



**SOUTHERN PORTS AUTHORITY**  
*Port of Esperance*

# Port Standards and Procedures

Approval and Implementation			
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**1. Application of Port Standards and Procedures**

- (a) Port Users enter the Port on the condition that they must observe and be bound by these Port Standards and Procedures.
- (b) Any rights that SPA PoE may have that arise out of these Port Standards and Procedures are in addition to any other rights that SPA PoE has at law and in equity.
- (c) If any provision in these Port Standards and Procedures is contrary to any term in any contract entered into between SPA PoE and the relevant Port User then the provision in the contract will prevail to the extent of any inconsistency.
- (d) Where SPA PoE's consent or approval is required by these Port Standards and Procedures, then SPA PoE may in its absolute discretion grant or withhold its consent or approval subject to any conditions that it considers appropriate. In giving or withholding its consent, SPA PoE shall not under any circumstances be taken as acting as an expert or expressing an opinion on or approving the subject matter of the consent or approval.
- (e) SPA PoE may, in its absolute discretion from case to case, enforce, ignore or otherwise deal with any rights that it may have as a consequence of any breach of these Port Standards and Procedures by any Port User

**2. Definitions and interpretation**

**2.1 Definitions**

In these Port Standards and Procedures:

**Access Cards** means any identification cards required by SPA PoE for security purposes and any identity cards required under the Maritime Transport and Offshore Facilities Security Act 2003 (Cth).

**Act** means the Port Authorities Act 1999 (WA) and Amendment Bill.

**Affiliates** means any legal entity which controls, is controlled by, or is under common control with, another legal entity and an entity is deemed to "control" another if it owns directly or indirectly more than fifty per cent of either of the following:

- (a) the shares entitled to vote at a general election of directors of such other entity; and
- (b) the voting interest in such other entity if such entity does not have either shares or directors.

**AMSA** mean the Australian Maritime Safety Authority established under the Australian Maritime Safety Authority Act 1990 (Cth).

**Application for Credit** means any SPA PoE form entitled "Application for Credit" which may be published on the Website, as amended from time to time.

**Associates** means:

- (a) in the case of a Port User, all employees, invitees, contractors and agents of a Port User who have entered the Port for any purposes associated with the Port User's interests, business or other activities, excluding SPA PoE in its capacity as the Port User's services contractor pursuant to any contract made between SPA PoE and the Port User with respect to the provision of any Services; and
- (b) in the case of SPA PoE, SPA PoE's officers and employees.

**Berth** means a berth allocated by SPA PoE to the Port User or any other berth in the Port.

**Cargo** means any solid, liquid or gaseous product, substance or material that is loaded or is intended to be loaded onto or unloaded from or kept aboard a Vessel while it is in the Port.

**Consequential Loss** means any incidental, punitive, special or economic loss, expense or damage including loss of profit, loss of revenue, loss of opportunity or demurrage charges, whether direct or indirect, suffered by anyone (including third parties) as a result of any act or omission of any party that arises out of or in connection with the provision of any Services by SPA PoE or any of its Associates or contractors.

**Costs and Losses** means all losses, damages, costs, charges, expenses and other expenditure of whatever nature (including all legal fees, costs and disbursements on the higher of a full indemnity basis and a solicitor and own client basis, determined without taxation, assessment or similar process and whether incurred by or awarded against a party) whether:

- (a) arising from or in connection with any demand, notice proceeding or claim or not;
- (b) liquidated or not;
- (c) present, prospective or contingent; or
- (d) owed, incurred or imposed by or to or on account of or for the account of any person alone or severally or jointly with another or others.

**Contaminant** means:

- (a) any solid, liquid, gas, odour, heat, sound, vibration or radiation;
- (b) any combination of the items in paragraph (a); or
- (c) any substance of any kind,

which is or may be harmful to the Environment or to the health or safety of any person or animal or cause damage to any property and **Contamination** has a corresponding meaning.

**DAFF Biosecurity** means the body within the Department of Agriculture, Fisheries and Forestry which performs or requires biosecurity inspection and quarantine for international passengers, cargo, mail, animals, plants, and animal or plant products arriving in Australia (formerly the Australian Quarantine and Inspection Service).

**DAFF Biosecurity Services** means any container yard movements or other services or work required in order to comply with any requirements established, notified or enforced by DAFF Biosecurity that apply to the Port User's use of the Port.

**Delay** means:

- (a) any delay in the performance of all or any aspect of any Services; or
- (b) any delay to the berthing, loading, unloading or departure of any vessel or vehicle; or
- (c) any delay in the receipt or delivery of anything,

however arising including delays arising out of any breach of any agreement for SPA PoE to provide any Services and including delays arising out of any negligent or wrongful acts or omissions on the part of SPA PoE or any of its Associates or contractors.

**Emergency** means an event, threat or contingency that SPA PoE considers imminent and will or may adversely affect or endanger any one or more of:

- (a) the health or safety of any person;
- (b) private or public property of any kind; or
- (c) the environment,

in or around the Port.

**Emergency Response Plan** means any SPA PoE emergency response plan which may be published on the Website or provided by SPA PoE at the request of a Port User, as amended from time to time.

**Environment** means the physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factors of aesthetics.

**Environment Department** means the department of SPA PoE which has the primary responsibility for managing environmental aspects of Port operations and Works as that department is constituted from time to time.

**Environmental Policy and Management Plan** means the SPA PoE Environmental Policy and Management Plan which may be published on the Website or provided by SPA PoE at the request of a Port User, as amended from time to time.

**EPA** means the Environmental Protection Authority of Western Australia as established under the EPA Act.

**EPA Act** means the Environmental Protection Act 1986 (WA).

**SPA PoE** means Southern Port Authority Port of Esperance ABN 30 044 341 250 of The Esplanade, Esperance, Western Australia, WA, 6450, the corporatised entity operating under the Act which oversees the operations of the Port, trading as SPA.

**Equipment** means any plant, machinery, equipment or property which is owned, vested in, managed, leased or otherwise controlled by SPA PoE or any of its Associates or contractors.

**Facilities** means any land, buildings, berths, wharves, jetties, laydown areas and any associated plant, equipment and infrastructure of any kind that is owned, vested in, managed, leased or otherwise controlled by SPA PoE and made available for use by Port Users including any cranes, loaders, unloaders and conveyors.

**Force Majeure Event** means any event beyond the reasonable control of SPA PoE or any of its Associates or contractors which interferes with or prevents the performance of any Services work.

**Fees and Charges** means the SPA PoE fees and charges, details of which are available on the Website or may be provided by SPA PoE at the request of a Port User, as amended from time to time.

**Gross Default** means any wilful or deliberate act or omission on the part of SPA PoE that is so malicious, calculated, reckless, fraudulent, deceitful or criminal in nature that it amounts to a knowing, fundamental and complete disregard for the commercial interests of a Port User.

**Harbour Master** means the Port's harbour master and any deputy harbour master, acting harbour master or other person authorised to carry out any harbour master's functions or duties in relation to the Port.

**Marine Accident** means any event where damage of any kind is caused to any Vessel, person or property.

**Marine Incident** means any event occurring which gives rise to a hazardous or potentially hazardous situation, including any pollution occurring within the Port.

**Marine Safety Plan** means any marine safety plan which may be published on the Website or provided by SPA PoE at the request of a Port User, as amended from time to time.

**Mooring Standards** means any mooring standards which may be published on the Website or provided by SPA PoE at the request of a Port User, as amended from time to time.

