSB; and/or

- (c) Parties to a Service Agreement or third party access agreement in relation to the Agility OMSB, other than Agility.

**Customer Insurances** means the insurance policies required to be put in place by the Customer as described in Clause 8.

**Customer Personnel** means any of the Customer's employees, subcontractors, agents, servants, representatives, visitors and invitees, and when used in relation to a Vessel includes not only the owner, but also the charterer and/or the master of the Vessel and/or any other person who acts as agent of the owner, charterer or master.

**Customer Representative** means the officer nominated from time to time in writing by and representing the Customer for the purposes of this Agreement.

**Department of Transport** means the government body which manages and has overall controlling authority of the Beadon Creek Maritime Facility in accordance with the *Shipping and Pilotage Act 1967 (WA)*.

**Environment** means living things, their physical and social surroundings and interactions between all of these and includes:

- (a) the well-being of humans;
- (b) structures made or modified by humans;
- (c) the amenity values of an area; and
- (d) economic, cultural and social conditions.

**Environmental Harm** means any harm to or adverse effect on the Environment or any potential harm (including the risk of harm and future harm) to or potential adverse effect on the Environment.

**Emergency** means a situation involving actual or reasonably apprehended substantial damage to or loss of property, injury to persons, loss of life, or injury or harm or contamination or pollution to the Environment.

**Facilities** means any facilities or equipment provided by Agility at Agility OMSB (including cranes, forklifts, trucks and other plant or any substituted equipment (including all tools, accessories and spare parts supplied with the plant and equipment)) for use by the Customer or Customer Personnel in connection with the Services.

**Fees and Charges** means the levies, fees and charges applicable to the Agility OMSB from time to time as published on the Agility OMSB Website or as agreed in writing.

**Force Majeure Event** means an event or circumstance not within the control of the parties including but not limited to acts of God, cyclones, hurricanes, floods, earthquakes and storms, but does not include any strike or industrial dispute solely affecting the Customer or the Customer Personnel's workforce.

**Government Agency** means any federal, state or local government or any ministry, department, court, commission, board, agency, institution or similar entity of that government.

**Government Authorisations** means all approvals, consents, authorisations, permits, clearances, licences or other requirements that are required from any Government Agency for Agility to perform its obligations under this Agreement.

**Hazardous Substance** means any substance with potential to cause harm to persons, property or the Environment because of the chemical, physical and/or biological properties of the substance and includes all hazardous substances identified in the IMDG Code.

**Insolvency Event** means an event whereby:

- (a) a person is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act);
- (b) a person has had a Controller (as defined in the Corporations Act) appointed or is in liquidation, in provisional liquidation, under administration or wound up or has had a receiver appointed to any part of its property;
- (c) a person is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by the other party to this Agreement);
- (d) an application or order has been made (and in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with a person, which is preparatory to or could result in any of (a), (b) or (c) above;
- (e) a person is taken (under section 459F(1) of the Corporations Act) to have failed to comply with a statutory demand;
- (f) a person is the subject of an event described in sections 459C(2)(b) or 585 of the Corporations Act (or it makes a statement from which another party to this Agreement reasonably deduces it is so subject);
- (g) a person is otherwise unable to pay its debts as and when they fall due; or
- (h) something having a substantially similar effect to (a) to (g) happens in connection with a person under the Law of any jurisdiction.

**Law** means any law of Australia (whether local, federal or state) and includes all orders, rules, regulations, executive orders (including directions or orders given by the Department of Transport), decrees judicial decisions and notifications as may be amended or supplemented from time to time.

**Liabilities** means damages, Claims, losses, liabilities, judgments, orders, obligations, duties, claims by third parties, costs and expenses of any kind.

**P&I Insurance** means Protection and Indemnity Insurance provided by one of the thirteen principal underwriting associations which comprise the International Group of P&I Clubs

**Parties** means Agility and the Customer.

**Pollution** has the meaning given to that term in the *Waste Management and Pollution Control Act 1998*.

**Port** means the Port of Onslow as defined in the *Shipping and Pilotage Act 1967 (WA)*.

**Port Captain** means a Harbour Master of the Port as defined in the *Shipping and Pilotage Act 1967 (WA)*.

**Related Body Corporate** has the meaning given to it in the Corporations Act.

**Remedial Work** means any work to remediate land, water or Facilities affected by spill, pollution, contamination, Hazardous Substances or environmental harm, including to:

- (a) remove, destroy or reduce;
- (b) dispose of or disperse;
- (c) contain or encapsulate;
- (d) treat;
- (e) manage (including restrict or prohibit access to or use of the affected area); or
- (f) abate or control, any spill, pollution, contamination, Hazardous Substance or environmental harm and to remove or minimise any risk or potential risk it presents to human health or the Environment.

