

Port Commitment Deed

Port Kembla

The Hon. Michael Baird, Treasurer, for and on behalf of the Crown in right of the State of New South Wales (**State**)

Port Kembla Operations Pty Limited (as trustee for the Port Kembla Unit Trust) (**Kembla Port Manager**)

NSW Ports Kembla Property Co Pty Limited as trustee for the NSW Ports Kembla Property Trust (**Kembla Port Lessee**)

NSW Ports Operations Hold Co Pty Limited as trustee for the NSW Ports Operations Hold Trust (**Purchaser**)

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Details

Date 31 May 2013

Parties

Name **The Hon. Michael Baird, Treasurer, for and on behalf of the Crown in right of the State of New South Wales**

Short form name **State**

Notice details

Name **Port Kembla Operations Pty Limited (as trustee for the Port Kembla Unit Trust)**

ABN 50 132 250 580

Short form name **Port Manager**

Notice details

Name **NSW Ports Kembla Property Co Pty Limited (ACN 163 262 404) as trustee for the NSW Ports Kembla Property Trust**

ABN

Short form name **Kembla Port Lessee**

Notice details

Name **NSW Ports Operations Hold Co Pty Limited (ACN 163 262 351) as trustee for the NSW Ports Operations Hold Trust**

ABN

Short form name **Purchaser**

Notice details

Background

- A Kembla Port Manager is or will become the sublessee of the Port Kembla Land.
- B Kembla Port Manager may impose certain statutory charges under PAMA.
- C The Treasurer has certain obligations to Kembla Port Manager under this Deed in certain circumstances.

Agreed terms

1. Defined terms & interpretation

1.1 Defined terms

In this Deed:

Associate means:

- (a) in relation to an entity that is not a natural person:
 - (i) each of that entity's related bodies corporate (as that term is defined in the Corporations Act 2001 (Cth));
 - (ii) each person who has a relevant interest (as that term is defined in the Corporations Act) in 20% or more of the voting shares in that entity;
 - (iii) each other entity in which that entity has a relevant interest (as that term is defined in the Corporations Act) in 20% or more of the voting shares in that other entity as if that other entity were a 'company' as defined in the Corporations Act and its securities were shares;
 - (iv) each other entity that Controls that entity;
 - (v) each other entity that is Controlled by that entity;
 - (vi) each trust of which the entity or a person or entity described in paragraphs (a)(i), (ii), (iii), (iv) or (v) is a trustee; and
 - (vii) each trust under which that entity holds 20% or more of voting rights of voting securities, as if that trust were a 'company' as defined in the Corporations Act and its securities were shares,

except that, for the purposes of this Deed a relevant interest (as that term is defined in the Corporations Act) that has arisen merely because the person is party to a shareholders' agreement or consortium agreement, or a constitution, in respect of the entity that gives members pre-emptive rights on the transfer of securities if all members have pre-emptive rights on the same terms, will be disregarded; and
- (b) in relation to a natural person, any:
 - (i) spouse;
 - (ii) relative by blood or adoption of that person or that person's spouse;
 - (iii) body corporate in which that person and an Associate (as determined by another application of this definition) of that person hold in aggregate more than 20% of the voting shares; and
 - (iv) trust of which that person or a person described in paragraphs (b)(i), (ii) or (iii) is a trustee,

where a reference to the Corporations Act in this definition is to that Act as in force at 1 January 2013.

Botany Port Lessee means NSW Ports Botany Property Co Pty Limited (ACN 163 262 422) as trustee for the NSW Ports Botany Property Trust.

Botany Port Manager means Port Botany Operations Pty Ltd ABN 25 855 834 182.

Business Day means:

- (a) for receiving a notice under clause 8, a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is received; and
- (b) for all other purposes, a day that is not a Saturday, Sunday, public holiday or bank holiday in Sydney, Australia.

Business Hours means from 8.00am and 5.00pm on a Business Day.

Completion Date means date on which Completion occurs under the Sale and Purchase Agreement between the Purchaser, Port Kembla Lessor, the State and others dated on or about 12 April 2013.

Container means any moveable device, designed for continuous use in loading and unloading cargoes on and from Ships, including boxes, crates, cylinders, tanks, TEUS, other stackable units and any similar cargo-carrying device which is designated as a container by international stevedoring standards from time to time and **Containerised** has a corresponding meaning.

Container includes:

- (a) overseas import containers;
- (b) overseas export containers; and
- (c) local containers (coastal inwards or outwards); and
- (d) empty containers and transhipped containers.

Container Capacity means, in relation to Port Kembla or Port Botany, capacity for the export or import of Containers, including associated handling and logistics services, provided on or from facilities located on the Port Kembla Land or the Port Botany Land, as the case may be.

