



## DMSB TERMS AND CONDITIONS

### VERSION – AUGUST 2018

#### 1 DMSB AND SERVICES

##### 1.1 Access and Services

During the Term, ASCO will provide the User:

- (a) access to the DMSB; and
- (b) the Services,

on these Terms and Conditions and in accordance with the DMSB Handbook.

##### 1.2 DMSB Handbook

The User:

- (a) agrees to comply with the DMSB Handbook; and
- (b) acknowledges that, in case of any inconsistency between these Terms and Conditions and the DMSB Handbook, these Terms and Conditions will apply.

##### 1.3 Availability of DMSB and requested Services

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

##### 1.4 Darwin Port

The User acknowledges that the DMSB forms a part of the Port and the User must comply at all times with the lawful directions of the Harbourmaster at the Port and the DP relating to the access to and use of the Port.

#### 2 CHARGES AND PAYMENT

##### 2.1 Fees and Charges

- (a) The User must pay the Fees and Charges for the use of DMSB and the Services.
- (b) The User must pay directly to DP any charges applicable at the Port which are levied by the DP.
- (c) ASCO will issue a tax invoice for all amounts payable by the User under these Terms and Conditions.
- (d) If applicable, ASCO will endeavour to issue invoices within 7 days of the Vessel departure. Otherwise, ASCO will issue invoices monthly in arrears.
- (e) The User must pay each invoice within 28 days of the date of the invoice. ASCO is entitled to ask for security from the User to ensure payment and the User must comply with that request.
- (f) Subject to clause 2.1(g), if any amount payable under these Terms and Conditions by the User to ASCO is not paid by the due date, ASCO may charge and the User must pay interest on any outstanding amounts at the Interest Rate calculated daily and compounded monthly as applied to the amount outstanding from and including the original due date of that amount up to and including the date that payment is received.
- (g) Where an invoice is disputed by the User and cannot be resolved before the invoice is due for payment, the User must pay the undisputed portion of the invoice but may withhold payment of the disputed portion provided that the User informs ASCO in writing of the User's reasons for withholding that portion.
- (h) If, upon resolution of the dispute, ASCO is found to have been entitled to the disputed portion of an invoice:
  - (i) the User must pay the withheld amount within 5 Business Days after the dispute is resolved; and
  - (ii) ASCO may charge and the User must pay interest on that disputed portion in accordance with clause 2.1(f).



- (i) If, upon resolution of the dispute, it is found that ASCO was not entitled to the disputed portion of the invoice, ASCO will reissue an invoice (or appropriate adjustments thereof) for the correct amount to the User and no interest shall be payable on the disputed portion.

## 2.2 Changes to Fees and Charges

- (a) ASCO may review and vary the Fees and Charges from time to time with the approval of the Darwin Port.
- (b) ASCO will publish, on its website, any variation to the Fees and Charges at least 30 days prior to the date on which the variation is to become effective.

## 3 USER OBLIGATIONS

### 3.1 General

- (a) The User must, and must ensure that, all of the User's Personnel at the DMSB:
  - (i) at all times comply with:
    - (A) all applicable Laws;
    - (B) all DMSB Plans and Policies; and
    - (C) all Government Authorisations, which apply to the User or the User's Personnel's access to, or use of, the DMSB or the Services;
  - (ii) complete ASCO's safety induction and visitors' site orientation programs before entering the DMSB;
  - (iii) comply with any reasonable and lawful directions of ASCO;
  - (iv) ensure that any Facilities used by the User are kept and maintained in good condition (having regard to their age and general condition prior to the User's use) and ensure that any Facilities used are left in a good, clean and operational condition after use;
  - (v) do not cause any damage to the Facilities or anything else in the DMSB or the Port;
  - (vi) take measures necessary to protect people, property and the Environment at or around the DMSB;

- (vii) use reasonable endeavours not to interfere with any of the activities of ASCO or any other person at the DMSB or the access channel to the DMSB;

- (viii) do not otherwise act in a manner which disrupts or adversely affects the operations and activities of the DMSB; and

- (ix) keep secure from theft, loss or damage any Vessel, tools, equipment, material or other things brought to the DMSB by the User or its Personnel.

- (b) ASCO will notify the User of any changes made to the DMSB Plans and Policies.

- (c) To the extent that the User is required to comply with a Government Authorisation issued to or held by ASCO, ASCO will notify the User of that Government Authorisation.