**Services** means activities Agility agree to perform or cause to be performed for the purposes of servicing the Customer including but not limited to:

- (i) Waterway and wharf bookings and berthing management;
- (ii) Wharf operations, including fork, crane, LCT ramp and reach stackers;
- (iii) Ship chandelling – including access to fuel, water, food, waste, spares, consumables;
- (iv) Bulk fuel
- (v) Marine husbandry and agency;
- (vi) Logistic and supply chain services
- (vii) Material management including inventory storage and handling;
- (viii) Provision of lay down areas;
- (ix) Reworking containers, repacking and shrink wrapping;
- (x) Transport;
- (xi) Security;

- (xii) Hot work areas.
- (xiii) Crew Changes;
- (xiv) Safety Management and Induction Walk to Work;
- (xv) Mud, chemical and concrete management;
- (xvi) Offshore equipment hire and management;
- (xvii) General waste and Dangerous Goods management;
- (xviii) Storage, handling and hiring of shipping sea baskets;

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

**Wilful Misconduct** means any act or omission by any person or entity that was intended to cause, or was in reckless disregard of or wanton indifference to, harmful consequences such person or entity knew, or should have known, such act or failure would have on the safety or property of another person or entity.

## 1.2 Interpretation

In this Agreement, unless the context otherwise requires:

- (a) reference to these Terms and Conditions means the Agility OMSB Terms and Conditions;
- (b) references to days mean calendar days;
- (c) references to time are to the time in Perth, Western Australia;
- (d) references to a person include an individual, a partnership, a body corporate, an association or parties in an unincorporated joint venture and the successors and permitted assignees of any of those entities;
- (e) time for doing any act or thing under this Agreement which is of a purely administrative nature will, if it ends on a day that is not a Business Day, be deemed to end on the next Business Day;
- (f) public holidays are the designated public holidays in Perth, Western Australia;
- (g) clause headings and sub-clause headings do not form part of, and will not be used in the interpretation of this Agreement;
- (h) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context;
- (i) words importing a gender include every gender;

- (j) measurements of physical quantities will be in legal units of measurement in Australia;
- (k) unless otherwise provided, prices and amounts referred to in this Agreement shall be denominated in Australian dollars;
- (l) the words 'include', 'includes' and 'including' are not to be construed as words of limitation;
- (m) reference to a document is to that document as varied, novated, ratified or replaced from time to time;
- (n) reference to a statute, regulation, proclamation, ordinance or by-law includes any statute, regulation, proclamation, ordinance or by-law varying, consolidating or replacing it, and a reference to a statute includes any regulation, proclamation, ordinance or by-law under the statute;
- (o) reference to any government department, statutory authority, local or municipal authority or other administrative body includes any department, authority or administrative body replacing it from time to time;
- (p) no provision of this Agreement will be construed adversely to a party solely on the ground that it was responsible for the preparation of this Agreement or that provision;
- (q) any consent or approval required under this Agreement must be in writing and may be given conditionally or unconditionally or withheld in the absolute discretion of the person whose consent or approval is required, unless otherwise expressly provided; and
- (r) unless a contrary intention is specifically expressed, no provision of this Agreement limits any right of a party whether under a term of this Agreement or under any Law.

## **2. AGILITY OMSB AND SERVICES**

### **2.1 Access and Services**

During the Term, Agility will allow the Customer access to the Agility OMSB and its Facilities and provide the Services on these Terms and Conditions and in accordance with the Handbook and Agility OMSB Plans and Policies applicable from time to time.

### **2.2 Compliance with Agility Handbook and Agility OMSB Plans and Policies**

The Customer agrees to comply with the Handbook and Agility OMSB's Plans and Policies and acknowledges that, in case of any inconsistency between these Terms and Conditions, the Handbook, an Application for Berth and the Agility OMSB Plans and Policies, these documents will rank in the following order of precedence:

1. Terms and Conditions
2. Agility Handbook
3. Application for Berth
4. Agility OMSB Plans and Policies.

### **2.3 Availability of Agility OMSB, its Facilities and Services**

- (a) Notwithstanding any other provision of these Terms and Conditions, entry into and use of the Agility OMSB or allocation of any Facilities (including berths) or provision of Services will always be subject to availability (as determined by Agility in its absolute discretion).
- (b) Nothing in these Terms and Conditions grants to the Customer any exclusive rights to use the Agility OMSB any Facilities or the Services. The Customer acknowledges that there is no guarantee that it will obtain access to the Agility OMSB any Facilities and the Services at the times or for the period requested by the Customer and that such access and the order of allocations will be determined by Agility in its absolute discretion in accordance with processes set out in the Handbooks and Agility OMSB's Plans and Policies.

### **2.4 Port of Onslow**

The Customer acknowledges that the Agility OMSB falls under the Department of Transport's control and forms part of the Port of Onslow and the Customer agrees to comply at all times with the lawful directions of the Port Captain as the agent of the Port's Harbour Master and the Department of Transport relating to the access to and use of the Agility OMSB.

## **3. CHARGES AND PAYMENT**

### **3.1 Fees and Charges**

- (a) The Customer agrees to pay the Fees and Charges for the use of Agility OMSB and the Services.
- (b) Agility will issue a tax invoice for all amounts payable by the Customer to Agility pursuant to this Agreement.
- (c) The Customer must pay each invoice within 14 days of the date of the invoice.

### **3.2 Changes to the Fees and Charges**

- (a) Agility may review and vary the Fees and Charges from time to time during the Term.
- (b) Agility will publish on the Agility OMSB Website any variation to the Fees and Charges at least 30 days prior to the date on which the variation is to become

effective, except where changes to statutory or regulatory provisions are such that Agility have the effect of increasing costs to Agility then Agility may vary its Fees and Charges with immediate effect and without the need to give prior notice of such change.