**Owner** means the owner of a Vessel and includes any charterer of the Vessel.

**Permissible Delay** means any Delay (other than a Delay to the extent that it is caused by Gross Negligence on the part of SPA PoE or any of its Associates) including, without limitation, any Delay to the extent that it is caused by or contributed to or arises out of:

- (a) the Facilities or anything else that is necessary to provide Services;
- (b) Port congestion of any kind (including vessel or vehicle queues that arise for any reason);

- (c) any act or omission on the part of the Port User or the beneficiary of any Services work or any of their respective Associates;
- (d) any act, omission, decision or direction of the Harbour Master;
- (e) any act, omission, decision or requirement of the master or crew of any vessel;
- (f) any act, omission, decision, direction or requirement of SPA PoE or its Associates arising out of a safety concern as determined by SPA PoE at its absolute discretion;
- (g) any electrical outage;
- (h) any damage to or the breakdown of any of the Facilities, any item of Equipment or anything else in the Port; and
- (i) any Delay to the extent that it arises as a consequence of any act, omission, decision or direction on the part of SPA PoE or any of its Associates or contractors:
  - (i) relating to the safety of any person, vessel or property;
  - (ii) relating to any security issue, security concern or any Emergency;
  - (iii) relating to the compliance with any law or any ministerial direction or Ministerial request;
  - (iv) relating to any vessel, berthing, mooring or navigation matter;
  - (v) relating to any issue concerning the environment; or
  - (vi) relating to any maintenance or repair works.

**Port** means the Port of Esperance in Western Australia and any land, water or seabed that is owned by, vested in, occupied or controlled by SPA PoE from time to time.

**Port Standards and Procedures** means the rules, rights, powers, obligations, standards, procedures and other provisions contained in this document as amended by SPA PoE from time to time and communicated to the Port User, including any documents published on the Website, details of which shall be deemed to have been communicated as soon as they are published on the Website.

**Port User** means any person or entity:

- (a) in the Port at any time;
- (b) using Facilities or Equipment;
- (c) who is bound by a lease, licence or other contract with SPA PoE under which they promise to comply with these Port Standards and Procedures; or
- (d) who is the owner, charterer or master of any Vessel in the Port.

**SDR** means "Special Drawing Rights", being supplementary foreign exchange reserve assets defined and maintained by the International Monetary Fund.

**Security Procedures** means any other document pertaining to security policies, procedures or standards applicable to the use of the Port which is published on the Website or provided by SPA PoE at the request of a Port User.

**Services** means any services that are provided by or arranged by SPA PoE including any stevedoring or cargo handling services of any kind.

**Terminal Manager** means the individual performing the role of terminal manager within the Port or any other person authorised to carry out any terminal manager's functions or duties in relation to the Port.

**Terminal Supervisor** means the individual performing the role of terminal supervisor within the Port or any other person authorised to carry out any terminal supervisor's functions or duties in relation to the Port.

**Vessel** means any vessel visiting the Port.

**Vehicle** means any:

- (a) motor vehicle within the meaning of the Road Traffic Act 1974 (WA); and
- (b) any trailer, cart, wagon or other like item attached to a motor vehicle.

**Website** means the website found at [www.epsl.com.au](http://www.epsl.com.au) containing information about the Port or any other website advised by SPA PoE from time to time.

**Works** means any work or service to be performed for the benefit of SPA PoE or a Port User.

**Work Permit** means a permit issued by SPA PoE pursuant to a Work Permit System permitting a Port User to perform works or services in the Port.

**Work Permit System** means any work permit system adopted by SPA PoE, details of which may be published on the Website or provided by SPA PoE at the request of a Port User, as amended from time to time.

## 2.2 Interpretation

In these Port Standards and Procedures:

- (a) an obligation or liability assumed by, or a right conferred on, 2 or more parties binds or benefits all of them jointly and each of them severally;
- (b) the expression "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (c) a reference to any party includes that party's executors, administrators, successors and permitted assigns, including any person taking by way of novation and, in the case of a trustee, includes any substituted or additional trustee;
- (d) a reference to any document (including these Port Standards and Procedures) is to that document as varied, novated, ratified or replaced from time to time;

- (e) a reference to any statute or to any statutory provision includes any statutory modification or re-enactment of it or any statutory provision substituted for it, and all ordinances, by-laws, regulations, rules and statutory instruments (however described) issued under it;
- (f) words importing the singular include the plural (and vice versa), and words indicating a gender include every other gender;
- (g) references to parties, clauses, schedules, exhibits or annexures are references to parties, clauses, schedules, exhibits and annexures to or of these Port Standards and Procedures, and a reference to these Port Standards and Procedures includes any schedule, exhibit or annexure to these Port Standards and Procedures;
- (h) where a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) where SPA PoE places procedures, requirements, policies, rules, standards, provisions, systems, guides, plans or other information (Information) or documents on the Website, it shall be deemed to have communicated the Information or the content of those documents to the Port User as soon as the information is placed on the Website.
- (j) the words "include" and "including" are not words of limitation; and
- (k) a person or body which has ceased to exist or has been reconstituted, amalgamated, reconstructed or merged, or the functions of which have become exercisable by any other person or body in its place, shall be taken to refer to the person or body established or constituted in its place or by which its functions have become exercisable.

### **2.3 Port Authorities Act**

- (a) The Port Standards and Procedures shall augment SPA PoE's rights, powers, defences, immunities or limitations of liability under the Act. Nothing in or arising out of the Port Standards and Procedures:
  - (i) in any way diminishes SPA PoE's rights, powers, defences, immunities, indemnities or limitations of liability under the Act;
  - (ii) in any way fetters any discretions that SPA PoE has under the Act; or
  - (iii) in any way precludes SPA PoE from accessing, relying upon or using any of its rights, powers, defences, immunities, indemnities or limitations of liability under the Act in relation to any matter concerning the Port, the Port User or any matter arising out of the Port Standards and Procedures.
- (b) If there is any inconsistency between anything in these Port Standards and Procedures and anything in the Act, then the Act always prevails and overrides the terms of these Port Standards and Procedures.

### 3. General duties of Port Users

#### 3.1 Activities in the Port

With respect to all activities carried on in the Port by a Port User or any of its Associates, the Port User must ensure that it and its Associates:

- (a) have all the training and expertise that is necessary to perform the activity;
- (b) are properly supervised;
- (c) obtain and keep current all necessary consents, approvals, licences and permits relating to the activity;
- (d) use procedures, systems and techniques that minimise the risk of injury to persons or property in the Port as far as is reasonably practicable;
- (e) do not cause any damage to the Facilities, Equipment or anything else in the Port;
- (f) do not injure any person;
- (g) conduct the activity in a way that minimises any risk of damage, injury or disruption to the environment in the Port;
- (h) do not obstruct or interfere with:
  - (i) SPA PoE;
  - (ii) any other activities or operations in the Port; or
  - (iii) any other Port User, Vessel, person or property in the Port,
  - (iv) except to the extent absolutely necessary to carry out the particular activity (**Necessary Activities**) in a lawful manner; and
- (i) carry out all Necessary Activities in consultation with SPA PoE and other Port Users.

#### 3.2 No nuisance

A Port User shall not do or permit anything to be done which may reasonably be considered noxious, noisome, offensive or a nuisance to SPA PoE or any other Port User.

