



# **Gove Wharf & Depot** **Access Agreement**

**Valid July 1<sup>st</sup> 2018 – June 30<sup>th</sup> 2019**

**For bookings contact Sea Swift:**

**Phone: (08) 8935 2435**

**Email: [gove@seaswift.com.au](mailto:gove@seaswift.com.au)**

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### 1 Dictionary

**Additional Proposed Price Increase** has the meaning given in Schedule 5.3.

**Additional Proposed Price Increase Notice** has the meaning given in Schedule 5.6.

**Additional Services** means all of the services listed in Schedule 3.2.

**ACCC** means the Australian Competition and Consumer Commission.

**Act** means the *Competition and Consumer Act 2010* (Cth).

**Access Service** means Sea Swift undertakes to provide the following services to a third party that requests access to the Gove Wharf (**Applicant**):

- i. Access to the roll-on, roll-off landing ramp (as indicated as area A in Schedule 2a; or
- ii. Access to the lift-on, lift-off wharf (as indicated as area C in Schedule 2a)

Together with:

- iii. Use and hire of the covered lay down area (as indicated as area D in Schedule 2a);
- iv. Use and hire of the lay down area (as indicated as area E in Schedule 2a); and
- v. Use of stevedoring services for the unloading and loading of cargo from a nominated vessel (at the Gove Wharf Rates specified at Schedule 3);

**Applicant** means a third party that requests access to the Gove Wharf.

**Business Day** mean a day other than a Saturday or Sunday on which banks are open for business generally in Australia or the relevant state or territory.

**Change of Control** means the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of Sea Swift to any other person or entity, or the sale or transfer of any assets necessary, or which may be necessary, to enable compliance with this Undertaking in its entirety.

**Commencement Date** refers to the date Sea Swift has provided the undertaking from which was September 9<sup>th</sup> 2016.

**Confidential Information** refers to information of an Applicant:

- (a) by its nature confidential, including but not limited to information about that Applicant's cargo manifests, cargo descriptions, cargo markings, cargo mix/volumes, cargo origin and destinations, overseas and local customer details, terminal expenditure/cost information; or
- (b) designated to be confidential by the Applicant who supplied it; or
- (c) known, or ought reasonably to be known, by Sea Swift to be confidential or commercially valuable, but excludes information that:
- (d) is comprised solely of the name, address, and contact details of an Applicant for the sole purpose of allowing Sea Swift to comply with requirements of the open access at Gove Wharf undertakings in **Access Service**;

- (e) is in the public domain at the time of the Applicant's request to access Gove Wharf; or
- (f) became available to Sea Swift prior to the Applicant's request to access Gove Wharf other than through a breach of confidence or breach of this Undertaking.

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

**Financial Year** refers to the period from 1 July to 30 June in each year.

**Gove Wharf** means the facilities located at Melville Bay Rd, Foreshore Drive, Nhulunbuy, and includes the areas set out in Schedule 2A.

**Gove Wharf Access Agreement** means the Access Agreement in Schedule 2 of this Undertaking.

**Gove Wharf Rates** means the fees or charges payable by an Applicant to Sea Swift for the **Access Service** (and if the Applicant elects, the Additional Services) as set out in Schedule 3.

**Gove Wharf Lease** means the asset acquired including the lease between Perkins Properties Pty Ltd and the Arnhem Land Aboriginal Council in relation to the Gove Wharf at Melville Bay Rd, Foreshore Drive, Nhulunbuy.

**Independent Price Expert** means the person appointed under Schedule 5 clause 1(b).

**Independent Price Review Process** means the process set out in Schedule 5 of this Undertaking.

**Original Undertaking** means the undertaking accepted by the ACCC on 22 December 2003, in accordance with section 87B of the *Trade Practices Act 1974 (Cth)* (as it then was) from Perkins Shipping with regard to access to some of the port facilities and maintaining levels of customer service.

**Parties** means Sea Swift and Toll.

**Price Related Dispute Resolution Process** means the process set out in Schedule 5 of this Undertaking.

**Transaction** means the agreement reached between the **Parties** under which Sea Swift acquired certain assets of TML's sea-borne freight business in far north Queensland and the Northern Territory including the lease of between Perkins Properties Pty Ltd and the Arnhem Land Aboriginal Council in relation to the Gove Wharf at Melville Bay Rd, Foreshore Drive, Nhulunbuy (**Gove Wharf Lease**)

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at <http://www.accc.gov.au/>.

**Related Bodies Corporate** has the meaning given to it by section 50 of the *Corporations Act 2001* (Cth).

**Revised Undertaking** means in order to avoid any potential inconsistency, while retaining the principles of the **Original Undertaking**, the **Original Undertaking** was varied with the ACCC's consent on 7 July 2005 when the ACCC granted authorisation to Perkins Shipping to provide priority use of a new heavy lift wharf at Gove Wharf to Alcan for three years.

**Sea Swift** means the entity Sea Swift Pty Ltd ACN 010 889 040, a subsidiary of Sea Swift (Holdings) Pty Limited ACN 159 387 390.