### **3.3 Government Notices and Charges / Department of Transport Charges**

- (a) The Customer must, at its own cost, comply with each Government Notice issued in respect of, arising from or relating to the performance by Agility of its obligations under the Agreement, whether the Government Notice is served on Agility or the Customer.
- (b) The Customer must notify Agility immediately upon the Customer or any Customer Personnel becoming aware of:
  - (i) any complaint made against the Customer or any Customer Personnel to any Government Agency;
  - (ii) any proceedings commenced against the Customer or any Customer Personnel, relating to an alleged failure by the Customer or Customer Personnel to comply with a Law or Government Authorisation in relation to the performance by the Customer of its obligations under the Agreement; or
  - (iii) any Government Notice being served on the Customer or Customer Personnel in relation to the performance by the Customer of its obligations under the Agreement.
- (c) The Customer must pay any charges applicable at the Port which are levied by the Department of Transport

## **4. CUSTOMER OBLIGATIONS**

### **4.1 General**

- (a) Prior to entering the Agility OMSB , the Customer and Customer Personnel must complete any applicable safety induction and visitors' site orientation programs as required by Agility;
- (b) Whilst at the Agility OMSB, the Customer and Customer Personnel must at all times:
  - (i) comply with all applicable Laws and Government Authorisations; the Agility Handbook, and Agility OMSB's Plans and Policies and with any reasonable and lawful direction of Agility;
  - (ii) Ensure that any Facilities used by the Customer are kept and maintained in good condition (having regard to their age and general

condition prior to the Customer's use) and ensure that any Facilities used are left in a good, clean and operational condition after use;

- (iii) Not cause any damage to the Facilities or anything else in the Agility OMSB or the Port of Onslow;
- (iv) Not act in a manner which hinders or blocks in any way whatsoever access to the Agility OMSB, or prevent Agility from delivering Services to other customers of the Agility OMSB;
- (v) Not act in a manner which disrupts or adversely affects the operations and activities of the Agility OMSB;
- (vi) Take all measures necessary to protect people, property and the Environment at or around the Agility OMSB;
- (vii) Not interfere with any of the activities of Agility or any other person at the Agility OMSB; and
- (viii) Keep secure at all time from theft, loss or damage any Vessel, tools, equipment, material or other things brought to the Agility OMSB by the Customer or Customer Personnel.

#### **4.2 Hazardous Substances**

- (a) The Customer and Customer Personnel must not, without the prior written consent of the Company, cause or allow any Hazardous Substances to be brought onto, produced on, transported to or from, treated, stored or disposed of at, the Agility OMSB.
- (b) Agility may impose charges to recover all reasonable extra costs incurred (including but not limited to costs for labour, delay time, special insurance and handling procedures) in connection with any Hazardous Substances brought onto or produced at the Agility OMSB. The Customer must pay those charges levied by Agility upon Agility issuing a tax invoice to the Customer.
- (c) Should Agility provide written consent to the Customer to bring onto, or produce at, Agility OMSB any Hazardous Substances, the Customer agrees to provide Agility with material safety data sheets on each of the Hazardous Substances regarding the potential effects on the Environment and risks to human health at least 7 days before the Hazardous Substances are brought onto the Agility OMSB and to comply with all Laws.

#### **4.3 Pollution, Contamination and Environmental Harm**

The Customer and Customer Personnel must not cause or allow any spills, pollution, contamination or any environmental harm of any kind to occur in or around the Agility OMSB

#### 4.4 Response to Pollution, Contamination and Environmental Harm

If the Customer or its Personnel or Vessel cause, or allow or contribute to any release or threatened release of any Hazardous Substance or any spill, pollution, contamination or Environmental Harm on the Agility OMSB or the area surrounding the Agility OMSB:

- (a) Agility may perform and complete Remedial Work resulting from the release or threatened release. All of Agility's reasonable costs of the Remedial Work will be charged to the Customer. The Customer must pay those charges levied by Agility, upon Agility issuing a tax invoice to the Customer.; *and*
- (b) the Customer must, at its own cost and as soon as practicable, support Agility to perform and complete Remedial Work to Agility's satisfaction to prevent, mitigate and rectify any damage or potential damage resulting from the release or threatened release.

#### 4.5 Notification of Incidents

- (a) The Customer must notify Agility's safety representative for shore based incidents and the Port Captain for maritime incidents immediately upon the Customer or its Personnel becoming aware of any **Safety Incident** being:
  - (i) any accident, release or threatened release of any Hazardous Substance or any spill, pollution, contamination or Environmental Harm on the Agility OMSB , the area surrounding the Agility OMSB or otherwise affecting the Agility OMSB or the Facilities; or
  - (ii) any circumstances presenting a risk of damage affecting the Agility OMSB or injury to a person within the Agility OMSB .
- (b) For the purpose of this clause:

"**accident**" means any event where damage of any kind is caused to any Vessel, person, property (whether real or personal) or the Environment; and
- (c) If requested by the Company, the Customer or the Vessel Master (if applicable) must provide a detailed report of the Safety Incident. Any such report must be provided to Agility within 48 hours of a request being made or upon request in the event of an Emergency.