Control of an entity means the definition of 'Control' in section 50AA of the Corporations Act and:

- (a) in the case of a corporation includes the power (whether it is legally enforceable or not) to control, whether directly or indirectly, the composition of the board of directors of that corporation, the voting rights of the majority of the voting shares of the corporation or the management of the affairs of the corporation; and
- (b) in the case of a unit trust, includes the power (whether it is legally enforceable or not) to control, whether directly or indirectly, the appointment or removal of the trustee of the trust, the composition of the board of directors of the trustee, the voting rights of the majority of the units of the trust or the management of the affairs of the trust or the business operated by the trust,

and **Controlled** has a corresponding meaning where a reference to the Corporations Act in this definition is to that Act as in force at 1 January 2013.

Excess State Charge has the meaning given in clause 4.1.

Force Majeure Event means:

- (a) in relation to Port Kembla, any event or circumstance affecting Port Kembla or its operations, including but not limited to natural disaster, fire, flood, weather event, earthquake, war, act of terrorism, act of God, and industrial action, but excluding a State Law made or modified after the date of this Deed that is specific and exclusive to Port Kembla (or to Port Kembla and Port Botany) and restricts the volume of Containers that may be exported or imported through the Port Kembla Land or the development of Container Capacity at Port Kembla; and

- (b) in relation to Port Botany, any event or circumstance affecting Port Botany or its operations, including but not limited to natural disaster, fire, flood, weather event, earthquake, war, act of terrorism, act of God, and industrial action, but excluding a State Law made or modified after the date of this Deed that is specific and exclusive to Port Botany (or to Port Botany and Port Kembla) and restricts the volume of Containers that may be exported or imported through the Port Botany Land or the development of Container Capacity at Port Botany.

Full Capacity has the meaning given in clause 3.1.

Independent Regulatory Body means:

- (a) the Independent Pricing and Regulatory Tribunal established under the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) or its successor body; and
- (b) any other body or agency established by statute with statutory powers or functions enabling it to make decisions regarding third party access to, or the economic regulation of, assets or services provided by assets in New South Wales, independent of the control or direction of any Minister of the State.

NSW Ports Botany Property Trust means the trust of that name established on or about 11 April 2013.

NSW Ports Kembla Property Trust means the trust of that name established on or about 11 April 2013.

NSW Ports Operations Hold Trust means the trust of that name established on or about 11 April 2013.

PAMA means the *Ports and Maritime Administration Act 1995* (NSW).

PKPC means Port Kembla Port Corporation.

Port Botany means Port Botany, New South Wales.

Port Botany Land means the land the subject of the Port Botany Lease from time to time.

Port Botany Lease means the long term concurrent lease granted by Port Botany Lessor Pty Ltd to the Botany Port Lessee in relation to certain land at Port Botany and the associated site at Cook's River dated on or about the Completion Date.

Port Corporation means at any time a State Agency that at that time:

- (a) holds a PSOL in respect of Port Kembla;
- (b) otherwise has statutory responsibility for performing functions in relation to Port Kembla; or
- (c) employs or remunerates a Port Officer.

Port Development Plan means as the context requires a Port Development Plan as defined in the Port Kembla Lease or the Port Botany Lease.

Port Kembla means Port Kembla, New South Wales.

Port Kembla Land means the land the subject of the Port Kembla Lease from time to time.

Port Kembla Lease means the long term concurrent lease granted by the Port Kembla Lessor to the Port Lessee in relation to certain land at Port Kembla dated on or about the Completion Date.

Port Kembla Lessor means Port Kembla Lessor Pty Limited ABN 18 161 246 546.

Port Officer means a person who has statutory duties or functions in relation to Port Kembla, including but not limited to a harbour master.

Ports Act means the *Ports Assets (Authorised Transactions) Act 2012* (NSW).

PSOL means an operating licence or any equivalent instrument issued under PAMA as amended.

Restricted Charges Loss in respect of a Support Period in which there is State Oversight means the amount by which the receipts of the Kembla Port Manager from charges it imposes under Division 5 Part 5 of PAMA and under Division 2 Part 5 of PAMA on users of Port Kembla in respect of that Support Period are less than they would have been had the State Oversight not been imposed, calculated as if the Kembla Port Manager and Kembla Port Lessee had taken all action reasonably available to them to mitigate the loss.

State Agency means any of:

- (a) the State of New South Wales;
- (b) any Minister of the State of New South Wales;
- (c) any Department, agency or authority of the State of New South Wales;
- (d) a body corporate owned by the State of New South Wales; and
- (e) a subsidiary of a body corporate owned by the State of New South Wales.

State Law means any:

- (a) enactment of the New South Wales parliament;
- (b) subordinate legislation made under any enactment of the New South Wales parliament; or
- (c) instrument made or issued by a State Agency under any enactment or subordinate legislation referred to in paragraph (a) or (b); or
- (d) decisions of a court in respect of any of the items in paragraphs (a), (b) or (c) above.