### 3.2 Hazardous Substances

- (a) The User and its Personnel must not, without the prior written consent of ASCO, cause or allow any Hazardous Substances to be brought onto, produced on, transported to or from, treated, stored or disposed of at, the DMSB.
- (b) ASCO may impose charges to recover reasonable extra costs incurred and substantiated (including costs for labour delay time, special insurance and handling procedures required by Law or industry good practice) in connection with any Hazardous Substances brought onto the DMSB. The User must pay those charges levied by ASCO upon ASCO issuing a tax invoice to the User. ASCO will provide to the User the supporting information necessary to verify the costs invoiced.

### 3.3 Pollution, Contamination and Environmental Harm

- (a) The User and its Personnel must not cause or allow any spills, pollution, contamination or any environmental harm of any kind to occur in or around the DMSB.
- (b) If the User or its Personnel cause, allow or contribute to any release or threatened release of any Hazardous Substances or any spill, pollution, contamination or environmental harm on the DMSB or the area surrounding the DMSB, the User must, at its own cost and as soon as practicable, perform and complete Remedial Work to ASCO's satisfaction to prevent, mitigate and



rectify any damage or potential damage resulting from the release or threatened release provided that ASCO will provide support to the User, if required. All ASCO's reasonable and substantiated costs of doing so will be charged to the User. The User must pay those charges levied by ASCO upon ASCO issuing a tax invoice to the User. ASCO will provide to the User the supporting information necessary to verify the costs invoiced.

### 3.4 Notification of incidents

- (a) The User must notify ASCO immediately upon the User or its Personnel becoming aware of any **Safety Incident** being:
  - (i) any accident, incident, damage, spill, pollution, contamination or environmental harm of any kind affecting the DMSB or the Facilities; or
  - (ii) any circumstance presenting a risk of damage affecting the DMSB or injury to a person within the DMSB.
- (b) For the purposes of this clause:
  - (i) "accident" means any event where damage of any kind is caused to any Vessel, person, property (whether real or personal) or the Environment; and
  - (ii) "incident" means any event occurring, which gives rise to a hazardous or potentially hazardous situation.
- (c) If requested by ASCO, the User or the Vessel Master (if applicable) must provide a detailed report of the Safety Incident. Any such report must be provided to ASCO within 48 hours of a request being made or upon request in the event of an Emergency.

### 3.5 Costs

If the User fails to comply with an obligation under this clause 3, ASCO, after giving reasonable written notice to the User 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 ASCO (at its election) and all reasonable and substantiated costs incurred by ASCO in doing so must be paid by the User upon the issue of a tax invoice by ASCO in accordance with clause 2.1 as a debt due and payable. ASCO will provide to the User supporting information necessary to verify the costs invoiced.

### 3.6 Indemnity

- (a) The User indemnifies ASCO Indemnified Parties and must keep ASCO Indemnified Parties indemnified against all Liability of any kind or nature whatsoever arising out of any breach by the User of its obligations in this clause 3.
- (b) The User will not be liable under this clause 3 to the extent that such liability has been caused or contributed to by the negligent act or omission of ASCO Indemnified Parties, a breach of these Terms and Conditions, Wilful Misconduct of ASCO Indemnified Parties or a breach of any Law or Government Authorisation by any of the ASCO Indemnified Parties.

## 4 SECURITY

### 4.1 Induction

All Personnel that visit the DMSB to carry out work, either in the DMSB or on a Vessel alongside the wharf, must complete the induction program for the DMSB. ASCO may refuse entry to the DMSB of any person that has not completed the induction program required by ASCO.

### 4.2 Right to exclude people

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

### 4.3 Site

- (a) At all times, ASCO retains possession of the DMSB and the Facilities and overriding control of the DMSB, the Facilities and all persons within the DMSB.
- (b) The User will not be regarded as having any possessory, proprietary or other interest in the DMSB or any of the Facilities.



## 5 LIABILITY AND INDEMNITY

### 5.1 Release of ASCO

- (a) The User will enter and use the DMSB, Services and Facilities at its own risk. ASCO will not be liable to the User for, and the User releases the ASCO Indemnified Parties from, any Liability that may be made by or against or incurred by the User, the User's Personnel or the Vessel at any time arising out of, or in connection with these Terms and Conditions or the use of the DMSB, Services or Facilities including:
  - (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 5.1(a) does not apply to the extent any Liability is caused or contributed to by the negligent act or omission of ASCO Indemnified Parties, Wilful Misconduct of ASCO Indemnified Parties, a breach of these Terms and Conditions or a breach of any Law or Government Authorisation by any of the ASCO Indemnified Parties.