#### 4.6 Costs

If the Customer fails to comply with an obligation under this clause 4, Agility, after giving reasonable written notice to the Customer and in addition to its other rights and remedies, may perform or procure the performance of the obligation by itself or by a third party appointed by Agility (at its election) and all reasonable costs incurred by Agility in doing so must be paid by the Customer upon the issue of a tax invoice by Agility in accordance with clause 3.1 as a debt due and payable.

#### **4.7 Indemnity**

- (a) The Customer shall indemnify Agility OMSB Indemnified Parties and must keep Agility OMSB Indemnified Parties indemnified against any and all Claims whatsoever arising out of or in relation to any breach by the Customer or its obligation in this clause 4.
- (b) The Customer will not be liable under this clause 4 to the extent that such liability has been caused by the negligent act or omission of the Agility OMSB Indemnified Parties, the Wilful Misconduct of the Agility OMSB Indemnified Parties or a breach of this Agreement and/or any Law or Government Authorisation by any of the Agility OMSB Indemnified Parties.

### **5. SECURITY AT AGILITY OMSB**

#### **5.1 Induction**

All the Customer's Personnel that visit the Agility OMSB to carry out work either in the Agility OMSB or on a Vessel alongside the wharf, must complete any induction program as required by Agility from time to time. Agility may refuse entry to the Agility OMSB of any person that has not completed a required induction program.

#### **5.2 Right to Exclude People**

- (a) Except with the prior written consent of the Agility, the Customer must not allow any person other than Agility Personnel or Customer Personnel to enter the Agility OMSB.
- (b) Agility may (and may instruct the Customer to) remove from or refuse entry to the Agility OMSB any person including a person who in Agility's opinion is:
  - (i) Engaged in activities which are contrary or detrimental to the interests of Agility;
  - (ii) Not complying with the Handbook and any of Agility's Plans and Policies; or
  - (iii) Guilty of misconduct or is incompetent, negligent or fails to follow Agility's reasonable instructions.

#### **5.3 Site**

- (a) At all times Agility retains possession of the Agility OMSB and the Facilities and has overriding control of the Agility OMSB, the Facilities and all persons within the Agility OMSB, subject to any Licence granted by Agility to the Customer.

- (b) The Customer will not be regarded as having any possessory, proprietary or other interest in the Agility OMSB or any of the Facilities, subject to any Licence granted by Agility to the Customer.

#### **5.4 Safety and Security Levy**

- (a) The Customer and Customer Personnel that visit the Agility OMSB to carry out work either in the Agility OMSB or on a Vessel alongside a wharf at the Agility OMSB will attract a levy (**Safety and Security Levy**) at the rate stipulated by Agility from time to time
- (b) Agility shall record dates and times of Customer Personnel entering and exiting the Agility OMSB.
- (c) Invoicing for the Safety and Security Levy will be done on a monthly basis or at the completion of the Services.

### **6. LIABILITY AND INDEMNITY**

#### **6.1 Release of Agility OMSB Indemnified Parties**

- (a) The Customer will enter, use and depart from the Agility OMSB and use its Facilities at its own risk. Agility will not be liable to the Customer for, and the Customer releases the Agility OMSB Indemnified Parties from, any Claims that may be made by or against or any Liabilities incurred by the Customer, the Customer's Personnel or its Vessels at any time arising out of, or in connection with the use of the Agility OMSB, the Services or Facilities including, and not limited to:
  - (i) Any loss of or damage to any Vessel, plant, equipment or other property;
  - (ii) Any damage, loss, expense or liability in respect of personal injury, disease, illness or death; or
  - (iii) Any Liability arising from environmental damage, pollution or contamination.
- (b) Clause 6.1(a) does not apply to the extent any Liability is caused to by any negligent act or omission of Agility OMSB Indemnified Parties, Wilful Misconduct of Agility OMSB Indemnified Parties, a breach of this Agreement or a breach of any Law or Government Authorisation by any of the Agility OMSB Indemnified Parties.

#### **6.2 Indemnity by the Customer**

Except to the extent that Liability is caused by the Agility OMSB Indemnified Parties' negligent acts or omissions, Wilful Misconduct, breach of this Agreement or any Law or

Government Authorisation, the Customer will be liable for, and will indemnify the Agility OMSB Indemnified Parties against all Liability arising out of or in connection with:

- (a) the performance or non-performance of the Customer's obligations under this Agreement;
- (b) the use by the Customer or Customer Personnel or its Vessels of the Agility OMSB , Services and Facilities;

including any Claim or Liability in respect of any:

- (c) death, injury or occupational disease of any person employed or engaged by the Customer;
- (d) personal injury to or death of any person; or
- (e) loss or destruction of, or injury or damage to, or loss of use of any real or personal property.

### **6.3 Indemnity by Agility**

Agility will indemnify the Customer against all Liability incurred or suffered by the Customer to the extent that such Liability is caused by the negligence or Wilful Misconduct of, or a breach of this Agreement or any Law or Government Authorisation, by Agility or Agility Personnel.

### **6.4 Indemnity Continuing**

Each indemnity in this Agreement is a continuing obligation separate and independent from the indemnifying party's other obligations and survives termination of this Agreement.

