

# STANDARD TERMS AND CONDITIONS

PORTS OF AUCKLAND LIMITED

VALID AS FROM 1<sup>ST</sup> FEBRUARY, 2010.

## **1. PARTIES**

1.1 PORTS OF AUCKLAND LIMITED of Auckland.

1.2 The USER as defined. See clause 12.

## **2.**

2.1 Ports of Auckland Limited, referred to as POAL hereafter, owns and operates wharves, premises, plant and equipment in the greater Auckland region.

2.2 The User wishes to use the services which POAL provides.

2.3 The provision of services by POAL will be upon the following terms and conditions.

## **3. SERVICES TO BE PROVIDED BY POAL**

3.1 POAL will provide berthage for the User's vessels at the Port.

3.2 Berthage will be subject to the absolute right of POAL to require a vessel berthed at any wharf to be moved or relocated to another berth in the Port, or to vacate the allocated berth and to moor in the stream or harbour as directed and any such requirement will be carried out by the Master.

3.3 POAL will use reasonable endeavours to provide a berth for the User's vessel on a date convenient to the User's sailing schedules, but POAL will be under no liability for the consequences (direct or indirect), if any, if for any reason POAL does not provide berthage as requested by the User.

3.4 Where POAL provides tug, towage, lineboat or similar services, such services will be subject to the UK Standard Conditions for Towage and Other Services (Revised 1986) as amended from time to time ("UKSC").

3.5 For the avoidance of doubt, references in the UKSC to "Tugowner" and "Hirer" are, respectively, references to POAL and the User under these Conditions.

3.6 The User is deemed to be familiar with UKSC, however POAL will make the UKSC available to the User on request.

3.7 POAL will provide services for the loading and/or discharging of vessels, for the handling and transport of Cargo and Containers on and between the wharf and the marshalling area (including, without limitation, the delivery to road or rail vehicles and transshipment), and for the transport, storage and packing of Cargo and Containers and all other services referred to in the Price Schedule provided for in clause 4.

## **4. PRICE SCHEDULE**

4.1 Unless otherwise agreed in writing, the charges for services provided will be those contained in POAL's Price Schedule of charges in force at the time of actual provision of the service. The User acknowledges that particulars of such Price Schedule are available upon request.

## **5. PAYMENT FOR SERVICES**

5.1 Unless otherwise agreed in writing, prior to provision of the services requested, the terms of payment for services will be in full prior to the time of departure of the vessel

to which services have been provided or, where services have not been provided in relation to a vessel, will be in full within 7 days of the date of POAL's invoice. If any amounts payable by the User under this agreement are not paid by the due date, the User will pay to POAL, by way of liquidated damages, interest at the rate of 1.5% per month on the amount outstanding calculated from the due date until payment is made in full. The User shall indemnify POAL for all legal fees and costs, on an indemnity basis, incurred by POAL with the recovery of any amounts owing by the User under or in connection with this agreement.

- 5.2 If the User has been granted credit pursuant to the POAL approved credit customer agreement then payment for services rendered under this agreement will be in accordance with the terms of credit established under that agreement.
- 5.3 In addition to and expressly without waiving or limiting any liens that POAL may have by operation of law or statute, POAL shall have a general lien over the Cargo and Containers and all property of the User for sums due by the User to POAL. POAL will be entitled to sell any property subject to the lien after the expiration of one month notice to the User without prejudice to any other rights and remedies POAL may have.