### 5.2 Indemnity by the User

Except to the extent that Liability is caused by the ASCO Indemnified Parties' negligent acts or omissions, Wilful Misconduct, breach of these Terms and Conditions, any Law or Government Authorisation, the User will be liable for, and will indemnify the ASCO Indemnified Parties against all Liabilities arising out of or in connection with:

- (a) the performance or non-performance of the User's obligations under these Terms and Conditions;
- (b) the use by the User or its Personnel of the DMSB, Services and Facilities, including any Claim in respect of any:
  - (c) death, injury or occupational disease of any person employed or engaged by the User;
  - (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.

### 5.3 Indemnity by ASCO

ASCO must indemnify the User against all Liability incurred or suffered by the User to the extent that such Liability is caused by:

- (a) the negligence or Wilful Misconduct of; or
- (b) a breach of these Terms and Conditions, any Law or Government Authorisation by, ASCO or ASCO's Personnel.

### 5.4 Indemnity continuing

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

### 5.5 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 these Terms and Conditions.

### 5.6 Exclusion of consequential loss

- (a) Subject to clause 5.6(b), neither the User nor the ASCO Indemnified Parties will be liable to each other for:
  - (i) indirect or consequential loss or damage of any kind; or
  - (ii) loss of business revenue, loss of profits, failure to realise expected profits or savings or other economic losses,

whether arising in contract, tort (including negligence), under any statute or otherwise arising out of or in any way connected to these Terms and Conditions.

- (b) If:
  - (i) but for clause 5.6(a), the User (**Insured Party**) would have had a liability to any of the ASCO Indemnified Parties (**Other Party**); and
  - (ii) but for clause 5.6(a), insurance proceeds would have been paid to the Insured Party under a policy of insurance required to be effected and maintained under these Terms and Conditions in respect of that liability or a portion of that liability (**Insured Liability**),

the Insured Party will remain liable to the Other Party for the Insured Liability despite clause 5.6(a).



- (c) For the avoidance of doubt, these Terms and Conditions (including this clause 5.6) in no way limit or affect the liability of a person (including a Vessel) under the *Darwin Port Act* (NT).
- (d) The exclusion of consequential loss set out in this clause 5.6 shall apply only to the liability of the User to ASCO Indemnified Parties in connection with these Terms and Conditions and shall not limit the liability of any other third party, including any contractor or sub-contractor of the User, to the ASCO Indemnified Parties.

### 5.7 Limitation of ASCO's Liability

Notwithstanding any other provision of these Terms and Conditions, ASCO's maximum aggregate liability to the User or User's Personnel for all Liability arising out of or in connection with the DMSB or these Terms and Conditions (whether under contract, in tort, including negligence, under statute or otherwise at law) is limited to and will not exceed an amount that is equal to:

- (a) in respect of Claims for which ASCO is entitled to be indemnified under any insurance effected by ASCO or required to be effected by ASCO pursuant to these Terms and Conditions (or would have been entitled to be indemnified if such a policy were effected, not cancelled, renewed or reinstated), the proceeds of insurance actually received by ASCO (or would have been received by ASCO had the required insurance been in effect) in respect of that Claim; and
- (b) in respect of Claims for which ASCO does not have an insurance policy or is not required to have an insurance policy under these Terms and Conditions:
  - (i) for all Claims made during the first 12 months of the Term (other than Claims arising under an Application for Berth (Single Visit)), the total amount of Fees and Charges paid by the User under these Terms and Conditions for the Services provided by ASCO in the month immediately preceding the month in which the User first notifies ASCO of that Claim (or if there are no Fees and Charges paid in that month, then the most recent month in which Fees and Charges were paid) multiplied by 12;
  - (ii) for all Claims made on or after the first 12 months of the Term (other than Claims arising under an Application for Berth (Single Visit)), the total amount of Fees and Charges paid by the User under

these Terms and Conditions for a 12 month period immediately preceding the date on which the User first notifies ASCO of that Claim; and

- (iii) for all Claims arising under an Application for Berth (Single Visit), the total amount of Fees and Charges paid by the User under these Terms and Conditions in respect of that visit multiplied by 12.

### 5.8 No liability for delay

Notwithstanding anything contained in these Terms and Conditions, ASCO does not make any representation, warranty or undertaking to the User in relation to the timing of access to, and the availability of, the DMSB or the Services and has no liability or will have no liability whatsoever to the User 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 and loading of any Vessel at the DMSB or arising in any way from Vessel congestion or traffic in the Port.