### **6.5 Enforcing Indemnity Right**

It is not necessary for an indemnified party to make payment in respect of the Liability before enforcing a right of indemnity conferred by this Agreement.

### **6.6 Consequential Loss**

The Customer agrees to protect, indemnify and hold Agility harmless against any damage or loss:

- (a) which does not arise naturally or in the usual course of things from the performance or non- performance of the Agreement; or
- (b) which constitutes or relates to a loss of revenue, profit or opportunity, loss of goodwill or loss of business reputation, even if such loss arises naturally or in the usual course of things from the performance or non-performance of the Agreement.

## 6.7 Limitation of Agility's Liability

Notwithstanding any other provision of this Agreement

- (a) Subject to clause 6.2, Agility's maximum aggregate liability to the Customer or Customer Personnel is strictly limited to and will not exceed an amount equal to:
  - (i) in respect of any Claim or Liability for which Agility is entitled to be indemnified under insurance, the proceeds of insurance actually received by Agility in respect of that Claim; and
  - (ii) in respect of any Claim or Liability for which Agility does not have insurance, the lessor of or at Agility's option:
    - (A) In the case of goods:
      - (I) The replacement of the goods;
      - (II) The supply of equivalent goods;
      - (III) The repair of the goods;
      - (IV) The payment of the cost of replacing the goods or of acquiring equivalent goods; or
      - (V) The payment of the cost or have the goods repaired
    - (B) In the case of services:
      - (I) The supply of the services again; or
      - (II) The payment of the cost of having the services supplied again.
- (b) Agility shall not be responsible for the safety of any property on any Vessel or the safety of any equipment of a Vessel entering, using or departing from the Agility OMSB, whether the property or equipment remains on board the Vessel or is landed at the Agility OMSB.
- (c) All towage and other services undertaken by the Agility's tugs during the currency of the Agreement (if any) shall at all times be subject to the terms and conditions of *The UK Standard Conditions of Towage and Other Services (Revised 1974)* a copy of which forms Annexure A to the Agreement.
- (d) The Parties agree that Part 1F of the *Civil Liability Act 2002 (WA)* is expressly excluded from application to the Agreement pursuant to Section 4A of that Act.

- (e) Each indemnity in this Agreement is a continuing obligation separate and independent from the Customer's other obligations and survives termination of the Agreement.
- (f) It is not necessary for Agility, or Agility Personnel to incur expense or make payment before enforcing a right of indemnity conferred by the Agreement.

## **6.8 No Liability for Delay**

Notwithstanding anything contained in this Agreement, Agility does not make any representation, warranty or undertaking to the Customer in relation to the timing of access to, and the availability of, the Agility OMSB or the Services and has no liability or will have no liability whatsoever to the Customer for any Liability or Claim arising out of or caused directly or indirectly by, or in connection with demurrage or delay, including in the docking, loading and unloading of any Vessel at the Agility OMSB or arising in any way from Vessel congestion or traffic in the Port.

## **7. MASTER'S ACKNOWLEDGEMENTS**

Prior to each entry to the Agility OMSB, the Customer must procure the Vessel's Master to acknowledge in the manner required by Agility from time to time, the receipt by the Vessel's Master of the Agility OMSB Terms and Conditions, the Agility Handbook and the Agility OMSB Plans and Policies.

## **8. INSURANCE**

### **8.1 General Insurance**

- (a) Unless otherwise agreed with Agility in writing, the Customer must effect and maintain at its own expense, throughout the Term or whilst using Agility OMSB, the insurances and extensions (**Customer Insurances**) as set out in this Clause 8.
- (b) Each of the Customer Insurances must:
  - (i) Be primary in that the insurer waives any rights it may have to seek contribution from any other insurer of Agility;
  - (ii) Be taken out with a reputable insurer authorised under the *Insurance Act 1973* (Cth);
  - (iii) Note Agility as a principal or co-insured;
  - (iv) Not exclude any contractual liability of the Customer to indemnify the Agility OMSB Indemnified Parties under this Agreement.
- (c) The Customer must ensure that its subcontractors have the benefit of, or effect and maintain insurance policies similar to, the Customer Insurances.

- (d) At Agility's request, the Customer must provide Agility with written evidence of the Customer Insurances including certification of their currency and coverage.

## **8.2 Hull and Machinery Insurance**

- (a) Any Vessel entering the Port for the purposes of using or visiting the Agility OMSB must at all times during its visit or use of the Agility OMSB or Facilities maintain and keep current throughout the relevant visit to the Port and during the vessel's use in connection with the Operator's activities in the Port, marine hulls insurance in accordance with the International Hull clauses (01/11/03) and P&I Insurance with an International Group P&I Club or in accordance with the Institute Protection and Indemnity Clauses Hulls - Time (20/7/87):
  - (i) including coverage for 4/4ths collision liability, pollution, spillage and wreck removal; and
  - (ii) for an amount not less than \$50,000,000 for each and every occurrence.
- (b) It is a precondition of the Vessel being allowed to enter the Port and the Agility OMSB that:
  - (i) Agility is informed of the name of the Customer's or the Vessel Owner's P&I Club; and
  - (ii) on request Agility be provided with proof of a current P&I Insurance policy.
- (iii) proof of a current hull and machinery insurance is provided to Agility.
- (c) The Customer warrants that, for the Term, the full amount of hull and machinery insurance on the Vessels used by the Customer will not change without Agility's prior written consent, which shall not be unreasonably withheld.