State Oversight has the meaning given in clause 5.1.

Statutory Revenue Loss in respect of a Support Period in which there is an Excess State Charge means the amount by which the receipts of the Kembla Port Manager from charges it imposes on users of Port Kembla under Division 5 Part 5 of PAMA and under Division 2 Part 5 of PAMA in respect of that Support Period are less than they would have been had the Excess State Charge not been imposed, calculated as if the Kembla Port Manager and Kembla Port Lessee had taken all action reasonably available to them to mitigate the loss.

Support Period means:

- (a) each period of 12 consecutive months commencing on the anniversary of 1 July 2013 and ending during the Term; and
- (b) the period commencing on the last anniversary of 1 July 2013 that commences during the Term and ending on the last day of the Term (if less than 12 months).

Wharfage Charges means charges imposed and payable under section 61 of PAMA in respect of sites at Port Kembla, known as "wharfage charges".

Term means the period commencing on the Completion Date and ending on the earlier of the 50th anniversary of the Completion Date and the date of termination of the Port Kembla Lease.

TEU means Twenty Foot Equivalent Unit or 20 foot shipping container.

Transaction Documents means the Port Kembla Lease and the other documents described as "Transaction Documents" in the Port Kembla Lease.

1.2 Interpretation

In this Deed, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this Deed, and a reference to this Deed includes any schedule or annexure;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (e) a reference to **A\$, \$A**, dollar or **\$** is to Australian currency;
- (f) a reference to time is to Sydney, Australia time;
- (g) a reference to a party is to a party to this Deed, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (i) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (j) a word or expression defined in the Corporations Act has the meaning given to it in the Corporations Act;
- (k) the meaning of general words is not limited by specific examples introduced by **including, for example** or similar expressions;
- (l) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them severally and not jointly;
- (m) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them severally and not jointly; and
- (n) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Deed or any part of it.

1.3 Headings

Headings are for ease of reference only and do not affect interpretation.

1.4 Business Days

If a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

1.5 Trustee capacity

- (a) Kembla Port Manager as trustee for the Port Kembla Unit Trust (in this clause 1.5, the **Kembla Trustee**) is a party to this Deed only in its capacity as trustee for the Port Kembla Unit Trust (in this clause 1.5, the **Kembla Trust**). A liability arising under or in

connection with this Deed is limited to and can be enforced against the Kembla Trustee only to the extent to which it can be satisfied out of the property of the Kembla Trust out of which the Kembla Trustee is actually indemnified for the liability.

- (b) The limitation of liability in clause 1.5(a) will not apply to any obligation or liability of the Kembla Trustee to the extent that it is not satisfied because under the agreement governing the Kembla Trust or by operation of law there is a reduction in the extent of the indemnification of Kembla Trustee out of the assets of the Kembla Trust as a result of fraud, negligence or breach of trust of the Kembla Trustee or the Kembla Trustee waiving or agreeing to amend the rights of indemnification it would otherwise have out of the assets of the Kembla Trust.
- (c) Botany Port Manager as trustee for the Port Botany Unit Trust (in this clause 1.5, the **Botany Trustee**) is a party to this Deed only in its capacity as trustee for the Port Kembla Unit Trust (in this clause 1.5, the **Botany Trust**). A liability arising under or in connection with this Deed is limited to and can be enforced against the Botany Trustee only to the extent to which it can be satisfied out of the property of the Botany Trust out of which the Botany Trustee is actually indemnified for the liability.
- (d) The limitation of liability in clause 1.5(c) will not apply to any obligation or liability of the Botany Trustee to the extent that it is not satisfied because under the agreement governing the Botany Trust or by operation of law there is a reduction in the extent of the indemnification of Botany Trustee out of the assets of the Botany Trust as a result of fraud, negligence or breach of trust of the Botany Trustee or the Botany Trustee waiving or agreeing to amend the rights of indemnification it would otherwise have out of the assets of the Botany Trust.

2. Term

This Deed will operate for and will terminate at the end of the Term. The parties will have no further obligations under this Deed after termination. This clause 2 does not affect obligations and rights that have accrued prior to such termination.

3. Support in respect of development of container capacity at Port of Newcastle

3.1 Full Capacity

There is **Full Capacity** at Port Kembla or Port Botany (a **Port**) as the case may be at a time when having regard to:

- (a) the existing utilisation of that Port;
- (b) the Port Development Plans for the Port in force under the Port Kembla Lease or Port Botany Port Lease as the case may be;
- (c) any statement made by the Kembla Port Manager, Kembla Port Lessee, Botany Port Manager or Botany Port Lessee as the case may be that it does not intend to develop further container capacity at the Port;
- (d) the bona fide plans of stevedore tenants at the Port to expand the capacity of their Container handling facilities at the Port, or the absence of such plans;
- (e) the physical environment and constraints of that Port;
- (f) laws applicable to that Port; and

(g) the availability of capital,

it is reasonable to conclude that the maximum Container Capacity of that Port at that time will not be able to be increased in the future by more than the greater of:

(h) a total of 5% of the Container Capacity at that time; or

(i) capacity to import or export an additional 500,000 TEUs in a year.