## 6 INSURANCE

### 6.1 General insurance

- (a) The User must effect and maintain throughout the Term at its own expense the insurances set out in Schedule 1 and such insurance policies must cover and include the 'Extensions' listed next to each insurance as set out in Schedule 1.
- (b) Each of the User's insurance policies specified in Schedule 1 must:
  - (i) to the extent of the indemnities provided by the User under these Terms and Conditions, be primary in that the insurer waives any rights it may have to seek contribution from any other insurer of ASCO or DP (where applicable);
  - (ii) be taken out with a reputable insurer authorised under the *Insurance Act 1973* (Cth) and with a Standard and Poors Rating of at least A- or an equivalent rating from another internationally recognised agency reasonably acceptable to ASCO;
  - (iii) where specified in Schedule 1, note ASCO and DP as principal; and
  - (iv) not exclude any contractual liability of the User to indemnify the ASCO Indemnified Parties under these Terms and Conditions.
- (c) The User must ensure that its subcontractors have the benefit of, or effect and maintain insurance policies



similar to, the insurance policies that the User is required to effect and maintain under these Terms and Conditions.

- (d) To the extent that the User and its subcontractors maintain insurance coverage in excess of the requirements of clause 6.1(a), ASCO is entitled to the benefit of those excess insurances.
- (e) At ASCO's request, the User must provide ASCO with written evidence of the insurance policies that the User is required to effect and maintain under these Terms and Conditions, including certification of their currency and coverage.

## 6.2 Protection & Indemnity insurance

- (a) All Vessels entering the Port or the DMSB must at all times during its visit be insured for P&I risks with a P&I Club which is a member of the International Group of P&I Clubs covering legal liability to third parties in respect of personal injury, disease, illness or death of any person and loss of, damage to or resulting loss of use of, real or personal property arising from the User or its Personnel's ownership, management or operation of Vessels entering the Port and the DMSB including the pollution risks set out in clause 3, collision liability and liability to crew at common law.
- (b) It is a precondition of the Vessel being allowed to enter the Port and the DMSB that:
  - (i) proof of a current P&I policy is provided to ASCO; and
  - (ii) ASCO is informed of the name of the User's or the Vessel owner's P&I Club.
- (c) The User must effect and maintain (or if the User does not own the Vessel, the User must procure the Vessel's owner to effect and maintain) throughout the Term P&I insurance in respect of the pollution risks set out in clause 3 above with a minimum sub-limit for the insurance cover of US\$500,000,000 in respect of any one pollution occurrence, with a P&I Club which is a member of the International Group of P&I Clubs and undertakes to provide written evidence of this cover to ASCO upon request to do so.

## 6.3 Hull and Machinery Insurance

- (a) Any Vessel entering the Port or DMSB must at all times during its visit have hull and machinery insurance on terms equivalent to the Institute Time Clauses.

- (b) It is a precondition of the Vessel being allowed to enter the Port and the DMSB that proof of a current hull and machinery insurance is provided to ASCO.
- (c) The User warrants that, for the Term, the full amount of hull and machinery insurance on the Vessels used by the User will not change without ASCO's prior written consent, which shall not be unreasonably withheld.

## 6.4 Maintenance of insurances

- (a) If the User fails to arrange and keep any of the insurances provided for under the provisions of this clause 6 in the manner described, ASCO will notify the User whereupon the User will rectify the position within 3 Business Days, failing which ASCO will have the right to suspend all Services to the User and direct any Vessel failing to comply with the insurance requirements to immediately depart from the DMSB and the Port without prejudice to any other rights or remedies that ASCO may have under these Terms and Conditions and the User and the Vessel must comply with that direction.
- (b) Except with ASCO's consent, the User must not do or allow to be done anything in or near the DMSB, as a result of which any insurances in respect of the DMSB taken out by the User may be prejudiced, invalidated or avoided.

## 6.5 ASCO insurances

- (a) ASCO must at its own expense obtain and maintain during the Term the following insurance policies:
  - (i) Public & Products Liability Insurance for an amount of not less than AUD\$20,000,000.00;
  - (ii) Employers' Liability/Workers' Compensation Insurance (Northern Territory) for an amount not less than the statutory minimum;
  - (iii) Environmental Impairment Liability (Pollution) Insurance for AUD\$20,000,000.00;
  - (iv) Comprehensive Motor Vehicle Insurance covering motor vehicles owned or used by ASCO at the DMSB for an amount of not less than AUD\$5,000,000.00; and
  - (v) Property and Plant & Equipment Insurance covering plant and equipment owned or used by ASCO to provide the Services at the DMSB for its full replacement value.
- (b) ASCO will provide to the User, at the User's request, a copy of the certificate of currency of insurances referred to in this clause.