## **6. OBLIGATIONS AS TO CARGO**

- 6.1 The User will ensure that all cargo and containers presented to POAL are properly packed and labelled, are in every way safe for carriage by sea or road or rail, do not exceed their rated gross capacity, are in a fit and proper condition to be handled or otherwise dealt with in the normal course of business by the equipment and operating procedures usually employed by POAL and comply with all applicable laws, orders, regulations, other requirements of the New Zealand Government and all other local or governmental authorities whatsoever.
- 6.2 The User will comply with any rules and directions made from time to time by POAL in respect of the handling of dangerous, hazardous and noxious goods and will also comply with any statute, statutory regulations or other legal requirements that may be in force whether prescribed by the New Zealand Government or any international agency or institution and also with rules, requirements or procedures set by owners of cargo as appropriate and in addition comply with all such procedures and rules as are good operating practice.
- 6.3 The User will comply with the documentation and procedures in respect of all operations as required from time to time by POAL.
- 6.4 The User will notify POAL on or before the arrival at the wharf gate of dangerous, hazardous or noxious export cargo or other export cargo requiring special care.
- 6.5 The User will give POAL at least 48 hours advance notice prior to the vessel's arrival of dangerous, hazardous or noxious import (including transshipment) cargo or other import (including transshipment) cargo requiring special care carried by that vessel.
- 6.6 If any User fails to remove any containers or cargo from the wharves within the time allotted for free storage as detailed in POAL's applicable Price Schedule then POAL may at its sole and unfettered discretion, remove, warehouse or otherwise deal with such containers and cargo at the entire risk and expense of the User.
- 6.7 POAL shall be entitled to release the User's goods to any person holding a delivery order (whether in conventional or electronic or any other customary form) entitling it to uplift the User's goods. POAL shall not be responsible for verifying such delivery order and POAL will not be liable for any loss to the User in the event that the delivery order is subsequently shown to be incorrect or fraudulent.

- 6.8 The User shall indemnify POAL against any liability for duty, sales tax, penalties or other charges in respect of the Cargo and/or Containers and against all costs and expenses incurred in connection with any such liability or claim.

## 7. LIABILITY REGIME

### LIABILITY TABLE

Loss/ Damage	Maximum Liability	Maximum Aggregate Liability	Excess
User's Vessels & Vessel's Equipment	Lesser of reasonable cost of repair, or market value, or \$200,000	\$200,000	\$1,000
Containers	Lesser of reasonable cost of repair, or market value, or  (i) Refrigerated \$7,500  (ii) Other \$1,000	\$100,000	\$300
Cargo	\$1,500 per Unit	\$50,000	\$300
Ancillary equipment (cl 7.1.4)	Lesser of reasonable cost of repair or market value or \$7,000	\$40,000	\$300

#### 7.1 Liabilities of POAL

Subject to the provisions of clause 7.2 (maximum liabilities of POAL), 7.4 (exclusions of liability) and 7.6 (notification of claims) hereof, POAL shall only be liable for physical loss or physical damage caused directly by the negligence of POAL to:

7.1.1 the User's vessel and/or equipment of the vessel;

7.1.2 Containers;

7.1.3 Cargo; and or

7.1.4 Ancillary equipment (not part of the User's vessel's equipment) (including clip-on refrigeration units, generators, trailers and chassis, road or rail vehicles) owned by the User or any other persons.

POAL shall not be liable to the User or any other person howsoever arising except in the circumstances specified in this clause 7.1.

#### 7.2 Maximum Liabilities of POAL

7.2.1 The maximum liability of POAL, its employees, agents and subcontractors to the User or any person claiming through the User ("Maximum Liability"); and

- 7.2.2 The maximum aggregate liability of POAL, its employees, agents and Subcontractors of all claims for loss or damage by any claimant or claimants made, arising out of any one event or series of events (“Maximum Aggregate Liability”); and
- 7.2.3 The excess of any claim shall be in accordance with the Liability Table (as set out above). The excess amount will be deducted from the amount payable by POAL for any loss or damage and shall not be payable by POAL.
- 7.2.4 All amounts of loss and damage referred to in this clause 7.2 including those referred to in the Liability Table are in New Zealand Dollars and are GST inclusive.
- 7.2.5 Overall Limit of Liability NZ \$2,000,000.

Without limiting the above limitations of liability, in no circumstances whatsoever shall the liability of POAL, its employees, agents or Subcontractors, howsoever arising, including, without limitation, the negligence of POAL, its employees, agents or Subcontractors, in respect of any one event or series of events, exceed a maximum of NZ \$2,000,000.

### 7.3 User’s Liability

The User will be liable for loss or damage caused to POAL where the UKSC so provide and/or where such loss or damage is caused by the fault or negligence of the User, its employees, agents or Subcontractors.