3.2 No present Full Capacity

The parties acknowledge that as at the date of this Deed, there is not yet Full Capacity at Port Kembla or Port Botany.

3.3 Support

Subject to clause 3.8, if all of the conditions in paragraphs (a) to (e) are satisfied in respect of a Support Period (**Relevant Support Period**):

- (a) the Kembla Port Manager demonstrates to the reasonable satisfaction of the State that at least one of Port Kembla nor Port Botany was not at Full Capacity during the whole of the Relevant Support Period;
- (b) the EXCESS as calculated in accordance with clause 3.4 in respect of the Relevant Support Period is greater than zero;
- (c) the EXCESS as calculated in accordance with 3.4 in respect of the Support Year (if any) immediately prior to the Relevant Support Year was also greater than zero (Previous Support Period);
- (d) the Kembla Port Manager demonstrates to the reasonable satisfaction of the State that the number of Containers imported or exported by Port Kembla in the Relevant Support Period is less (**Shortage**) than it would have been had EXCESS been zero or less and that there is both a reasonable, and a material, causal connection and correlation between the amount of EXCESS and the amount of the Shortage; and
- (e) the Kembla Port Manager demonstrates to the reasonable satisfaction of the State that the number of Containers imported or exported by Port Kembla in the Previous Support Period (if any) is less (**Prior Shortage**) than it would have been had EXCESS for that Previous Support Period been zero or less, and that there is both a reasonable, and a material, causal connection and correlation between the amount of EXCESS and the amount of the Prior Shortage,

then the State must pay to the Kembla Port Manager in accordance with this clause 3 the amount of NSupport as calculated under clause 3.4.

3.4 Calculation of NSupport

In this Deed:

$NSupport = EXCESS \times TEUPK_n / TEU_{total} \times WAWpk \times N / 365$

where:

Escalation is the greater at the time of calculation of NSupport of:

- (a) $1.06^{p/365}$; and
- (b) $TEUPK_n / TEUPK_{base}$

where p is the number of days in the period commencing on 30 June 2013 and ending on the last day of the Relevant Support Period.

EXCESS is the greater of:

- (a) zero; and
- (b) $TEUN_n - (30,000 \times \text{Escalation} \times N/365)$

FM Capacity is the number of TEU imports or exports attributable to capacity developed at Port of Newcastle in any period of time between the occurrence of a Force Majeure Event that is reasonably likely to materially reduce Container Capacity, or prevent the development of Container Capacity, at Port Kembla or Port Botany for at least 5 years and the time that the effect of that Force Majeure Event is removed and the Container Capacity at Port Kembla or Port Botany is restored to what it would have been had the Force Majeure Event not occurred, to the extent such capacity used or developed at Port of Newcastle is used or developed predominantly in response to that Force Majeure Event.

N is the number of days in the Relevant Support Period.

TEUPK_{base} is the number, expressed in terms of the number of TEUs, of containers imported to or exported from Port Kembla during the year ending 30 June 2013.

TEUPB_n is the number, expressed in terms of the number of TEUs, of Containers imported to or exported from Port Botany during the Relevant Support Period.

TEUPK_n is the number, expressed in terms of the number of TEUs, of Containers imported to or exported from Port Kembla during the Relevant Support Period.

TEUN_n is the number, expressed in terms of the number of TEUs, of Containers imported to or exported from the Port of Newcastle during the Relevant Support Period, excluding:

- (a) any FM Capacity; and
- (b) the number of TEU imports or exports (if any) attributable to any state of emergency or disaster that results in the temporary import or export through Port of Newcastle of humanitarian aid or emergency supplies, goods or vehicles.

TEU_{total} is the aggregate of TEUPB_n and TEUPK_n.

WAW_{pk} is the weighted average per TEU of the Wharfage Charges actually imposed by Kembla Port Manager on users of Port Kembla in respect of Containers at Port Kembla in respect the Relevant Support Period.

3.5 Kembla Port Manager may make a submission

If all the conditions in clause 3.3 were satisfied in respect of a Support Period, then within 20 Business Days after the end of that Support Period the Kembla Port Manager may make a written submission to the State which:

- (a) provides evidence that all of the conditions of clause 3.3 were satisfied;
- (b) provides a calculation of N_{Support}; and
- (c) provides reasonable written details of and supporting evidence for that calculation.