- (c) Each of the ASCO insurance policies specified in this clause must be taken out with a reputable insurer authorised under the Insurance Act 1973 (Cth) and with a Standard and Poors Rating of at least A- or an equivalent rating from another internationally recognised agency
- (d) ASCO must ensure that any subcontractors it engages in relation to the Services have the benefit of or maintain insurances similar to the insurances that ASCO is required to obtain and maintain under this clause.
- (e) Except with the User's consent, ASCO must not do or allow to be done anything which may cause any insurances in respect of the DMSB taken out by ASCO to be prejudiced, invalidated or avoided.

## 7 FORCE MAJEURE

- (a) If ASCO is prevented or delayed in providing the Services and access to and usage of the DMSB by any cause whatsoever that is not within the control of ASCO, including damage to, or blockages or obstructions of, the navigational channel, approach or berths at the Port, the DMSB or any Facilities, then ASCO will be relieved from performing its obligations under these Terms and Conditions and will not be liable for any damage or delay arising on account of failure or delay due to such cause. ASCO will use reasonable endeavours to mitigate the impact of that failure or delay in performance of its obligations and will keep the User updated in relation to the measures it is taking and when it will be able to resume performance.
- (b) If the User is prevented from performing its obligations under these Terms and Conditions by reason of Force Majeure, the User must forthwith give to ASCO notice of the occurrence of the event of Force Majeure and the particulars thereof. The obligations of the User, so far as they are affected by that event of Force Majeure, will be suspended during but no longer than, the continuation of that Force Majeure and no event of default entitling any other party to determine the rights, obligations and privileges conferred by these Terms and Conditions will be held to have occurred. The User must use all reasonable endeavours to remedy or circumvent the effect of any event of Force Majeure and comply with its obligations under these Terms and Conditions provided that the User is not obliged to settle an industrial dispute falling within the meaning of Force Majeure on terms not satisfactory to the User.
- (c) No event of Force Majeure however occurring will affect the obligation of the User to make a money payment under these

Terms and Conditions when such payment falls due.

- (d) In this clause **Force Majeure** means any event or circumstance not within the control of the User and which by exercise of reasonable care, the User is not able to prevent or overcome but does not include any industrial dispute solely affecting the User or the User's Personnel's workforce.

## 8 DEFAULT

- (a) In this clause 8:

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

**Other Default** means a breach of an obligation of the User or ASCO under these Terms and Conditions, 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 the notice:
  - (i) in the case of the User being the defaulting party, ASCO 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 these Terms and Conditions.
- (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 User being the defaulting party, ASCO 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 these Terms and Conditions.
- (d) On termination of these Terms and Conditions, nothing will release or discharge a party from Liability in relation to anything occurring prior to the date of termination.

## 9 DISPUTES

- (a) Where a dispute arises out of or in connection with these Terms and Conditions between the parties (**Dispute**), a party may give notice to the other parties initiating a dispute resolution process described in this



clause 9 in respect of the Dispute (**Dispute Notice**) which Dispute Notice must:

- (i) state that the notice is given under this subclause;
  - (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.
- (b) 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.
- (c) The parties' representatives must negotiate in good faith with a view to resolving the Dispute within 15 Business Days after the receipt of the Dispute Notice, (or such longer period as those representatives agree), failing which either party may immediately refer the Dispute to the Chief Executive Officers of the parties.
- (d) If a party refers the Dispute to the Chief Executive Officers, then the Chief Executive Officers of each party must negotiate in good faith with a view to resolving the Dispute within 10 Business Days of the Dispute being referred to them (or such longer period as the Chief Executive Officers agree) failing which:
- (i) either party may commence litigation proceedings in respect of the Dispute; or
  - (ii) if both parties consent, the Dispute may be referred by any party by notice (**Mediation Notice**) to mediation under these Terms and Conditions.
- (e) Mediation of a Dispute must:
- (i) be conducted in the Territory by the person or body agreed to by the parties or, failing agreement within 5 Business Days after receipt of the Mediation Notice, as nominated by the President for the time being of the Law Society of the Territory on request by either party;
  - (ii) be conducted in accordance with such rules as may be agreed by the parties or, failing agreement within 5 Business Days after receipt of the Mediation Notice, in accordance with the rules nominated by the person or body agreed or nominated to conduct the mediation;
  - (iii) be at the cost and expense of the parties equally (except that each party must pay its own advisers, consultants and legal fees and expenses) unless the parties otherwise agree; and
  - (iv) if not earlier resolved, be continued for a period expiring on the date being 10 Business Days after the nomination of

the mediator (or such other period as the parties may agree) after which any party may at any time after that date commence litigation proceedings in respect of the Dispute.