## **8.3 Maintenance of Insurances**

- (a) If the Customer fails to arrange and keep any of the insurances provided for under the provisions of clause 8 in the manner described, Agility will notify the Customer whereupon the Customer will rectify the position within 3 Business Days, failing which Agility will have the right to suspend all Services to the Customer and direct any Vessel failing to comply with the insurance requirements to immediately depart from the Agility OMSB and the Port without prejudice to any other rights or remedies that Agility may have under this Agreement and the Customer and the Vessel must comply with that direction.

- (b) Except with Agility's consent, the Customer must not do or allow to be done anything in or near the Agility OMSB, as a result of which any of the Customers Insurances in respect of the Agility OMSB taken out by the Customer may be prejudiced, invalidated or avoided.

## **9. WRECK REMOVAL**

Irrespective of any other provision of this Agreement to the contrary:

- (a) Agility shall have the right to procure the raising, removal or destruction of any Vessel sunk, stranded or abandoned in, presenting a danger to, or obstructing access to, the Agility OMSB and its Facilities; and
- (b) the Customer shall indemnify and hold harmless and make good and compensate Agility for any and all costs and expenses incurred , and against all Claims brought or instituted by or on behalf of, any Person in relation to any operation to raise, remove or destroy any Vessel or part of a Vessel.

## **10. FORCE MAJEURE**

### **10.1 Notice of Force Majeure Event**

If a Party (the **Affected Party**) is prevented from, or delayed in, performing under the Agreement by a Force Majeure Event:

- (a) the Affected Party must give the other Party written notice of that fact within 5 Business Days after the start of the Force Majeure Event; and
- (b) the obligations of the Parties under the Agreement, other than an obligation to pay moneys outstanding prior to the occurrence of the Force Majeure Event, are suspended to the extent to which they are affected by the Force Majeure Event as long as the Force Majeure Event continues.

### **10.2 Mitigation of event**

The Affected Party must use its best endeavours to remove, or relieve any effects of, any Force Majeure Event and to minimise the delay in the performance of the Affected Party's obligations under the Agreement caused by a Force Majeure Event. However, this does not require a Party to settle any industrial dispute in any way it does not want to.

### **10.3 Cessation of Force Majeure Event**

When the Affected Party's obligations are no longer affected by the Force Majeure Event:

- (a) the Affected Party must recommence performance of all its obligations under the Agreement as soon as practicable; and
- (b) Agility shall be relieved of all Liability for loss, injury or damage suffered by the Customer or Customer Personnel during the period of the Force Majeure Event.

## **11. TERMINATION**

### **11.1 Termination by notice**

- (a) Agility may, at any time and for any reason, terminate the Agreement or any part of it by giving the Customer not less than 10 days' notice (**Notice Period**) of its intention to do so.
- (b) The Agreement terminates on the day immediately after the expiry of the Notice Period.

### **11.2 Termination without notice**

Notwithstanding any other clause in this Agreement, Agility may by written notice immediately terminate the Services under the Agreement if:

- (a) the Customer fails to perform any of its obligations under the Agreement;
- (b) Agility is likely to have a conflict of interest in the performance of any of its obligations under the Agreement;
- (c) Agility is in financial distress; or
- (d) the Customer becomes subject to an Insolvency Event.

### **11.3 Obligations upon termination or expiry**

Upon the termination or expiry of the Agreement, the Customer must:

- (a) immediately take all possible action to mitigate any Liability incurred by it as a result of the termination or expiry;
- (b) take any other action reasonably required by Agility in relation to the termination or expiry;
- (c) pay for the Services provided by Agility to the Customer as at the date of termination or expiry, less any payments previously made by the Customer in respect of those Services;
- (d) pay to Agility the reasonable out-of-pocket costs and expenses that Agility has incurred up to and including the date of termination or expiry and any other costs reasonably incurred by reason of the termination or expiry;
- (e) immediately return to Agility any Confidential Information belonging to Agility; and
- (f) return to Agility any items (including Agility Equipment) provided to the Customer or to the Customer's Personnel by Agility.

#### 11.4 Default

- (a) In this clause 11:

**Financial Default** means a failure by a party to pay any undisputed amounts payable under this Agreement by the due date for payment or a party suffering an Insolvency Event; and

**Other Default** means a breach of an obligation of the Customer or Agility under this Agreement, not being a Financial Default.

- (b) If a Financial Default occurs, the non-defaulting party may (without limiting other remedies available to it), give notice to the defaulting party of the occurrence of a Financial Default and if the defaulting party fails to cure that Financial Default within 7 days of receiving notice:
- (i) In the case of the Customer being the defaulting party, Agility may suspend the provision of any Services until such time as the Financial Default is cured; and/or
  - (ii) The non-defaulting party may terminate this Agreement.
- (c) If an Other Default occurs, the non-defaulting party may (without limiting other remedies available to it) give notice to the defaulting party of the occurrence of an Other Default and if the defaulting party fails to cure that Other Default within 28 days of receiving the notice:
- (i) In the case of the Customer being the defaulting party, Agility may suspend the provision of any Services until such time as the Other Default is cured; and/or
  - (ii) The non-defaulting party may terminate this Agreement.
- (d) On termination of this Agreement, nothing will release or discharge a party from Liability in relation to anything occurring prior to the date of termination.