#### 3.3 Compliance

- (a) A Port User must ensure that it and all its Associates at all times comply with:
  - (i) all federal and state statutes and all regulations, by-laws, ordinances or orders made under them and the lawful requirements for any public, municipal or other authority so far as they may affect or apply to the Port User or the Port;

- (ii) any directions given by any regulatory authority having jurisdiction over anything done within the Port, including, the police, customs, AMSA, the EPA and DAFF Biosecurity;
  - (iii) SPA PoE's directions concerning anything in or relating to the Port, including directions concerning: security, safety, environmental protection or any Emergency; and the use of any part of the Port;
  - (iv) the Harbour Master's directions concerning anything in or relating to the Port including Marine Notices; and
  - (v) all requirements set out in the Port Standards and Procedures.
- (b) For the purposes of clause 3.3(a)(iii), a direction given by an Associate of SPA PoE shall be deemed to be a direction given by SPA PoE.

### 3.4 SPA PoE's access

A Port User must ensure that it and all its Associates permit SPA PoE and its Associates, contractors and agents prompt access to:

- (a) any Vessel to which the Port User has access rights while it is in the Port;
- (b) any property or area of the Port being used, occupied or controlled by the Port User; and
- (c) any information that SPA PoE reasonably requires in order to check and monitor compliance with these Port User's obligations under the Port Standards and Procedures.

### 3.5 Induction

If required by SPA PoE, a Port User must ensure that it and its Associates undertake appropriate induction procedures or courses prior to entering the Port or particular areas of the Port. The Port User must pay SPA PoE's costs of preparing and presenting each individual course.

### 3.6 Notification of accidents and incidents

As soon as the Port User or any of its Associates become aware of any Marine Accident, Marine Incident or contamination in or around the Port, damage to the Port, damage to any Facilities or Equipment or injury to any person or any circumstances likely to cause any damage or injury (**Event**):

- (a) the Port User shall ensure that SPA PoE is informed of the details immediately; and
- (b) if the Port User or any of its Associates are involved in any Event, then the Port User must provide a detailed written report to SPA PoE in respect of the Event and the report shall be provided to SPA PoE within 24 hours of the Port User or any of its Associates becoming aware of the Event.

### 3.7 Responsibility for operations

The Port User:

- (a) will be exclusively responsible for managing and controlling all activities and operations conducted in the Port by it and any of its Associates (**Operations**);
- (b) will, while any Operations are being carried out, be exclusively responsible for managing and controlling all areas of the Port that are used in connection with the Operations (**Working Areas**); and
- (c) will be exclusively responsible for managing and controlling all of its Associates during Operations and the Port User will be exclusively responsible for managing and controlling all issues and risks associated with the workplace health and safety of its Associates while they are in Working Areas while Operations are being carried out.

Nothing in this clause affects the Port User's obligation to comply with any orders or directions that may be given by SPA PoE or any of its Associates from time to time pursuant to the terms of these Port Standards and Procedures (**Orders and Directions**) and nothing relating to the Orders and Directions in any way diminishes the Port User's exclusive responsibility for management and control of Operations and the Working Areas while any Operations are being carried out.

## 4. Conduct of Port Users in the Port

### 4.1 Social functions

The Master or Owner of a Vessel must not permit any social functions (other than functions involving the Vessel's Master and crew and less than 5 invited guests) to occur on the Vessel without SPA PoE's permission.

### 4.2 Intoxication by drugs or alcohol

- (a) A Port User must ensure that it and any of its Associates.
  - (i) does not enter or remain in the Port if intoxicated by drugs or alcohol; and
  - (ii) undergo random drug and alcohol testing immediately at the request of SPA PoE or its Associates.
- (b) If a person in the Port appears to SPA PoE or its Associates to be intoxicated by drugs or alcohol, then SPA PoE, its Associates and its contractors may do everything necessary to refuse entry to or remove that person from the Port.

## 5. Safety and security

### 5.1 Safety

A Port User must ensure that it and its Associates comply with the:

- (a) Marine Safety Plan;
- (b) Health & Safety Management Plan;
- (c) Personal Protective Equipment (PPE) Standard;
- (d) Hazard and Risk Management Standard; and

- (e) any other safety procedures or requirements communicated by SPA PoE to the Port User;

### **5.2 Security**

The Port User must ensure that it and its Associates comply with SPA PoE's security rules, procedures and requirements (including the Security Procedures) relating to the Port, Cargo, Vessels, Facilities, Equipment and access to and from the Port when such procedures and requirements are communicated to them.

### **5.3 Maritime Transport and Offshore Facilities Security Act**

The provisions of these Port Standards and Procedures relating to access and security are in addition to the provisions of the Maritime Transport and Offshore Facilities Security Act 2003 which must be observed by all Port Users to whom the Maritime Transport and Offshore Facilities Security Act 2003 applies.

### **5.4 Port Access Cards**

- (a) A Port User must ensure that it and its Associates:
  - (i) wear (if required) or carry valid and current Access Cards;
  - (ii) do not cause or permit their Access Cards to be, lost, damaged, used by any other person or worn or carried by any other person;
  - (iii) immediately inform SPA PoE of the loss or theft of the Port User's Access Cards; and
  - (iv) produce their Access Cards to SPA PoE or its Associates on demand.
- (b) SPA PoE and its Associates may do everything necessary to remove a person from the Port if that person does not have any Access Cards.

## **6. Berth, Facilities and Equipment**

### **6.1 Application**

A Port User must ensure that neither it nor any of its Associates uses any Berth, Facilities or Equipment, unless such a request has been made to and accepted by SPA PoE or the Harbour Master.

### **6.2 Availability**

- (a) Allocation of Berths, Facilities, Services and Equipment is always subject to availability and suitability. SPA PoE will determine availability and suitability in its absolute discretion.
- (b) Provision of DAFF Biosecurity Services is always subject to availability of resources as determined by SPA PoE at its absolute discretion.
- (c) If SPA PoE considers it necessary for any reason, SPA PoE may at any time withdraw, suspend, reallocate, terminate or otherwise vary or modify any usage or access rights that are granted with respect to any Berth, Facilities or Equipment.

- (d) If SPA PoE exercises any of its rights under clause 6.2(c), nothing will relieve the Port User from any liability accrued nor entitle the Port User to any Costs and Losses.
- (e) If SPA PoE considers that a Port User should use certain services, extra resources or equipment in order to ensure safety, security, operational efficiency, general expediency or Port User compliance with any laws or industry standards (**Extra Requirements**) then the Port User must promptly utilise and otherwise comply with any Extra Requirements that are imposed by SPA PoE and the Port User shall pay any applicable usage costs for the Extra Requirements in accordance with the Fees and Charges.

### 6.3 No warranty

SPA PoE makes no warranty:

- (a) about the suitability of the Facilities or Equipment for any use; or
- (b) that any of the Facilities or Equipment are clean and free from contaminants.