## 10 CONFIDENTIALITY

### 10.1 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.

### 10.2 Permitted disclosure

These Terms and Conditions do 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 these Terms and Conditions;
- (c) the disclosure of Confidential Information is to an employee, subcontractor, agent or representative who needs it for the purposes of these Terms and Conditions 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 these Terms and Conditions 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 10.3.

### 10.3 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



- (b) give the proposed disclosee notice that the information is Confidential Information.

#### **10.4 ASCO may disclose**

ASCO may disclose Confidential Information to DP with the consent of the User such consent not to be unreasonably withheld provided that the DP agree to comply with ASCO's confidentiality obligations under this clause 10.

### **11 AMENDMENT AND ASSIGNMENT**

#### **11.1 Amendment**

These Terms and Conditions 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.

#### **11.2 Assignment**

- (a) The User may without consent assign these Terms and Conditions to a Related Body Corporate provided that the assignee agrees to be bound by these Terms and Conditions.
- (b) Except for assignments under clause 11.2(a), the User must not assign these Terms and Conditions or any right under these Terms and Conditions without the prior written consent of ASCO, which shall not be unreasonably withheld.
- (c) ASCO may assign these Terms and Conditions or any right under these Terms and Conditions without the prior written consent of the User, provided that the assignee agrees to be bound by these Terms and Conditions.

### **12 NOTICES**

#### **12.1 Notices**

- (a) A notice, consent or other communication under these Terms and Conditions is only effective if it is in writing, signed and either left at the addressee's address or sent to the addressee by mail, fax or email.
- (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.

### **13 GST**

#### **13.1 GST Gross-Up**

If a party (the supplier) is required to pay GST in respect of a supply made under or in connection with (including by reason of a breach of) this document, the recipient of the supply must (in addition to any other payment for, or in connection with, the supply) pay to the supplier an amount equal to such GST (**GST gross-up**).

#### **13.2 GST Invoice**

If a GST gross-up is payable, then the supplier must give the recipient a tax invoice for the supply.

#### **13.3 Payment**

Provided a tax invoice has been given, the GST gross-up must be paid by the recipient:

- (a) if any monetary consideration is payable for the supply, at the same time and in the same manner as such monetary consideration;
- (b) if no monetary consideration is payable for the supply, within 10 Business Days after the day on which the tax invoice is given.

#### **13.4 Reimbursements**

If any payment to be made to a party under or in connection with this document is a reimbursement or indemnification of an expense or other liability incurred or to be incurred by that party, then the amount of the payment must be reduced by the amount of any input tax credit to which that party is entitled for that expense or other liability, such reduction to be effected before any increase in accordance with clause 13.1.

#### **13.5 Adjustments**

If an adjustment event has occurred in respect of a supply made under or in connection with this document, any party that becomes aware of the occurrence of that adjustment event must notify the other party as soon as practicable, and the parties agree to take whatever steps are necessary (including to issue an adjustment note), and to make whatever adjustments are required, to ensure that any GST or additional GST on that supply, or any refund of GST (or part thereof), is paid no later than 20 Business Days after the supplier first becomes aware that the adjustment event has occurred.

#### **13.6 Definitions**

- (a) Terms used in this clause 13 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the meaning given to them in that Act.
- (b) In this clause, a reference to a payment includes any payment of money and any



form of consideration other than payment of money.

- (c) In these Terms and Conditions, all references to payments and obligations to make payments, including all references to compensation (including by way of reimbursement or indemnity), are, but for the operation of this clause, exclusive of GST.

## 14 GENERAL

### 14.1 Governing law

- (a) The Terms and Conditions are governed by the Laws of the Northern Territory.
- (b) The User and ASCO irrevocably and unconditionally submit to the jurisdiction of the courts of the Northern Territory.

### 14.2 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 these Terms and Conditions 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.

### 14.3 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 these Terms and Conditions.

### 14.4 Costs

- (a) Each party must bear its own costs arising out of the negotiation, preparation and signing of these Terms and Conditions.
- (b) The User must pay all duty under the *Stamp Duty Act* (NT) or other statutory charges in relation to these Terms and Conditions.

### 14.5 Severability

If a clause or a part of a clause of these Terms and Conditions shall be or be determined to be illegal, unenforceable or invalid, that clause or part is to be treated as removed from these Terms and Conditions, but the rest of the Terms and Conditions are not affected.