3.6 Consultation in respect of submission

If the Kembla Port Manager makes a submission in accordance with clause 3.5:

- (a) the parties must make their respective representatives reasonably available to discuss the submission within the period of 20 Business Days following the receipt of the submission by the State; and
- (b) the State must within 20 Business Days following the receipt of the submission by the State either:

- (i) give the Kembla Port Manager written notice that the State accepts the submission; or
- (ii) give the Kembla Port Manager written notice that the State rejects the submission, and a statement of the material reasons for the rejection.

3.7 Payment of agreed support or dispute

- (a) If under clause 3.6 the State accepts a submission by the Kembla Port Manager, it must pay the amount of NSupport to the Kembla Port Manager within 60 days after notifying the Kembla Port Manager of that acceptance.
- (b) If the State rejects a submission made by the Kembla Port Manager, either party may take such action including legal proceedings in relation to the matters the subject of the submission as it sees fit.
- (c) The Kembla Port Manager must not bring legal proceedings, or otherwise seek to enforce clause 3.3, in respect of any alleged EXCESS referred to in clause 3.4 unless it has complied with clauses 3.5 and 3.6 in respect of that alleged EXCESS.

3.8 Newcastle capacity resulting from long-term Force Majeure Event

- (a) Clause 3.3 will cease to apply and have no further effect (other than in respect of any Support Period that has already ended) at any time after a Force Majeure Event affecting both Port Kembla and Port Botany has occurred that is reasonably likely to:
 - (i) materially reduce Container Capacity, or prevent the development of Container Capacity, at Port Botany and Port Kembla for at least 5 years; and
 - (ii) materially constrain the import or export of Containers into or from New South Wales by sea unless additional Container handling capacity is established.
- (b) Clause 3.3 will cease to apply and have no further effect (other than in respect of any Support Period that has already ended) at any time after the conditions in both paragraphs (i) and (ii) of this clause 3.2(b) are satisfied:
 - (i) a Force Majeure Event (**Primary FM Event**) has occurred that is reasonably likely to:
 - (A) materially reduce Container Capacity, or prevent the development of Container Capacity, at one of Port Kembla or Port Botany (the **Affected Port**) for at least 5 years; and
 - (B) materially constrain the import or export of Containers into or from New South Wales by sea unless additional Container handling capacity is established; and
 - (ii) having regard to:
 - (A) the existing utilisation of whichever of Port Kembla or Port Botany is not the Affected Port (**Other Port**);
 - (B) any Force Majeure Event (including the Primary FM Event) which at or after the occurrence of the Primary FM Event affects the Other Port;
 - (C) the Port Development Plans in force under the Port Kembla Lease or Port Botany Lease as the case may be;
 - (D) any statement made by or on behalf of the Port Kembla Manager, Port Kembla Lessee, Port Botany Manager or Port Botany Lessee, as

applicable, that it does not intend to develop further container capacity at the Other Port;

- (E) the bona fide plans of stevedore tenants at the Other Port to expand the capacity of their Container handling facilities at the Other Port, or the absence of such plans;
- (F) the physical environment and constraints of the Other Port;
- (G) laws applicable to the Other Port; and
- (H) the availability of capital,

the State, acting reasonably, concludes (and notifies the Port Manager of its conclusion) that the maximum Container Capacity of the Other Port will not, within 24 months after the occurrence of the Primary FM Event, be increased to accommodate the amount of Container Capacity that has been constrained by the Primary FM Event at the Affected Port.

- (c) If one of clause 3.8(a) or (b) has applied to end the application of clause 3.3, clause 3.3 will not commence to apply again even if the circumstances described in clause 3.8(a) or (b) change or cease.

3.9 Other limits on support

- (a) Each of Kembla Port Manager, Kembla Port Lessee and Purchaser releases each of the State, the Port Kembla Lessor and SPC from any liability whatsoever in respect of any increase in the use of or the capacity of the Port of Newcastle to import, export or handle Containers, however arising, in connection with this Deed or the Transaction Documents, other than liability under clause 3.3.
- (b) Kembla Port Manager must not make a claim under this Deed in respect of any temporary increase in movements of Containers through the Port of Newcastle that results from any Force Majeure Event affecting Port Kembla or Port Botany.
- (c) The State holds the benefit of this clause 3.9 on trust for each of the Port Kembla Lessor and SPC.

4. Support in respect of duplication of PAMA charges

4.1 Excess State Charge

In this Deed, an **Excess State Charge** exists to the extent that all of the following conditions (a) to (d) apply:

- (a) during the Term, a State Agency imposes a charge under Division 5 Part 5 of PAMA or under Division 2 Part 5 of PAMA on users of Port Kembla in connection with those users' use of Port Kembla (**State Charge**);
- (b) the State Charge is not confined to the types of charges which SPC is, immediately after the Completion Date, charging users of Port Kembla under PAMA;
- (c) the State Charge is not confined to:
 - (i) funding or recovering the costs and expenses of:
 - (A) a Port Corporation in providing goods, equipment, facilities or services, or performing statutory functions including pilotage, in relation to Port Kembla;
 - (B) employing and accommodating Port Officers; or

- (C) providing resources (including human resources), equipment and facilities for the performance by a Port Officer of their statutory functions in relation to Port Kembla; or
- (ii) recovering a reasonable margin or profit on such costs and expenses; and
- (d) at approximately the same the time that the State Charge is imposed, the Kembla Port Manager is imposing charges under the same section of PAMA on the same class of users of Port Kembla.