### 6.4 Port User's duties

If a Port User uses any Berth, Equipment or Facilities, the Port User must ensure that it and its Associates:

- (a) have checked the Berth, Equipment or Facilities prior to their use and are satisfied that the Equipment or Facilities to be used are:
  - (i) free from any substances which may damage or contaminate its Cargo or other goods or materials; and
  - (ii) in all respects safe to operate,and the Port User bears all risk associated with any contamination of any Cargo or other goods or materials including any contamination arising in circumstances where SPA PoE or any of its Associates, contractors or agents have undertaken any cleaning, wash down, maintenance or other work concerning the Berth, Equipment or Facilities;
- (b) follow all operating instructions posted on the Berth, Equipment or Facilities or any directions given by SPA PoE;
- (c) treat and care for the Berth, Equipment or Facilities as would a careful and prudent owner in order to prevent any damage to the Berth, Equipment or Facilities;
- (d) do not remove any identification marks on the Berth, Equipment or Facilities;
- (e) have all the training, expertise, licences and permits necessary to use the Berth, Equipment or Facilities;
- (f) only use the Berth, Equipment or Facilities in the manner and for the purpose the Berth, Equipment or Facilities were constructed and in accordance with the manufacturer's specifications and instructions;

- (g) keep the Berth, Equipment or Facilities at all times in the exclusive possession, control and operation of the Port User or any of its Associates;
- (h) permit SPA PoE and its Associates, contractors or agents to inspect the Berth, Equipment or Facilities at any reasonable time;
- (i) do not abandon or permit to be abandoned any part of the Equipment or Facilities in any location;
- (j) keep the Berth, Equipment or Facilities free from any distress, execution or other legal process and take all reasonable steps to safeguard SPA PoE's title, rights and interests in the Berth, Equipment or Facilities, and not do or permit anything which might reasonably be expected to expose the Berth, Equipment or Facilities to penalty, forfeiture, impounding, detention or destruction;
- (k) if the Equipment or Facilities are seized, notify any person seizing the Equipment or Facilities of SPA PoE's interest and immediately notify SPA PoE in writing of the seizure; and
- (l) clean and remove any contaminants from the Berth, Equipment or Facilities when the Berth, Equipment or Facilities are no longer required by the Port User.

### **6.5 Damage or malfunction**

- (a) If a Port User or any of its Associates suspect that any damage or malfunction has occurred to any Berth, Equipment or Facilities, the Port User must ensure that:
  - (i) the Berth, Equipment or Facilities are not used by the Port User or any of its Associates; and
  - (ii) SPA PoE is immediately notified of the damage or malfunction.
- (b) SPA PoE shall not be liable to the Port User or any other person for any Costs and Losses that arise from the damage or malfunction of the Berth, Equipment or Facilities for any reason, including any negligence or other tortious conduct on the part of SPA PoE or any of its Associates.
- (c) A Port User must at its own cost, repair any damage caused to the Equipment or Facilities by it or any of its Associates.
- (d) A Port User must immediately notify SPA PoE of any damage caused to the Berth by it or any of its Associates and the Port User is liable to SPA PoE for the full cost of any repairs required by SPA PoE in respect of damage caused to the Berth by the relevant Port User or any of its Associates.
- (e) If SPA PoE is not satisfied with the condition of Berth, Equipment or Facilities after they have been used by the Port User or any repairs made to the Equipment or Facilities by the Port User, then SPA PoE and its Associates may do everything necessary to put the Berth, Equipment or Facilities into the condition that they were in prior to their use by the Port User.
- (f) Without limiting any of SPA PoE's other rights or remedies, the Port User shall promptly reimburse SPA PoE for all of its Costs and Losses that arise

out of anything done by SPA PoE or any of its Associates under clause 6.5(e).

### 6.6 Maintenance and repair

The Port User shall ensure that any Facilities or Equipment used by the Port User, or any of the Port User's Associates are kept and maintained in good condition (having regard to their age and general condition) and the Port User shall ensure that any Facilities or Equipment used are left in good, clean and operational condition after use. However nothing in this clause obliges a Port User to repair or make good any damage comprising fair wear and tear or any damage that was not caused by the Port User or any of its Associates.

### 6.7 SPA PoE may rectify

If the Port User fails to comply with any of its obligations under clause 6.6, then SPA PoE may carry out any work necessary to rectify the breach and the costs of the work shall be paid by the Port User on demand.

### 6.8 No proprietary interest

Nothing in these Port Standards and Procedures creates any tenancy, estate or proprietary interest of any kind in or over the Berth, Facilities or Equipment.

### 6.9 Dangerous Goods in Port

The Port User acknowledges and agrees that:

- (a) other Port users import and export dangerous and hazardous products to and from the Port (**Dangerous Goods**);
- (b) as a consequence of the movement of Dangerous Goods in the Port, SPA PoE may make or be required to make rules (**Dangerous Goods Rules**), which may affect other Port Users' access to or efficient use of the Port;
- (c) as a consequence of Dangerous Goods Rules and the movement of Dangerous Goods through the Port, the Port User may incur delays or may be restricted from accessing certain parts of the Port or the Port waters, resulting in costs and expenses being incurred by the Port User, such as demurrage fees;
- (d) it will promptly comply with Dangerous Goods Rules; and
- (e) SPA PoE is not liable for anything arising out of the application of any Dangerous Goods Rules or the movement of any Dangerous Goods in the Port.

## 7. Moorings

- (a) A Port User must ensure that neither it nor any of its Associates installs, uses or sets any mooring buoys, tackle or other mooring equipment, unless a request has been made to and accepted by SPA PoE or the Harbour Master (**Mooring Licence**).
- (b) If SPA PoE grants the Port User a Mooring Licence, the Port User must ensure that it and its Associates comply with the Mooring Standards, the

terms of the Mooring Licence and all other directions given by SPA PoE in relation to the mooring at all times.

### **8. Development applications and guidelines**

A Port User must not commence any construction, demolition, alterations or installations until it has submitted to SPA PoE all plans relating to the construction, demolition, alterations or installations (**Plans**) and SPA PoE has approved the Plans in writing.

### **9. Works**

#### **9.1 Work permits and applications**

- (a) A Port User who wishes to carry out significant Works within the Port must advise and liaise with the Environment Department prior to commencing Works and must continue to liaise with the Environment Department for the duration of the Works or as advised by the Environment Department.
- (b) A Port User must ensure that neither it nor any of its Associates carries out any Works of any kind in the Port without a Work Permit.
- (c) If SPA PoE considers it necessary for any reason, SPA PoE may at any time withdraw, suspend, reallocate, terminate or otherwise vary or modify the terms of any Work Permit.
- (d) If SPA PoE exercises any of its rights under clause 9.1(c), nothing will relieve the Port User from any liability accrued nor entitle the Port User to any Costs and Losses.

#### **9.2 Port user's duties**

If SPA PoE grants a Work Permit to a Port User to perform Works in the Port, the Port User must ensure that it and its Associates:

- (a) comply with the Work Permit System;
- (b) complete the Works within the time required by SPA PoE;
- (c) perform Works in a conscientious, expeditious and workmanlike manner with a high degree of skill, competence and professionalism;
- (d) where required by SPA PoE, do not permit or cause any person to provide any part of the Works unless that person is approved by SPA PoE;
- (e) do not interfere with any Port User's property or operations in the Port except with SPA PoE's permission;
- (f) provide progress reports and any other information concerning the Works as required by SPA PoE;
- (g) do not vary, modify or exceed the Works permitted under the Work Permit without SPA PoE's permission;
- (h) remove, re-execute, replace or amend any aspects of the Works if required by SPA PoE;

- (i) take all necessary precautions to ensure the safety of people and property in the Port; and
- (j) supply and wear any safety gear and clothing required to be worn by SPA PoE.

### **9.3 Notifications required**

If SPA PoE grants a Work Permit to a Port User to conduct Works in the Port, the Port User must ensure that SPA PoE is notified:

- (a) when the Works have been commenced, suspended or completed;
- (b) when the Port User is unable to provide or conduct the Works; and
- (c) of any accident or incident that occurs in relation to the Works.

## **10. Emergencies**

### **10.1 Emergency Response Plan**

A Port User must ensure that it and all of its Associates are aware of and comply with all rules, requirements and procedures set out in any Emergency Response Plan.