#### 11.5 Disputes

- (a) Where a dispute arising out of or in connection with this Agreement between the parties (**Dispute**), a party may give notice to the other parties initiating a dispute resolution process described in this clause 11) in respect of the Dispute (**Dispute Notice**).
- (b) This Dispute Notice must:
- (i) State that the notice is given under this sub-clause;
  - (ii) Describe the nature of the Dispute; and

- (iii) Nominate a representative of the party who is authorised to negotiate and settle the Dispute on the party's behalf.
- (c) Each other party must within 5 Business Days after receipt of a Dispute Notice nominate in writing to the other parties a representative authorised to negotiate and settle the Dispute on its behalf.
- (d) The parties' representatives must negotiate in good faith with a view to resolving the Dispute.
- (e) If the Dispute is not resolved within 30 days from the date it is referred to the Parties' representatives, then either Party may by written notice to the other Party refer the dispute to arbitration.
- (f) The arbitral tribunal will consist of:
  - (i) a single arbitrator to be mutually agreed between the Parties; or
  - (ii) in the event that the Parties are unable to agree on a single arbitrator within 3 days of the dispute being referred to arbitration, three arbitrators one of whom shall be chosen by Ability, one by the Customer and a third by the two so chosen.
- (g) The arbitration shall be held in Perth, Western Australia in the English language and in accordance with Arbitration Rules of the Australian Centre for International Commercial Arbitration..
- (h) The award of the arbitration shall be final and binding on the Parties.
- (i) Nothing in this clause restricts or limits the right of either Party to obtain interlocutory relief or to immediately terminate this Agreement where the Agreement provides such a right.
- (j) The Customer must make any Claim in relation to this Agreement within the earlier of:
  - (i) 6 months of the provision of Services to which the Claim relates; or
  - (ii) 6 months after the expiry of the Term,after which the Customer acknowledges and agrees that Agility's liability for that Claim is extinguished.

## **12. CONFIDENTIALITY**

### **12.1 Confidential Information**

Each party must keep confidential the Confidential Information and must not disclose or permit the disclosure of such information to any other person.

## **12.2 Permitted Disclosure**

This Agreement does not prohibit the disclosure of Confidential Information by a party if:

- (a) The other party has consented in writing to the disclosure of the relevant Confidential Information;
- (b) The disclosure is specifically permitted by this Agreement;
- (c) The disclosure of Confidential Information is to an employee, subcontractor, agent or representative who needs it for the purposes of this Agreement and the party disclosing the Confidential Information ensures that the relevant employee, subcontractor, agent or representative understands and complies with the terms of this clause;
- (d) The disclosure is to a professional adviser in order for it to provide advice in relation to matters arising under or in connection with this Agreement and the party disclosing the Confidential Information ensures that the professional adviser understands and complies with the terms of this clause;
- (e) Required by any applicable Law or the listing rules of any recognised stock exchange if the disclosure is made in accordance with clause 12.3.

## **12.3 Disclosures required by Law**

If a party must disclose Confidential Information by Law, that party must, where reasonably possible, before doing so:

- (a) give the other party:
  - (i) notice and details of the proposed disclosure;
  - (ii) reasonable opportunity to take any steps the other party considers necessary to protect the confidentiality of that information; and
  - (iii) any assistance reasonably required by the other party to protect the confidentiality of that information; and

## **12.4 Agility May Disclose**

Agility may disclose Confidential Information to the Department of Transport with the consent of the Customer such consent of the Customer not to be unreasonably withheld provided that the Department of Transport agree to comply with Agility's confidentiality obligations under this clause 12.

## **13. AMENDMENT AND ASSIGNMENT**

### **13.1 Amendment**

This Agreement may not be modified, varied, amended, supplemented, replaced or novated

other than by an instrument in writing signed by an authorised representative of each of the parties.

### **13.2 Assignment and Novation**

- (a) The Customer must not novate or assign (as the case may be) this Agreement or any right or obligation under its terms without the prior written consent of Agility, which shall not be unreasonably withheld.
- (b) Agility may novate or reassign this Agreement or any right under its terms without the prior written consent of the customer, provided that the assignee agrees to be bound by the terms of this Agreement.

### **14. Notices**

- (a) A notice, consent or other communication under this Agreement is only effective if it is in writing, signed and either left at the address of the other party and marked to the attention of the Agility Representative or Customer Representative (as the case may be) or sent by mail, fax or email to the Agility Representative or Customer Representative (as the case may be).
- (b) A notice, consent or other communication that complies with this clause shall be deemed as given and received:
  - (i) if sent by mail, 4 Business Days after it is posted;
  - (ii) if sent by fax, when the addressee actually receives it in full and in legible form; and
  - (iii) if sent by email, at the time shown in the delivery confirmation report generated by the sender's email system which indicates that the email was sent to the recipient's email address.
- (c) A party's postal address, email address and fax number are those of their respective Representatives or as last notified by the relevant party.