4.2 State's obligation to support

The State must pay to the Kembla Port Manager in accordance with this clause 4 the amount of the Statutory Revenue Loss that the Kembla Port Manager demonstrates, to the reasonable satisfaction of the State, the Kembla Port Manager has forgone in any Support Period as a direct result of an Excess State Charge imposed in that Support Period.

4.3 Kembla Port Manager may make a submission

Where an Excess State Charge has been imposed in any Support Period, the Kembla Port Manager may within 20 Business Days after the end of that Support Period make a written submission to the State which:

- (a) provides evidence that each of the conditions of clause 4.1 was satisfied;
- (b) provides a calculation of the Statutory Revenue Loss that the Kembla Port Manager alleges it has foregone in respect of that Support Period as the direct result of an Excess State Charge during the Support Period; and
- (c) provides reasonable written details of and supporting evidence for that calculation.

4.4 Consultation in respect of submission

If the Kembla Port Manager makes a submission in accordance with clause 4.3:

- (a) the parties must make their respective representatives reasonably available to discuss the submission within the period of 20 Business Days following the receipt of the submission by the State; and
- (b) the State must within 20 Business Days following the receipt of the submission by the State either:
 - (i) give the Kembla Port Manager written notice that the State accepts the submission; or
 - (ii) give the Kembla Port Manager written notice that the State rejects the submission, and a statement of the material reasons for the rejection.

4.5 Payment of agreed support or dispute

- (a) If under clause 4.4 the State accepts a submission by the Kembla Port Manager, it must pay the amount of the relevant Statutory Revenue Loss to the Kembla Port Manager within 60 days after notifying the Kembla Port Manager of that acceptance.
- (b) If the State rejects a submission made by the Kembla Port Manager, either party may take such action including legal proceedings in relation to the matters the subject of the submission as it sees fit.
- (c) The Kembla Port Manager must not bring legal proceedings, or otherwise seek to enforce clause 4.2, in respect of an alleged Excess State Charge or alleged Statutory Revenue Loss unless it has complied with clauses 4.3 and 4.4 in respect of that alleged Excess State Charge and alleged Statutory Revenue Loss.

4.6 Limits on support

- (a) Each of the Kembla Port Manager, Kembla Port Lessee and Purchaser releases each of the State, the Port Kembla Lessor and SPC from any liability whatsoever in respect of any Excess State Charge, however arising, in connection with this Deed or the Transaction Documents, other than liability under clause 4.2.
- (b) The State holds the benefit of this clause 4.6 on trust for each of the Port Kembla Lessor and SPC.

5. Support in respect of restrictions on PAMA charges

5.1 State Oversight

In this Deed, **State Oversight** exists if both of the following conditions (a) and (b) apply:

- (a) during the Term, a State Law comes into force or is amended with the effect that the State Law limits, or a State Agency other than an Independent Regulatory Body has the right to limit, approve, reject or impose conditions on, the charges that the Kembla Port Manager may otherwise impose under Division 5 Part 5 of PAMA or under Division 2 Part 5 of PAMA on users of Port Kembla; and
- (b) such a State Law or State Agency operates or acts to limit, reject or impose conditions on the charges that the Kembla Port Manager seeks to impose under Division 5 Part 5 of PAMA or under Division 2 Part 5 of PAMA on users of Port Kembla.

5.2 Support

The State must pay to the Kembla Port Manager in accordance with this clause 5 the amount of the Restricted Charges Loss that the Kembla Port Manager demonstrates, to the reasonable satisfaction of the State, the Kembla Port Manager has forgone during the Term as a direct result of State Oversight.

5.3 Kembla Port Manager may make a submission

Where State Oversight has occurred in any Support Period, the Kembla Port Manager may within 60 days after the end of that Support Period make a written submission to the State which:

- (a) provides evidence that all of the conditions of clause 5.1 are satisfied;
- (b) provides a calculation of the Restricted Charges Loss that the Kembla Port Manager alleges it has foregone as the direct result of State Oversight during the Support Period; and
- (c) provides reasonable written details of and supporting evidence for that calculation.

5.4 Consultation in respect of submission

If the Kembla Port Manager makes a submission in accordance with clause 5.3:

- (a) the parties must make their respective representatives reasonably available to discuss the submission within the period of 20 Business Days following the receipt of the submission by the State; and
- (b) the State must within 60 days following the receipt of the submission by the State either:
 - (i) give the Kembla Port Manager written notice that the State accepts the submission; or
 - (ii) give the Kembla Port Manager written notice that the State rejects the submission, and a statement of the material reasons for the rejection.