### **10.2 Directions**

SPA PoE and its Associates may do anything that SPA PoE considers necessary in relation to any Emergency in the Port.

### **10.3 Port User's duties to give notice**

The Port User must give SPA PoE immediate notice of any material actual or potential threat, emergency or hazard that the Port User becomes aware of in relation to the Facilities.

### **10.4 Interference with emergency equipment**

Except in an Emergency, or as directed by SPA PoE, a Port User must ensure that neither it nor any of its Associates deactivates or interferes with any emergency facility or equipment in the Port including any:

- (a) life saving and first-aid equipment; or
- (b) alarm or signalling device.

### **10.5 False alarms**

- (a) A Port User must ensure that neither it nor any of its Associates deliberately raises any false alarm.
- (b) Without limiting any of SPA PoE's other rights or remedies, a Port User shall promptly reimburse SPA PoE for all of its Costs and Losses that arise out of or in connection with any deliberate false alarm raised by the Port User or any of its Associates.

## **11. Vehicles in the Port**

### **11.1 Road legislation**

The provisions of these Port Standards and Procedures in relation to Vehicles in the Port are in addition to any State or Federal legislation relating to roads, Vehicles and traffic.

### **11.2 Drive with care**

A Port User must ensure that neither it nor any of its Associates operate a Vehicle in the Port unless it and its Associates:

- (a) have all the training, expertise, licences and permits necessary to operate the Vehicle;
- (b) drive at a safe speed and within all sign posted speed limits;
- (c) drive with due care and attention; and
- (d) wear seat belts at all times.

### **11.3 Parking on the wharf**

A Port User must ensure that:

- (a) neither it nor any of its Associated park a Vehicle on any berth, wharf or jetty for a period that exceeds 4 hours without the prior consent of SPA PoE; and
- (b) any Vehicle brought onto any berth, wharf or jetty is removed if SPA PoE directs at any time and for any reason that the Vehicle be removed from the berth, wharf or jetty.

### **11.4 Insurance**

If required by SPA PoE, a Port User must ensure that neither it nor any of its Associates operates a Vehicle in the Port unless the Port User has insurance on terms acceptable to SPA PoE.

### **11.5 Accidents involving Vehicles**

If a collision or accident occurs in the Port involving any Vehicle in the possession, custody or control of the Port User or any of its Associates, the Port User must ensure that SPA PoE is notified as soon as possible of the collision or accident specifying:

- (a) the time and location of the collision or accident;
- (b) the persons involved in the collision or accident;
- (c) the events leading up to and during the collision or accident;
- (d) any damage to Vehicles, property or people in the Port; and
- (e) any other matter that may affect the efficient or safe operation of the Port.

## 12. Environment

### 12.1 Environmental legislation

The provisions of these Port Standards and Procedures relating to environmental protection and sustainability are in addition to the provisions of any State or Federal legislation that relate to the environment.

### 12.2 Contamination

- (a) A Port User must ensure that it and all of its Associates:
  - (i) do not cause any spills and do all things reasonably necessary to prevent Contaminants from escaping onto SPA PoE's land or into the Port waters or into the air surrounding the Port;
  - (ii) do all things reasonably necessary to contain, minimise the effect of and remove Contaminants from SPA PoE's land or the Port waters if any Contaminants escape because of any act or omission by the Port User or any of its Associates;
  - (iii) comply with any directions given by SPA PoE, the Harbour Master, the Terminal Supervisor or the Terminal Manager in respect of environmental issues including any spills or leakage; and
  - (iv) comply with any requirements relating to Contamination set out in the Marine Safety Plan, Emergency Response Plan, Oil Spill Contingency Plan and any other policies, procedures, standards, plans, systems or guides communicated by SPA PoE to the Port User from time to time.
- (b) If SPA PoE is not satisfied with anything done by a Port User under clause 12.2(a) SPA PoE may do everything necessary to contain, clean-up and mitigate the effect of any Contamination.
- (c) SPA PoE is not liable to any person for Costs and Losses that arise out of or in connection with any Contamination or pollution, including anything done by SPA PoE or any of its Associates under clause 12.2(b).
- (d) Without limiting SPA PoE's other rights or remedies, the relevant Port User must promptly reimburse SPA PoE for all of its Costs and Losses that arise out of anything done by SPA PoE or any of its Associates under clause 12.2(b).

### 12.3 Other environmental obligations

A Port User must ensure that it and all of its Associates do all things reasonably necessary to prevent significant risk to the Environment and promote sustainability within the Port. This includes an obligation on the Port User to:

- (a) practice correct handling practices and safety precautions to minimise collisions;
- (b) prevent discharge to all stormwater drains that drain into the ocean;
- (c) prevent any visible dust leaving the Port;

- (d) minimise noise emissions by using best available technology, maintaining equipment in good condition and conducting noisy works during the day as a last resort;
- (e) minimise consumption of scheme water by utilising rainwater or treated water where practicable and reporting any leaks or behaviour that is wasteful of water;
- (f) minimise consumption of electricity by utilising best available technology and reporting any behaviour that is wasteful of electricity; and
- (g) report any landside spills to the Terminal Supervisor (or Terminal Manager) and Harbour Master and any marine side spills to the Harbour Master immediately.

### **12.4 Obligations with respect to waste**

A Port User must:

- (a) reuse and recycle waste generated in the course of the Port User's use of the Port to the greatest extent practicable;
- (b) dispose of all waste which cannot be reused or recycled in accordance with clause 12.4(a) at an appropriate landfill site at the Port User's cost; and
- (c) not remove any potentially contaminated waste from the Port without notifying SPA PoE via the Environment Department and providing any documentation required by SPA PoE in respect of that potentially contaminated waste or its removal.

### **12.5 Duty to notify**

A Port User must ensure that it and all of its Associates:

- (a) give SPA PoE immediate notice of any actual or potential environmental hazard that the Port User or any of its Associates becomes aware of in relation to anything in the Port; and
- (b) produce on demand any information reasonably required by SPA PoE in relation to any actual or potential environmental hazard in the Port.

### **12.6 Interference with flora and fauna**

A Port User must ensure that neither it nor any of its Associates remove, kill, damage or otherwise interfere with any form of marine or terrestrial flora or fauna from anywhere in the Port without SPA PoE's permission.

## **13. Services provided or arranged by SPA PoE**

### **13.1 Application to Services and Services related work**

Without limiting anything else contained in these Port Standards and Procedures, the provisions in this clause 13 apply only to Services and Services related work provided to the Port User or any of its Associates by SPA PoE or any of its Associates or contractors.

### 13.2 Directions

SPA PoE shall use its reasonable endeavours to comply with all reasonable directions given by the Port User in relation to the Services. However, SPA PoE is not obliged to comply with any Port User direction or request (**Direction**) in circumstances where:

- (a) compliance is likely to expose any person or any property to risks that are unacceptable to SPA PoE (acting reasonably);
- (b) compliance is likely to give rise to an environmental risk that is unacceptable to SPA PoE (acting reasonably);
- (c) compliance would be contrary to any law;
- (d) compliance would be contrary to the directions given by the Harbour Master, or contrary to any right, power or benefit that is given to SPA PoE under the Act or in these Port Standards and Procedures;
- (e) compliance would entitle any insurers of SPA PoE to deny cover or otherwise refuse to indemnify SPA PoE under any of SPA PoE insurance policies;
- (f) compliance requires a third party to do something in circumstances where SPA PoE, having been given the relevant Direction and having made reasonable attempts to obtain third party compliance, has no legal power to compel the third party to comply;
- (g) compliance would constitute a departure from the scope of the relevant Services work;
- (h) compliance would render SPA PoE in breach of any lease, licence or agreement entered into by SPA PoE with anyone;
- (i) compliance would require SPA PoE to spend money or incur expenses that it is not entitled to recover from the Port User; or
- (j) SPA PoE considers that compliance is not reasonably practicable having regard to the resources that SPA PoE has at its disposal.