### 7.4 Exclusions of Liability

Notwithstanding clauses 7.1 and 7.2 POAL, its employees, agents or Subcontractors will not be liable in any circumstances whatsoever:

- 7.4.1 Where liability might otherwise be attributable to POAL but New Zealand law excludes POAL’s liability, or imposes liability on another party or parties (e.g. including without limitation circumstances in which POAL provides pilots);
- 7.4.2 Where UKSC so provide;
- 7.4.3 Where any loss, damage, expense, accident or injury to any property or person has been caused wholly or principally by the failure of the User to comply with any of these conditions;

And, for the avoidance of doubt:

- 7.4.4 For any demurrage, delay or other costs of transportation of any kind howsoever caused including the negligence of POAL, its employees, agents or Subcontractors;
- 7.4.5 To pay any costs, charges, expenses, damages, compensation or any other monies whatsoever for any injury or loss arising out of a failure by POAL or any person whether or not an agent, employee or Subcontractor of POAL to properly and adequately secure any cargo or container on any rail or road vehicle, or on any other form of transport;
- 7.4.6 For any costs, charges, expenses, damages, compensation or any other monies whatsoever for any injury or loss arising from any failure to inspect containers, any failure to note or to report damage thereto, (whether apparent damage or not), or any failure to take steps necessary to protect the contents of any container and POAL undertakes no responsibility to inspect containers for damage or to report any damage to the User; and

7.4.7 For indirect, special or consequential loss or damage howsoever caused including, without limitation, the negligence of POAL, its employees, agents or Subcontractors.

7.4.8. In addition to and without limiting the other limits and exclusions of liability under this agreement, POAL and its employees, agents and Subcontractors shall be entitled to rely on any limitation of liability available under New Zealand law and POAL, its employees, agents and Subcontractors shall not be liable in any event in excess of those limits.

#### 7.5 User Indemnifies POAL Where Liability Excluded or Liability is in Excess of Limits.

The User hereby holds POAL, its employees, agents and Subcontractors free and indemnified from and against all claims, suits, costs, charges, expenses (including all legal and court expenses), damages, compensation or other monies whatsoever ("the Amount") in respect of all loss, damage, expense, accident or injury (whether direct, indirect, special or consequential) to the extent that the liability of POAL its employees, agents and Subcontractors for the Amount has been excluded under clause 7.4 or any other clause hereof and to the extent that the Amount exceeds the Maximum Liability, Maximum Aggregate Liability, or Overall Limit on Liability under clause 7.2.

#### 7.6 Notification of Claims

7.6.1 For loss of or damage to cargo, POAL will be liable only if notice in writing of any loss or damage is given to POAL by the User within 10 days after the delivery of the cargo or the date when the cargo should have been delivered to the consignee.

7.6.2 For all other loss, damage, expense, accident or injury POAL will be liable only if notice in writing is given to POAL by the User within 30 days after the date when the loss, damage, expense, accident or injury occurred.

7.6.3 If no such notice is given within the above periods any claim will be deemed waived and absolutely barred.

#### 7.7 Benefit of Bills of Lading and Establishment of Bills of Lading

7.7.1 Without prejudice in any manner to the provisions and limitations contained in this agreement, the User will incorporate in its bills of lading or other contracts of carriage to be issued on cargo carried or to be carried on any of the User's vessels a clause to the effect that POAL, its employees, agents and Subcontractors will have the benefit of the provisions of any bill of lading or other contract of carriage and any limitation of liability provided therein and POAL for itself, its employees, agents and Subcontractors hereby accepts such benefit.

7.7.2 Where any cargo or container is received by POAL prior to the establishment of a bill of lading or other contract of carriage the benefit of the intended bill of lading or contract of carriage will apply in all respects (and in particular as set out in sub-clause 7.7.1 above) and will bind all persons interested in the cargo or container as though such bill of lading or contract of carriage had then been established.

#### 7.8 User Responsible for Safe Management and Operation

7.8.1 Nothing in these conditions contained or implied will affect the User's responsibility for the safe navigation and proper management of the vessel including, without prejudice to the generality of the foregoing, her stowage, trim and stability and the operations of berthing, mooring, unmooring and

unberthing. The User warrants that the vessel is and remains in all respects seaworthy.