5.5 Payment of agreed support or dispute

- (a) If under clause 5.4 the State accepts a submission by the Kembla Port Manager, it must pay the amount of the relevant Restricted Charges Loss to the Kembla Port Manager within 60 days after notifying the Kembla Port Manager of that acceptance.
- (b) If the State rejects a submission made by the Kembla Port Manager, either party may take such action including legal proceedings in relation to the matters the subject of the submission as it sees fit.
- (c) The Kembla Port Manager must not bring legal proceedings, or otherwise seek to enforce clause 5.2, in respect of alleged State Oversight or alleged Restricted Charges Loss unless it has complied with clauses 5.3 and 5.4 in respect of that alleged State Oversight and alleged Restricted Charges Loss.

5.6 Limits on support

- (a) Each of the Kembla Port Manager, Kembla Port Lessee and Purchaser releases each of the State, the Port Kembla Lessor and SPC from any liability whatsoever in respect of any State Oversight, however arising, in connection with this Deed or the Transaction Documents, other than liability under clause 5.2.
- (b) The State holds the benefit of this clause 5.6 on trust for each of the Port Kembla Lessor and SPC.

6. Limits on claims for support

- (a) Kembla Port Manager may not make a claim under clause 3, 4 or 5 of this Deed in respect of any Support Period unless the aggregate of amounts claimed in respect of that Support Period and the Support Period (if any) ending immediately prior to that Support Period exceeds a total of \$100,000.
- (b) Kembla Port Manager may not make a claim under clause 3, 4 or 5 of this Deed in respect of:
 - (i) any Support Period commencing after Kembla Port Manager or Botany Port Manager or an Associate of Kembla Port Manager or Botany Port Manager has developed or commenced development of Container handling capacity at Port of Newcastle; or
 - (ii) any Support Period during which:
 - (A) Port of Newcastle or any material part of it is operated, managed or leased by Kembla Port Manager or Botany Port Manager or an Associate of Kembla Port Manager or Botany Port Manager; or
 - (B) any material Container handling capacity at Port of Newcastle is operated by Kembla Port Manager or Botany Port Manager or an Associate of Kembla Port Manager or Botany Port Manager.
- (c) Kembla Port Manager, Kembla Port Lessee and the Purchaser must, as reasonably requested by the State from time to time, provide to the State information about:
 - (i) the number of Containers imported and exported through Port Kembla and Port Botany in any period of time;
 - (ii) the nature of charges imposed by Kembla Port Manager under PAMA and the revenue from those charges in any period of time;

- (iii) the identities of the Associates of the Kembla Port Manager, Kembla Port Lessee and the Purchaser at any given time; and
 - (iv) the extent to which any of Kembla Port Manager, Kembla Port Lessee, Botany Port Manager and Botany Port Lessee are under the common Control (direct or indirect) of any person at any given time.
- (d) Each of Kembla Port Manager, Port Lessee and the Purchaser must use their respective reasonable endeavours to minimise any loss of revenue that may be the subject of a claim by Port Manager under this Deed.

7. Support in respect of TMF

7.1 State Support

Subject to clause 7.2, the State must procure that New South Wales Self Insurance Corporation, as administrator of the Treasury Managed Fund (TMF), indemnifies the Kembla Port Manager under and in accordance with and subject to the TMF's statement of cover that sets out the terms on which PKPC and the Kembla Port Manager are self-insured under the TMF's scheme (TMF Cover), to the extent that it benefits the Kembla Port Manager in respect of occurrences and events occurring before or circumstances existing before the Completion Date that are covered by the TMF Cover.

7.2 Exclusions

Clause 7.1 does not apply in respect of any:

- (a) claim against the Kembla Port Manager or Kembla Port Lessee or against their respective directors, officers, employees, contractors or agents, by:
 - (i) the Kembla Port Manager, Kembla Port Lessee or Purchaser;
 - (ii) an Associate of the Kembla Port Manager, Kembla Port Lessee or Purchaser; or
 - (iii) any of the respective directors, officers, employees, contractors or agents of any of the entities referred to in paragraphs (a)(i) or (a)(ii); or
- (b) liability of the Kembla Port Manager or Kembla Port Lessee or any of their respective directors, officers, employees, contractors or agents, to:
 - (i) the Kembla Port Manager, Kembla Port Lessee or Purchaser;
 - (ii) an Associate of the Kembla Port Manager, Kembla Port Lessee or Purchaser; or
 - (iii) any of the respective directors, officers, employees, contractors or agents of any of the entities referred to in paragraphs (b)(i) or (b)(ii).