### 13.3 Suspension

- (a) If SPA PoE, acting in good faith, considers it necessary to suspend Service for reasons concerned with safety, security, damage to anything in the Port or for reasons connected with any Emergency, then SPA PoE may suspend all or any part of the Services until such time as SPA PoE considers the suspension is no longer necessary (**Suspension Direction**).
- (b) SPA PoE shall use its reasonable endeavours to keep any period of suspension of the Services arising out of clause 13.3(a) to a minimum and shall promptly notify the Port User when the suspension has been lifted.

### 13.4 Port User to provide relevant information

The Port User must ensure that it provides SPA PoE with any information (including copies of relevant documents) that SPA PoE reasonably requests (**Relevant Information**):

- (a) in order to carry out any aspect of Services work;
- (b) in order to identify the nature and risks associated with any cargo that is to be loaded, unloaded or handled by SPA PoE or any of its Associates as part of any Services work (including all necessary dangerous goods information); or
- (c) in order to ensure that Services work can be carried out safely and in an environmentally friendly and efficient manner.

If SPA PoE considers that it does not have any Relevant Information then SPA PoE may elect not to commence any Services work or elect to stop any Services work that is underway until such time as SPA PoE obtains the Relevant Information.

### 13.5 Variation of Services

- (a) The Port User may at any time request SPA PoE to submit a quotation in relation to any variations to the scope of Services work (**Variation Request**). As soon as reasonably practicable after receipt of a Variation Request, SPA PoE shall advise the Port User as to whether or not it is able and prepared to carry out the Variation Request and, if applicable, provide the Port User with a quotation for the relevant work (**Quotation**).
- (b) If the Port User accepts the original or any revised Quotation then SPA PoE shall carry out the work that is the subject of the relevant Variation Request as if the work was part of the scope of the Services and the Port User shall pay for the work as per the accepted Quotation.
- (c) If the Port User and SPA PoE do not agree upon the charge or rate that is to apply to any work that constitutes a departure from or a variation to the scope of any Services work (**Variation Work**) and the Variation Work proceeds substantially in compliance with the relevant Variation Request or any direction from the Port User, then SPA PoE shall be entitled to be paid by the Port User at a fair rate for the work performed.

### 13.6 No obligation to provide rates for Services

Rates for Services which are not available on SPA PoE's website may be advised by SPA PoE on request by the Port User or agreed between the parties and in circumstances where Services are provided prior to rates for such Services being agreed then SPA PoE shall be entitled to be paid by the Port User at a fair rate for the Services performed.

### 13.7 Payment for Services

The Port User must pay SPA PoE the invoiced fees and charges for all Services work without set-off within 30 days of receiving SPA PoE's invoice and payment must be made by electronic funds transfer to the bank account nominated by SPA PoE unless otherwise directed by SPA PoE.

## 14. Payment of Fees and Charges

### 14.1 Fees and Charges

- (a) Unless otherwise agreed in writing, the Fees and Charges will apply with respect to the Port User's use of the Port or any Facilities, services or Equipment.
- (b) Unless otherwise agreed or provided for in Fees and Charges, the Port User must pay any amount due to SPA PoE without set-off within 30 days of an invoice being issued by electronic funds transfer to the bank account nominated by SPA PoE.

### 14.2 Application for Credit

If requested by SPA PoE, the Port User must submit for SPA PoE's approval a completed Application for Credit. Where the Port User is required to submit an Application for Credit, the Port User must ensure that neither it nor any of its Associates uses any Facilities unless SPA PoE has notified the Port User that the Application for Credit has been approved.

### 14.3 Provision of security

If requested by SPA PoE, the Port User must provide a bond, guarantee or other security (**Security**) as security for the performance of the Port User's obligations under these Port Standards and Procedures including the payment of any Fees and Charges for which the Port User is liable. The Security must be in a form acceptable to SPA PoE and provided promptly upon the request being made.

### 14.4 DAFF Biosecurity charges

The Port User will reimburse to SPA PoE in accordance with SPA PoE's instructions any amounts that SPA PoE is required to pay DAFF Biosecurity in relation to DAFF Biosecurity Services provided to the Port User by SPA PoE.

### 14.5 Interest on overdue money

The Port User shall pay SPA PoE interest on all amounts due to SPA PoE by the Port User in respect of any Fees and Charges or Services or any other amounts payable by the Port User to SPA PoE that are not paid to SPA PoE by the date that they are due for payment. Interest on all outstanding amounts shall accrue daily at the rate per annum prescribed from time to time by Regulation 119 of the Port Authorities Regulations 2001 (WA) pursuant to section 136 of the Act (**Interest**). Interest may be capitalised by SPA PoE on the last day of each month and Interest shall be payable by the Port User to SPA PoE as a debt due on demand.

### 14.6 Suspension for Outstanding Amounts

If any amounts due to SPA PoE by the Port User in respect of any Fees and Charges or Services or any other amounts payable by the Port User to SPA PoE remain owing and outstanding for more than 30 days or past the date specified for payment of that amount in these Port Standards and Procedures in any invoice or any notice issued to the Port User (**Outstanding Amount**), SPA PoE may suspend any of the Port User's rights in relation to the Port User's use of the Port or activities in the Port or the

provision of Services until payment of that Outstanding Amount is received in full by SPA PoE.

## 15. Goods and services tax

### 15.1 Definitions

Unless clearly indicated to the contrary, GST and other terms used in this clause 15 (and in other provisions of the Port Standards and Procedures where the GST meanings are expressly intended) have the meanings ascribed to those terms by the A New Tax System (Goods and Services Tax) Act 1999 or any replacement or other relevant legislation and regulations.

### 15.2 GST Payable

If GST becomes payable by the supplier of any supply that it makes under, in connection with or resulting from these Port Standards and Procedures (**Supplier**), the parties agree that:

- (a) any consideration provided for that supply under the Port Standards and Procedures other than under this clause 15 or any value deemed for GST purposes in relation to that supply (**Agreed Amount**) is exclusive of GST;
- (b) an additional amount shall be payable by the recipient of the supply (**Recipient**) equal to the Agreed Amount for that supply multiplied by the applicable rate of GST;
- (c) the additional amount is payable in the same manner as for the Agreed Amount and at the same time as any part of the Agreed Amount is to be first provided for that supply; and
- (d) the Supplier shall provide, on or prior to the due date for payment, a tax invoice to the Recipient that complies with the requirements of relevant legislation.

### 15.3 Variation

If, following the payment of an additional amount pursuant to clause 15.2 in relation to a supply made by the Supplier, the GST payable by the Supplier to the Australian Taxation Office in respect of that supply varies from the total consideration provided by the Recipient to the Supplier on account of GST on that supply such that:

- (a) the Supplier is required to pay a further amount of GST in respect of that supply; or
- (b) the Supplier receives a refund or credit of the whole or any part of the GST paid by the Supplier in relation to that supply,

then the Supplier shall provide a corresponding refund or credit to the Recipient or shall be entitled to receive the amount of that variation from the Recipient (as appropriate). For the purposes of calculating variations under this clause, any additional amount referred to in clause 15.2 is taken to be amended by the amount of any earlier variation made under this clause.