- 7.8.2 The User shall comply with all statutory and or local/governmental laws and regulations which may at the time be in force. Without limiting the aforesaid, the User warrants to POAL that it will at all times comply with the Maritime Transport Act 1994 and rules and regulations thereunder.
- 7.8.3 The User warrants to POAL that it will at all times comply with its duties and obligations under the Health and Safety in Employment Act 1992 and that it will not do or omit to do anything which breaches or is likely to breach any duty or obligation under the Health and Safety in Employment Act 1992 or which is likely to result in enforcement proceedings under the Health and Safety in Employment Act 1992.
- 7.8.4 The User undertakes and warrants to POAL that it will comply fully with all directions, requirements and instructions notified to it by POAL in respect of health and safety or in respect of any duties or obligations of any person under the Health and Safety in Employment Act 1992. The User acknowledges that this may include producing, on demand, evidence that it is satisfying its obligations under the Health and Safety in Employment Act 1992.
- 7.8.5 If at any time the User becomes aware that it is in breach, or is likely to be in breach, of any such duty or obligation, the User agrees to immediately notify POAL and follow all directions to avoid, remedy or mitigate any such breach or anticipated breach.
- 7.8.6 The User undertakes and warrants to POAL that it will comply fully with its duties and obligations under the Maritime Security Act 2004.
- 7.8.7 The User will ensure that its agents, Subcontractors and employees are aware of these conditions and will abide by them.

## 7.9 User Environmental Warranties

- 7.9.1 The User warrants to POAL that it will not do or omit to do anything or to use materials, substances or processes which breaches or is likely to breach any duty or obligation under the Resource Management Act 1991 and/or the Maritime Transport Act 1994 (including subsequent amendments) or which is likely to result in the issue of an abatement order or enforcement proceedings under the Resource Management Act 1991.
- 7.9.2 Any time the User becomes aware that it is in breach, or is likely to be in breach, of any of the warranties in this clause 7.9, the User agrees to immediately notify POAL and follow all directions to avoid, remedy or mitigate any such breach or anticipated breach.
- 7.9.3 The User will ensure that its agents, Subcontractors and employees are aware of these conditions and will abide by them.
- 7.9.4 The User warrants to POAL that it will comply with the Auckland District Plan and the Auckland Regional Plan: Coastal and all other relevant plans and statutes with respect to noise.
- 7.9.5 The User warrants to POAL that it will comply with all other relevant standards, by-laws, local authority and other regulations and statutes including but not limited to regulations and statutes relating to sound environmental practice and the handling of dangerous, hazardous or noxious goods.

7.9.6 The User agrees to indemnify POAL from and against all losses, costs, expenses, claims, demands, liabilities, damages, actions and proceedings suffered by or commenced against POAL which arise out of or in connection with the failure of the User, its agents, Subcontractors or employees to comply with the provisions of clauses 7.8 and 7.9 (including without limitation, subclauses 7.8.2, 7.8.3, 7.8.4, 7.8.6, 7.9.1, 7.9.4 and 7.9.5).

#### 7.10 Carriage of Goods Act 1979

7.10.1 Where the COGA applies, then, within the meaning of the COGA, where POAL is a contracting carrier, this contract shall be “at limited carrier’s risk”.

7.10.2 Where the COGA applies, then, within the meaning of the COGA, where POAL is an actual carrier, this contract shall be “on declared terms”.

### 8. GENERAL

8.1 The User will ensure that all Subcontractors employed by it will cooperate with POAL and will comply with the safety precautions required by POAL at all times.

8.2 POAL may subcontract any of its services under this agreement.

8.3 The User will not directly or indirectly enter into negotiations relating to employment or labour matters with any employee or employees of POAL or any of its agents or Subcontractors or with any bargaining agent or employee organisation representing or purporting to represent any such employee or employees. All such negotiations will be exclusively conducted by POAL.

8.4 These conditions will be governed and interpreted in all respects in accordance with the laws of New Zealand and the parties hereto submit themselves to the exclusive jurisdiction of the New Zealand High Court at Auckland.

8.5 Any dispute concerning the interpretation or operation of these conditions will be referred.

8.5.1 In the case of any dispute in which an amount by way of costs, charges, expenses, damages or other monetary compensation, amounting to NZ \$50,000 (GST inclusive) or less, is claimed by either party, to the arbitration of a single arbitrator who will be chosen by the agreement of the parties or failing such agreement by the President for the time being of the Auckland District Law Society. The arbitration will otherwise be conducted in all respects in accordance with the Arbitration Act 1996 of New Zealand; and

8.5.2 In the case of all other disputes, whether involving a claim for any monetary sum or otherwise, to the decision of the courts of New Zealand in Auckland.

8.5.3 For the avoidance of doubt, nothing in this clause 8.4 shall prejudice POAL’s right to apply for injunctive relief or interim measures, to arrest the User’s vessel or to proceed against the User’s vessel “in rem” in any jurisdiction.