### 14.6 Survival of provisions

Clauses 3.3 (Pollution, Contamination and Environmental Harm), 5 ('Liability and Indemnity'), 6 ('Insurance'), 9 ('Disputes'), 10 ('Confidentiality') and 14 ('General') survive the expiry or termination of these Terms and Conditions.

### 14.7 Representations and warranties

- (a) The User acknowledges and declares that by entering into these Terms and Conditions, the User has relied solely on its own inspection, inquiry, perusal and opinion in relation to the suitability of the DMSB, the infrastructure and facilities at the DMSB, the access channel to the DMSB, the berths at the DMSB and ASCO's property and facilities and has not relied on any promise, representation, warranty, condition, undertaking or other conduct that may have been given by or on behalf of ASCO or any person purporting to act on behalf of ASCO in respect of the suitability of ASCO's property or facilities for any use required by the User 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 these Terms and Conditions 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 these Terms and Conditions and to carry out the obligations contemplated by these Terms and Conditions; and
  - (iv) its obligations under these Terms and Conditions are valid and binding and enforceable against it in accordance with their terms.

### 14.8 Subcontractors

ASCO may subcontract the performance of any of the Services to be provided under these Terms and Conditions without the prior consent of the User. If a subcontractor is engaged by ASCO, ASCO is responsible for the actions of the subcontractor and remains liable under the Terms and Conditions as if it was providing the subcontracted Services.

### 14.9 Anti-bribery and corruption

- (a) Each party with regard to operations and/or activities under these Terms and Conditions:
  - (i) warrants that such party and its Related Bodies Corporate and their respective directors, officers, employees and



personnel have not made, offered, or authorized; 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 these Terms and Conditions:
  - (i) warrants that such party and its Related Bodies Corporate and their respective directors, officers, employees and personnel have complied with; and
  - (iii) 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.

## 15 DEFINITIONS AND INTERPRETATION

### 15.1 Definitions

The following definitions apply in these 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:

- (a) Application for Berth (Single Visit); or
- (b) Application for Berth (Multiple Visit),

(as applicable) published by ASCO on the DMSB Website.

**ASCO Indemnified Parties** means ASCO, DP and ASCO's Personnel.

**ASCO Representative** means the officer nominated in writing by and representing ASCO for the purposes of these Terms and Conditions from time to time.

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

**Claim** includes any action, claim, suit, proceeding, application or demand of any kind.

**Commencement Date** means the date these Terms and Conditions commence, being the date specified in the Application for Berth executed by the User and accepted by ASCO.

**Completion Date** means earliest to occur of:

- (a) the date (if any) specified in the Application for Berth executed by the User and accepted by ASCO;
- (b) the date upon which these Terms and Conditions are terminated in accordance with their terms; and
- (c) the date on which the lease agreement between DP and ASCO, under which the DP grants to ASCO a lease of the DMSB, expires or terminates in accordance with the terms of that lease.

**Confidential Information** means any information (in whatever form) or documentation of a confidential nature (or which the recipient or its 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).

**DMSB** means the Darwin Marine Supply Base, located within East Arm Wharf as leased or licensed by ASCO from the DP from time to time.

**DMSB Handbook** means the rules applicable to the use and operation of the DMSB from time to time which are published on the DMSB Website.

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

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



**DMSB Website** means

<http://www.ascoworld.com/where-we-work/australasia/dmsb>.

**DP** means the Darwin Port.

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

**environmental harm** has the meaning given to that term in the *Waste Management and Pollution Control Act 1998 (NT)*.

**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 to the Environment.

**Facilities** means any facilities or equipment provided by ASCO at DMSB (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 User or the User's Personnel in connection with the Services.

**Fees and Charges** means the levies, fees and charges applicable to the DMSB from time to time as published on the DMSB Website.

**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 ASCO to perform its obligations under these Terms and Conditions.

**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.

An **Insolvency Event** occurs if:

- (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 these Terms and Conditions);

- (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 these Terms and Conditions 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.

**Interest Rate** means 2% above Westpac Banking Corporation's indicator rate (reference lending rate), calculated daily.

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

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

**Personnel** means:

- (a) (in relation to ASCO) any of its employees, subcontractors, agents and representatives involved either directly or indirectly in the provision of the Services under these Terms and Conditions; and
- (b) (in relation to the User) any of its 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.