## 16. Insurance

### 16.1 Insurance cover

If required by SPA PoE, the Port User shall effect and maintain any insurance cover designated by SPA PoE and the Port User shall comply with any requirements promptly.

### 16.2 Claims

If requested by SPA PoE, the Port User shall make and pursue a claim under its insurance policies in circumstances where:

- (a) a breach of the Contract has occurred and some or all of the resulting loss or damage (**Loss or Damage**) is covered under the Port User's insurance policies;
- (b) there are reasonable prospects of the claim succeeding; and
- (c) some or all of the proceeds from a successful claim could be applied towards any Loss or Damage,

however, this clause shall not apply in circumstances where the Port User is ready, willing and able to pay for the Loss or Damage on its own account.

## 17. Liability limited

Except to the extent that any rights or warranties cannot be excluded or limited at law, the liability of SPA PoE to the Port User for anything arising out of the Port Standards and Procedures or any agreement incorporating the Port Standards and Procedures will be limited at the election of SPA PoE to:

- (a) the resupply of equivalent services, Facilities or Equipment; or
- (b) the payment of the cost of having the services, Facilities or Equipment supplied again.

Nothing in this clause in any way limits any of SPA PoE's immunities under the Act.

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## 18. Delay

### 18.1 SPA PoE's obligations and limited liability in relation to Delays

- (a) SPA PoE's obligations and liabilities and the Port User's rights and remedies in respect of any Delays are strictly limited in all circumstances to the obligations, liabilities, rights and remedies set out in this clause 18.1.
- (b) Subject to clauses 18.1(c) and 18.1(d), where a Permissible Delay occurs SPA PoE must use its reasonable endeavours to resolve the Delay and mitigate the effect of the Delay on the Port User as soon as reasonably practicable.
- (c) To the extent that a Permissible Delay which has occurred affects the interests of Port users or customers other than the Port User, nothing is

intended to give the interests of the Port User any priority over the interests of any other Port user or customer.

- (d) Nothing in clause 18.1(b) obliges SPA PoE to incur any expenses in order to resolve any Delay unless SPA PoE considers (in its absolute discretion):
  - (i) that it has the money readily available to it; and
  - (ii) that the expenditure is warranted in the circumstances.
- (e) In the event of a Permissible Delay SPA PoE has no liability to the Port User for loss, damages or compensation of any kind in respect of anything arising out of the Permissible Delay other than any liability that SPA PoE may have as a consequence of SPA PoE breaching any of its obligations under clause 18.1(b).
- (f) if a Delay arises out of any Gross Default on the part of SPA PoE or any of its Associates (**Gross Default Delay**) then:
  - (i) SPA PoE must use its best endeavours to resolve the Delay as quickly as possible and mitigate the effect of the Delay on the Port User as quickly as possible. However, to the extent that a Gross Default Delay affects the interests of Port users or customers other than the Port User, nothing is intended to give the interests of the Port User any priority over the interests of any other affected Port user or customer; and
  - (ii) except to the extent provided for elsewhere, there is no restriction on SPA PoE's liability to the Port User with respect to anything arising out of a Gross Default Delay and no restriction on the rights, remedies or recourse available to the Port User at law or in equity with respect to anything arising out of a Gross Default Delay.

### 18.2 Exclusion of non-delay liability

Despite anything to the contrary in clause 18.1 and subject to clause 18.4, SPA PoE is not liable in tort, contract, bailment or otherwise (regardless of how negligent or otherwise wrongful any act or omission may be) to the Port User under any circumstances for:

- (a) anything arising out of any acts or omissions on the part of any third party towage, lines, mooring or bunkering service providers;
- (b) anything arising out of any acts or omissions on the part of any marine pilot (whether employed or supplied by SPA PoE or anyone else); or
- (c) any claims for demurrage or any claims for compensation in relation to any demurrage that may be charged to the Port User or anyone else for any reason.

### 18.3 Limitation of non-delay liability

SPA PoE's liability to the Port User for any incident or series of related incidents arising out of a single event resulting in loss or damage to goods, damage to or loss of a Vessel or any cargo or other property, is limited in all circumstances (regardless of how

negligent, tortious or otherwise wrongful the relevant acts or omissions of SPA PoE or any of its Associates or contractors may be) as follows:

- (a) for cargo or goods, the least of:
  - (i) the insured value of any goods lost;
  - (ii) the reduction in value of any goods damaged;
  - (iii) 2.75 SDR per kilogram gross weight of any cargo or goods lost or damaged; or
  - (iv) \$100,000;
- (b) for a vessel, the least of:
  - (i) the depreciated value of the vessel;
  - (ii) the market value of the vessel;
  - (iii) the reasonable cost of repairing the vessel; or
  - (iv) \$500,000; and
- (c) for other property, the least of:
  - (i) the depreciated value of the property;
  - (ii) the market value of the property;
  - (iii) the reasonable cost of repairing the property; or
  - (iv) \$50,000.

### **18.4 Gross Negligence**

Clauses 18.3(a), 18.3(b) or 18.3(c) do not apply to the extent that the Port User suffers loss or damage as a consequence of Gross Negligence on the part of SPA PoE or any of SPA PoE's Associates.

### **18.5 Consequential Loss and Force Majeure**

Despite anything to the contrary in or arising out of any term in these Port Standards and Procedures:

- (a) SPA PoE is not be liable for Consequential Loss in any circumstances; and
- (b) neither SPA PoE or the Port User is liable for anything to the extent that the event or circumstances giving rise to the relevant loss, damage or claim falls within the definition of a Force Majeure Event.

### **18.6 Non-excludable rights**

- (a) SPA PoE and the Port User acknowledge and agree that:
  - (i) under relevant State, territory and Commonwealth law certain conditions and warranties may be implied in any contract and rights

and remedies may be conferred on consumers that cannot be excluded, restricted or modified by agreement (**Non-excludable Rights**); and

- (ii) notwithstanding anything contained in these Port Standards and Procedures, the Non-excludable Rights shall not be excluded, restricted or modified except to the extent permitted by law.
- (b) The liability of SPA PoE to the Port User for a breach of any Non-excludable Right shall be limited in every case, at SPA PoE's option, to:
  - (i) supplying the Services again; or
  - (ii) payment of the cost of having the Services supplied again.

### 18.7 Complete defences

- (a) The provisions in this clause 18 are intended to provide SPA PoE with absolute and complete defences and limitations with respect to any claims that the Port User may have against SPA PoE at law or in equity in relation to the matters covered in those provisions (**Excluded Matters**) and the defences and limitations specified shall be available to SPA PoE as complete defences and absolute bars to any claims that the Port User may have or make with respect to the Excluded Matters including breach of contract or indemnity claims (including claims for breach of this Agreement), claims in negligence or any other tort and claims pursuant to any other cause of action available at law or in equity.
- (b) Clause 18.7(a) is intended to have reciprocal application for the benefit of the Port User in relation to clause 18.5(b).

### 18.8 Interference with stacking caused by weather conditions

Subject to clause 18.5, SPA PoE is not liable for damage to any goods, property or containers resulting from interference with the stacking of containers which is caused by weather conditions unless the Port User who owns, leases or otherwise has an interest in the goods, property or containers has directed SPA PoE in writing to stack the relevant containers to a maximum height and configuration of one container high and has paid SPA PoE any additional fees or charges advised by SPA PoE in respect of this stacking configuration.