8.6 All notices under these conditions will be given by personal delivery or by ordinary mail or facsimile transmission:

8.6.1 To POAL at Auckland;  
Ports of Auckland Building  
Sunderland Street, Mechanics Bay, Auckland 1010  
PO Box 1281, Shortland Street, Auckland 1140, New Zealand  
Facsimile 64 9 367 5455

8.6.2 To the User at any of the User's last known places of business whether in New Zealand or elsewhere, or at the address of the User's last known agent in New Zealand; and will be deemed to have been received two days after dispatch by mail or on the day of dispatch by facsimile.

8.7 The User represents and warrants that it is acquiring the services provided by POAL under these conditions solely for the purposes of a business and POAL and the User agree that nothing in the Consumer Guarantees Act 1993 shall apply to the provision of such services to the User.

## **9. FORCE MAJEURE**

POAL will not be responsible for any complete or partial failure to perform or delay in performing or incorrect performance of any services, arising out of or contributed to by one or more of Act of God, storm, flood, earthquake, fire or explosion, failure of electrical supply, strikes, riots, civil commotions, lockouts, stoppages, restraints of labour or whatsoever nature or kind (whether actual or threatened), any other industrial or environmental action, epidemic, war, civil war, hostilities, acts of terrorists, breakdown of or accident or failure of any crane or plant or machinery or equipment or other facility from any cause whatsoever, improper or insufficient or erroneous marking or addressing of any Cargo or Container, inherent vice or quality of goods, or any action or act whatsoever caused beyond the control of POAL.

## **10. VARIATION OF TERMS**

The terms of these Standard Conditions of Provision of Services may be varied by POAL from time to time. Such variations will be deemed effective and accepted by the User 30 days after posting of the varied terms on POAL's websites.

## **11. CONTRACTS (PRIVITY) ACT 1982**

For the purpose of section 4 of the Contracts (Privity) Act 1982 all provisions in these Standard Conditions of Provision of Services providing for exemption from liability for, and indemnities in favour of POAL or its employees, agents or Subcontractors are intended to be for the benefit of and enforceable by the employees, agents and Subcontractors of POAL.

## **12. DEFINITIONS**

In these Standard Conditions of Provision of Services the following meanings will apply (unless the context will otherwise indicate);

12.1 "Cargo" means any goods, merchandise or other property whatsoever whether or not within a container in respect of which POAL provides or is requested to provide services hereunder.

12.2 "COGA" means Carriage of Goods Act 1979.

12.3 "Consignee" means a person, firm or company to whom any goods are consigned.

12.4 "Container" means any article of transport equipment (including, for the avoidance of doubt, lift van, moveable tank, flat or other similar structure) constructed to the specifications of the International Standards Organisation.

12.5 "Dangerous Cargo" means dangerous, hazardous or noxious cargo as defined from time to time in the General Harbour Regulations and/or in the International Maritime Organisation's Code of Dangerous Cargo and/or the Maritime Transport Act 1994 and/or any other relevant New Zealand legislation.

12.6 "POAL" means Ports of Auckland Limited.

- 12.7 “Port” means the wharves of Auckland and Onehunga and all their associated facilities owned by Ports of Auckland Limited.
- 12.8 “Price Schedule” means POAL Price Schedule of charges in force at the date of provision of the service by POAL.
- 12.9 “Subcontractor” means direct or indirect contractors and their respective employees and agents.
- 12.10 “Unit” for the purpose of the liability table in clause 7 means unit as defined in section 3(1) of the Carriage of Goods Act 1979, as accepted by POAL for the provision of any services (and, for the avoidance of doubt, section 3(2) of the Carriage of Goods Act 1979 shall not apply).
- 12.11 “User” means any person for whom POAL provides or is to provide services hereunder or who requests POAL to provide services or any person who is or who appears on reasonable grounds to be an agent, employee, Subcontractor or a representative of any one or more of the foregoing, and the obligations and liabilities under these conditions of all or any of such persons, if there be more than one, will be joint and several. Without limiting the generality of the foregoing User will include the owner, lessee, charterer, operator or manager of any vessel, a road or rail carrier, a shipper, Consignee, or any other party interested in the cargo, stevedore or a combination of any two or more of those parties.