### **15. GST**

- (a) Unless expressly included, all sums of money or other considerations referred to or quoted in the Agreement are exclusive of GST.
- (b) To the extent that any supply made by Agility to the Customer under or in connection with the Agreement is a taxable supply and a tax invoice has been provided to the recipient of the supply, the Customer must pay, in addition to the consideration to be provided under the Agreement for that supply (unless it expressly includes GST), an amount equal to the amount of that consideration (or its GST exclusive market value) multiplied by the rate at which GST is imposed in respect of the supply.

- (c) If GST is payable, Agility will give the Customer a tax invoice for the supply.
- (d) The amount of GST payable in accordance with this clause 14 must be paid at the same time and in the same manner as the consideration otherwise payable for the supply is provided.

## **16. GENERAL**

### **16.1 Non-Waiver**

The failure or delay of any party at any time to require performance of any provision or to resort to any remedy provided under this Agreement shall in no way amount to a waiver of its rights to do so.

### **16.2 Governing Law**

- (a) This Agreement is governed by the law of the State of Western Australia and the applicable laws of the Commonwealth of Australia.
- (b) The Customer and Agility irrevocably and unconditionally submit to the non-exclusive jurisdiction of the Courts of Western Australia.

### **16.3 Relationship of Parties**

- (a) The relationship between the parties is one of independent contractors and the each party must not represent itself, and must ensure that its Personnel do not represent themselves, as being agents, servants, employees or representatives of any other party.
- (b) Nothing in this Agreement is or will be taken as constituting a partnership or joint venture between the parties or otherwise giving rise to sharing risks or rewards or constituting a party the agent, servant, employee or representative of the other party.

### **16.4 Further acts**

The parties will promptly do and perform all acts and things and execute all documents as may from time to time be required, for the purposes of or to give effect to the terms of this Agreement.

### **16.5 Costs**

Each Party must bear its own costs arising out of the negotiation, preparation and signing of this Agreement.

### **16.6 Severability**

If a clause or a part of a clause of this Agreement shall be or be determined to be illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of the Agreement is not affected.

## **16.7 Survival of provisions**

Clauses 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 17 and 18 survive the expiry or termination of this Agreement and the rights and obligations of the parties set forth in those clauses, and any right or obligation of a party in this Agreement which, by its express terms or nature and context is intended to survive termination or expiration of this Agreement, will survive any such expiration or termination.

## **16.8 Representations and Warranties**

- (a) The Customer acknowledges and declares that by entering into this Agreement, the Customer has relied solely on its own inspection, inquiry, perusal and opinion in relation to the suitability of the Agility OMSB , its Facilities, the access channel to the Agility OMSB , the berths at the Agility OMSB and has not relied on any promise, representation, warranty, condition, undertaking or other conduct that may have been given by or on behalf of Agility or any person purporting to act on behalf of Agility in respect of the suitability of the Agility OMSB , or Agility's property or facilities or any use required by the Customer and all warranties (if any) implied by Law are hereby so far as legally possible expressly excluded.
- (b) Each party warrants and represents that:
  - (i) it is validly existing under the Laws of its place of registration, incorporation or establishment;
  - (ii) its signing, delivery and performance of this Agreement will not constitute:
    - (A) a violation of any judgment, order or decree;
    - (B) a material default under any material contract by which it or any of its assets are bound; or
    - (C) an event that would, with notice or lapse of time, or both, constitute such a default;
  - (iii) it has the requisite power and authority to enter into this Agreement and to carry out the obligations contemplated by this Agreement; and
  - (iv) its obligations under this Agreement are valid and binding and enforceable against it in accordance with their terms.

## **17. SUBCONTRACTORS**

- (a) Agility may subcontract the performance of any of the Services to be provided under this Agreement without the prior consent of the Customer.

- (b) The Customer agrees that where it requires the use of services other than those provided by Agility (**Third Party Services**), such Third Party Services shall be arranged by Agility subject to an administrative fee of 15% unless otherwise agreed.
- (c) The Customer agrees to protect, indemnify and hold harmless Agility, against all Liabilities that may accrue against or be suffered by Agility relating to the use of Third Party Services.

## **18. ANTI-BRIBERY AND CORRUPTION**

- (a) Each party with regard to operations and/or activities under this Agreement:
  - (i) warrants that such party and its Related Bodies Corporate and their respective directors, officers, employees and personnel have not made, offered, or authorised; and
  - (ii) covenants that such party and its Related Bodies Corporate and their respective directors, officers, employees, and personnel will not make, offer, or authorise, any payment, gift, promise or other advantage, whether directly or through any other person or entity, to or for the use or benefit of any public official, any political party, political party official, or candidate for office, or any other individual or entity,

where such payment, gift, promise or advantage would violate such warranty, or such covenant, or the Anti-Bribery Laws and Obligations applicable to such party.

- (b) In addition each party with regard to operations and/or activities under this Agreement:
  - (i) warrants that such party and its Related Bodies Corporate and their respective directors, officers, employees and personnel have complied with; and
  - (ii) covenants that such party and its Related Bodies Corporate and their respective directors, officers, employees, and personnel will comply with the Anti-Bribery Laws and Obligations applicable to such party.