8. Notices and other communications

8.1 Service of notices

Subject to clause 8.3, a notice, demand, consent, approval or communication under this Deed (Notice) must be:

- (a) in writing, in English and signed by a person duly authorised by the sender; and
- (b) hand delivered or sent by prepaid post or facsimile to the recipient's address for Notices specified in the Details, as varied by any Notice given by the recipient to the sender.

8.2 Effective on receipt

A Notice given in accordance with clause 8.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, two Business Days after the date of posting (or seven Business Days after the date of posting if posted to or from a place outside Australia); and
- (c) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice,

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the Notice is taken to be received at 9.00am on the next Business Day.

8.3 Other methods

The parties may agree in writing to give and receive Notices by other methods for the purposes of this Deed.

9. Confidentiality

Each of Kembla Port Manager, Kembla Port Lessee and the Purchaser must procure that it and the its Associates keep the existence and terms of this Deed confidential and do not disclose or permit to be disclosed either directly indirectly the existence or terms of this Deed except:

- (a) to the officers, advisers, financiers, shareholders and unitholders of the Kembla Port Manager, Kembla Port Lessee and Purchaser respectively who:
 - (i) have a need to know; and
 - (ii) are aware of the obligations of confidentiality in this clause 9;
- (b) to the extent required by the law;
- (c) for the purpose of enforcement of the terms of this Deed; or
- (d) with the prior written approval of the State which may be withheld at the State's absolute discretion.

10. Miscellaneous

10.1 Alterations

This Deed may be altered only in writing signed by each party.

10.2 Approvals and consents

Except where this Deed expressly states otherwise, a party may, in its absolute discretion, give conditionally or unconditionally or withhold any approval or consent under this Deed.

10.3 Costs

Each party must pay its own costs of negotiating, preparing and executing this Deed.

10.4 Counterparts

This Deed may be executed in counterparts. All executed counterparts constitute one document.

10.5 No reliance

No party has relied on any statement by any other party that has not been expressly included in this Deed.

10.6 No merger

The rights and obligations of the parties under this Deed do not merge on completion of any transaction contemplated by this Deed.

10.7 Entire agreement

This Deed constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.

10.8 Further action

Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this Deed and any transactions contemplated by it.

10.9 Severability

A term or part of a term of this Deed that is illegal or unenforceable may be severed from this Deed and the remaining terms or parts of the term of this Deed continue in force.

10.10 Waiver

A party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver. A party is not liable for any loss of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

10.11 Relationship

Except where this Deed expressly states otherwise, it does not create a relationship of employment, trust, agency, partnership or joint venture between the parties.

10.12 Binding on parties

This Deed binds all of the parties to it whether or not all of the parties have executed or properly executed the document.

10.13 Rights cumulative

Except as expressly stated otherwise in this Deed, the rights of a party under this Deed are cumulative and are in addition to any other rights of that party.

10.14 Governing law and jurisdiction

This Deed is governed by the law of New South Wales and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales.

Signing page

EXECUTED as a deed.

Signed by The Hon. Michael Baird, Treasurer, for and on behalf of the Crown in right of New South Wales, but not so as to incur any personal liability, in the presence of:



Executed by Port Kembla Operations Pty Limited (as trustee for the Port Kembla Unit Trust) ABN 50 132 250 580 in accordance with Section 127 of the



Executed by NSW Ports Operations Hold Co Pty Limited (ACN 163 262 351) as trustee for the NSW Ports Operations Hold Trust in accordance with Section 127 of the Corporations Act 2001

Signature of director

Signature of director/company secretary
(Please delete as applicable)

Name of director (print)

Name of director/company secretary (print)

Executed by NSW Ports Kembla Property Co Pty Limited (ACN 163 262 404) as trustee for the NSW Ports Kembla Property Trust in accordance with Section 127 of the Corporations Act 2001

Signature of director

Signature of director/company secretary
(Please delete as applicable)

Name of director (print)

Name of director/company secretary (print)

Signing page

EXECUTED as a deed.

Signed by The Hon. Michael Baird, Treasurer, for and on behalf of the Crown in right of New South Wales, but not so as to incur any personal liability, in the presence of:

Signature of witness



The Hon. Michael Baird, Treasurer, for and on behalf of the Crown in right of New South Wales



Name of witness (print)

Executed by Port Kembla Operations Pty Limited (as trustee for the Port Kembla Unit Trust) ABN 50 132 250 580 in accordance with Section 127 of the *Corporations Act 2001*:

Signature of director



Signature of director/company secretary (Please delete as applicable)



Name of director (print)

Name of director/company secretary (print)

Executed by NSW Ports Operations Hold Co Pty Limited (ACN 163 262 351) as trustee for the NSW Ports Operations Hold Trust in accordance with Section 127



Executed by NSW Ports Kembla Property Co Pty Limited (ACN 163 262 404) as trustee for the NSW Ports Kembla Property Trust in accordance with Section