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

**Port** means the Darwin Port as defined in the *Darwin Port Act (NT)*.

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

**Remedial Work** means any work to remediate land or water affected by spill, pollution,



contamination, Hazardous Substances or environmental harm, including to:

- (a) remove, destroy or reduce;
- (b) dispose of or disperse;
- (d) contain or encapsulate;
- (e) treat;
- (f) manage (including restrict or prohibit access to or use of the affected area); or
- (g) 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 the provision of the following services for the purposes of servicing the offshore industry (as that term is defined in *Darwin Port (Darwin Marine Supply Base) Regulations 2012* (NT)):

- (a) wharf services being:
  - (i) access to wharf for loading/unloading cargo from Vessels;
  - (ii) access to fuel, water supply and other ancillary services as they become available (but excluding the actual supply of the relevant commodity or service, including water and fuel, which is to be purchased directly from the supplier) for which there is a published rate in the Fees and Charges;
  - (iii) short term storage for the purposes of loading cargo or clearing cargo unloaded from Vessels for which there is a published rate in the Fees and Charges;
- (b) Berth hire for berths 1, 2 or 3.

**Term** means the term of these Terms and Conditions commencing on the Commencement Date and ending on the Completion Date.

**Territory** means the Northern Territory of Australia.

**User Representative** means the officer nominated in writing by and representing the User for the purposes of these Terms and Conditions from time to time.

**Vessel** has the same meaning as "vessel" as described in the *Marine Act* (NT).

**Wilful Misconduct** means any act or failure to act 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.

## 15.2 Interpretation

In these Terms and Conditions, unless the context otherwise requires:

- (a) reference to these Terms and Conditions means these Terms and Conditions and the agreement between the User and the ASCO which incorporates these Terms and Conditions;
- (b) references to days mean calendar days;
- (c) references to time are to the time in Darwin, Northern Territory;
- (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 these Terms and Conditions 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 Darwin, Northern Territory and Perth, Western Australia;
- (g) clause headings and subclause headings do not form part of, and will not be used in the interpretation of these Terms and Conditions;
- (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 the Northern Territory;
- (k) unless otherwise provided, prices and amounts referred to in these Terms and Conditions 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 these Terms and Conditions will be construed adversely to a party solely on the ground that it was responsible for the preparation of these Terms and Conditions or that provision;
- (q) any consent or approval required under these Terms and Conditions 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 these Terms and Conditions limits any right of a party whether under these Terms and Conditions or under any Law.

## Schedule 1 – Insurance requirements

Class of Insurance	Required	Limit	Extensions
Public and Products Liability (for onshore activities) covering legal liability to third parties in respect of personal injury, disease, illness or death of any person and loss of, damage to or resulting loss of use of, real or personal property arising from the User or its Personnel's use of the DMSB, the Services and the Facilities or the performance or non-performance of User's obligations under these Terms and Conditions.	Yes	\$20m per event	Note ASCO and DP as Principal  To the extent of the indemnities provided by the User under these Terms and Conditions, include:  (a) waiver of subrogation in favour of ASCO and DP; and  (b) a cross-liability section*  For onshore activities – include a sudden and accidental pollution write-back to provide cover for claims arising out of the sudden and accidental discharge, dispersal, release or escape of contamination or pollution into or upon land, the atmosphere or any water course or body of water, including any costs and expenses incurred in removing, nullifying or clean up of such contamination or pollution.
Employer's Liability or Worker's Compensation which provides coverage in accordance with applicable statutory requirements of each jurisdiction in respect of all persons employed or treated under any Law as being employed by the User who may perform work in connection with the DMSB.	Yes	Statutory minimum amount as required under State or Federal Law	Including a principals indemnity in favour of ASCO and DP.  Common law extension
User's Plant and Equipment and Cargo brought onto the Port or the DMSB	Yes	Replacement value	Comprehensive insurance to the replacement value of the items including cover for associated third party liabilities
Protection and Indemnity Insurance in accordance with clause 6.2	Yes	US\$500m	Note ASCO and DP as Principal  Including either a Protective Co-Assured or Misdirected Arrow Co-Assured Clause providing waiver of subrogation in favour of ASCO and DP  Including a cross-liability section*  Minimum sub-limit of US\$500,000,000 in respect of any one pollution occurrence
Hull and Machinery Insurance including War Risks Insurance Policy in accordance with clause 6.3	Yes	Full insurable value (being the sum insured or agreed value plus any increased value which a prudent shipowner would insure the vessel for so that the insured can be adequately reimbursed to replace the vessel after a loss)	

\*Cross liability section means an endorsement on the policy that all agreements and endorsements except limits of liability shall operate in the same manner as if there were a separate policy of insurance covering each party noted on the policy and that a failure by any insured party to observe and fulfil the terms and conditions of the policy shall not prejudice the rights of any other party whose interests are noted on the policy