## 19. Limitations and exclusions

### 19.1 Limitations

Regardless of any contributing acts or omissions on the part of SPA PoE or any of its employees, agents or contractors (regardless of how negligent, tortious or otherwise wrongful the acts or omissions may be), SPA PoE does not and will not owe any Port User any duty of care in relation to, or be responsible for or liable to the Port User for:

- (a) anything arising out of the activities, acts or omissions (regardless of how negligent, tortious or otherwise wrongful the acts or omissions may be) of any other Port User;

- (b) anything arising out of circumstances where any Equipment or Facilities are being used, have been used or are going to be used to handle different products or materials from time to time (regardless of any product or materials incompatibility, regardless of any product or materials contamination and regardless of the risk of cross product or cross material contamination);
- (c) anything arising out of any access or egress delays or delays of any other kind that occur in relation to anything concerning the Port including any Vessel delays and delays caused by shutdowns, construction works, earth works, road closures or product or materials handling exclusion zones;
- (d) anything arising out of the temporary or permanent closure of any part of the Port for any reason;
- (e) anything arising out of theft or disappearance of anything that is in the possession, custody or control of the Port User or its Associates while that property is in the Port (excluding theft by any SPA PoE employee);
- (f) anything arising out of any security breach, security failure or lack of security anywhere in the Port;
- (g) any interruption or breakdown with respect to the supply of water, gas, electricity, phone service, lighting or other services in the Port;
- (h) any loss or damage suffered by the Port User as a consequence of any breakage, blockage or overflow of any sewer, stormwater drain, waste drain or pipe or any water runoff from any other parts of the Port or any neighbouring land;
- (i) any loss or damage suffered by the Port User as a consequence of any contamination of fuel or other products in the Port; or
- (j) anything arising out of the loss of any Port customer or any temporary or permanent downturn in trade, vessel visits or the loss of any business opportunities in the Port.

### **19.2 Acknowledgments**

- (a) Nothing obliges SPA PoE to stop (either temporarily or permanently) any third party from commencing or carrying on any activity in the Port in order:
  - (i) to enable the Port User to do anything; or
  - (ii) to protect a Port User's interests or protect any property owned by or in the possession, custody or control of the Port User.
- (b) Nothing precludes SPA PoE from granting third parties rights to use any part of the Port or anything in the Port for any purpose (excluding any part of the Port or anything in the Port over which the Port User has exclusive possession).
- (c) Nothing in or arising out of these Port Standards and Procedures creates any duty of care in favour of the Port User.

- (d) Nothing in or arising out of these Port Standards and Procedures creates or imports any implied obligations or implied responsibilities of any kind on SPA PoE's part.

### 19.3 Qualifications and Clarifications

- (a) Nothing in clause 19.1 is intended to relieve SPA PoE from liability in relation to anything that arises out of Gross Default on SPA PoE's part.
- (b) Clauses 19.1 and 19.2 are intended to provide SPA PoE with absolute and complete defences and limitations to any claims that a Port User may have against SPA PoE at law or in equity in relation to the matters covered in those clauses (**Excluded Matters**) and the defences and limitations shall be available to SPA PoE as complete defences and absolute bars to any claims that any Port User may have or make with respect to the Excluded Matters including breach of contract or indemnity claims, claims in tort and claims pursuant to any other cause of action available to a Port User at law or in equity.

### 19.4 Act and Regulations

All provisions in the Act and its regulations that state that a port authority is not liable or does not become liable in relation to anything are deemed to be incorporated into these Port Standards and Procedures as contractual provisions and shall limit SPA PoE's liability.

## 20. Liability of SPA PoE directors

The Port User will not under any circumstances take action, sue or initiate any proceedings of any kind against any director of SPA PoE for damages or compensation or any other remedy at law or in equity arising out of or relating to the death of or injury to any person while they are in the Port. However, this clause does not apply in circumstances where the death of or injury to a person is personally and physically inflicted by a director of SPA PoE. It is the intention of this clause to provide each director of SPA PoE from time to time with:

- (a) an absolute and complete defence and bar to all claims that the Port User may have against the director at law or in equity in relation to the death of or injury to any person while they are in the Port including claims based on negligence or any other tort or cause of action; and
- (b) a direct and personal benefit and the intention is that each director of SPA PoE from time to time may personally enforce the provisions of this clause in the same manner as if the director was a party to this agreement.

## 21. Rights over Port User's property

- (a) SPA PoE may exercise a right of lien and retention (**Right of Lien**) over the property of a Port User to secure:
  - (i) payment of all Fees and Charges for which the Port User is liable and for which a demand for payment has been made by SPA PoE; or

- (ii) the Port User's performance of all its obligations under the Port Standards and Procedures or any agreement in which the Port Standards and Procedures have been incorporated.
- (b) In exercising the Right of Lien, SPA PoE may seize and detain the Port User's property until all monies owing are paid and all costs and expenses associated with the Right of Lien are recovered from the Port User as a debt due on demand.

## 22. Abandoned property

- (a) SPA PoE may deem any property of a Port User or any of its Associates that remains in the Port after:
  - (i) the relevant permitted period of Port use has expired; or
  - (ii) 30 days of SPA PoE giving the Port User written notice requesting the Port User to remove the property,

to be abandoned (**Abandoned Property**) and the Port User shall be deemed to have unequivocally and irrevocably waived their right to assert any property rights to the Abandoned Property as against SPA PoE.
- (b) SPA PoE may in its absolute discretion deal with any Abandoned Property as if it were the owner including removing the Abandoned Property and storing, selling, gifting or disposing of the Abandoned Property free of all encumbrances and interest SPA PoE is not liable to any Port User, the owner of the property or anyone else for Costs and Losses that arise out of or in connection with any Abandoned Property, including any act or omission (negligent, tortious or otherwise) on the part of SPA PoE or its Associates while exercising SPA PoE's rights under this clause.
- (c) Without limiting any of SPA PoE's other rights and remedies, any Port User who is responsible for any Abandoned Property shall reimburse SPA PoE for all of its Costs and Losses that arise out of or in connection with the Abandoned Property, including any act or omission (tortious or otherwise) by SPA PoE or any of its Associates while exercising any rights under this clause.
- (d) If SPA PoE sells any of the Abandoned Property, the proceeds after deducting SPA PoE's Costs and Losses (**Net Proceeds**) will be kept aside for the Port User or owner of the Abandoned Property for at least 12 months from the date the Abandoned Property is sold (**12 Month Period**). SPA PoE will, within the 12 Month Period, use its reasonable endeavours to contact and notify the Port User or owner of the sale of the Abandoned Property and of SPA PoE's possession of the Net Proceeds. If the Net Proceeds are not claimed by the Port User or owner of the property within the 12 Month Period then, on expiry of the 12 Month Period, SPA PoE may deal with the Net Proceeds in any way it sees fit and SPA PoE shall not be liable to anyone who later claims any rights to the Net Proceeds.
- (e) Nothing in this clause shall be interpreted to:
  - (i) require SPA PoE to sell any property in preference to any other thing SPA PoE is entitled to do under this clause; or

- (ii) make SPA PoE a trustee or bailee in relation to any property.

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### **23. Governing law and jurisdiction**

The agreement formed between the Port User and SPA PoE incorporating the Port Standards and Procedures is governed by and will be construed in accordance with the laws of Western Australia and the Port User irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Western Australia.