**TML** means the entity ultimately owned by Toll Holdings Limited ACN 006 592 089, which provides services in certain regions in Far North Queensland and the Northern Territory.

**Toll** means the entity Toll Holdings Limited ACN 006 592 089.

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

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## 2 Interpretation

- (a) In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (i) a reference to this Undertaking includes all of the provisions of this document including its schedules;
  - (ii) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
  - (iii) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
  - (iv) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
  - (v) a reference in this Undertaking to any company includes its Related Bodies Corporate;
  - (vi) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
  - (vii) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
  - (viii) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
  - (ix) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
  - (x) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
  - (xi) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;

- (xii) a construction that would promote the purpose- or object- underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (xiii) material not forming part of this Undertaking may be considered to:
  - (A) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (B) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (xiv) in determining whether consideration should be given to any material in accordance with paragraph (xiii), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
  - (A) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (B) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (xv) the ACCC may authorise the ACCC Mergers and Adjudication Group, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (xvi) in performing its obligations under this Undertaking, Sea Swift will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (xvii) a reference to:
  - (A) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (B) a party includes its successors and permitted assignees; and
  - (C) a monetary amount is in Australian dollars.

## Schedule 2 Gove Wharf Access Agreement

*(see following page)*

## 1 Access Agreement

### AGREEMENT FOR ACCESS AND THE SUPPLY OF SERVICES BY Sea Swift Pty Ltd (ACN 010 889 040) of 41–43 Tingira Street, Portsmith Queensland 4870 (Sea Swift)

Sea Swift agrees to provide, and the Shipper agrees to engage, Sea Swift to provide the services on the terms below and in the attached Service Conditions and Schedules.

<b>1 Shipper</b>	
<b>Company name:</b>	
<b>ABN:</b>	
<b>Registered address:</b>	
<b>Phone no:</b>	
<b>Email address:</b>	
<b>Contact name:</b>	

<b>2 Access Service and Additional Services (if any):</b>	<i>[to be specified]</i>
<b>3 Wharfage volume</b>	<i>[insert approximate cargo volume]</i>
<b>4 Ancillary Services (provided at election of the Shipper):</b>	<i>[insert as applicable]</i>
<b>5 Sea Swift's Service Conditions applicable to the Services:</b>	<i>[Standard Stevedoring Conditions] [Standard Warehousing Conditions] Sea Swift Terms &amp; Conditions of Carriage Sea Swift Credit Terms</i>

<b>6 Access Day(s):</b>	
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<b>7 Nominated Vessel(s):</b>	
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<b>8 Commencement Date:</b>	
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<b>9 Agreement Port:</b>	Gove
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<b>10 Initial Term:</b>	
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<b>11 Further Term:</b>	<i>[insert if applicable]</i>
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<b>12 Place of delivery:</b>	Gove
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<b>13 Special conditions</b>	<i>[insert if applicable]</i>
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I acknowledge that I have read the above, and the attached Service Conditions and Schedules and am authorized to accept them and to sign this agreement on the Shipper's behalf.

Name: \_\_\_\_\_ Signature: \_\_\_\_\_

Date: / /

Signed for and on behalf of **Sea Swift**

Name: \_\_\_\_\_ Signature: \_\_\_\_\_

Date: / /

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## 2 Definitions and Interpretation

### 2.1 Definitions

'**Access Days**' means the specific day(s) as set out in item 6 upon which the Services will be provided to, and acquired by, the Shipper.

'**Access Service**' means Sea Swift's provision of:

- (i) access to the roll-on, roll-off landing ramp (as indicated as area A in Schedule 2A); or
- (ii) access to the lift-on, lift-off wharf (as indicated as area C in Schedule 2A),

together with:

- (iii) use and hire of the covered lay down area (as indicated as area D in Schedule 2A);
- (iv) use and hire of the lay down area (as indicated as area E in Schedule 2A); and
- (v) use of standard stevedoring services for the unloading and loading of cargo from a nominated vessel at the rates specified in the Gove Wharf Rates for a period not exceeding 6 hours.

'**Additional Services**' means Sea Swift's provision of other services specified in the Gove Wharf Rates.

'**Agreement**' means this agreement including Sea Swift's Service Conditions applicable to the Services, as amended from time to time.

'**Agreement Port**' means the ports specified in item 9.

'**Ancillary Services**' means any services other than the Access Service or Additional Services provided or to be provided in relation to the Goods, including, without limitation, stowing services, lashing services, fumigating, transshipping, packaging, inspecting, handling and any other services incidental to the provision of the Access Service or Additional Services.

'**Business Day**' means a day other than a Saturday, Sunday or gazetted public holiday in the Northern Territory.

'**Charges**' means Sea Swift's charges for the Access Service, the Additional Services and Ancillary Services as required.

'**Commencement Date**' means the date in item 8.

'**Financial Year**' means the period from 1 July to 30 June each year.

'**Force Majeure**' means anything outside of Sea Swift's reasonable control, including without limitation, fire, storm, flood, earthquake, lightning, explosion, accident, road or rail closures, rail derailment, wharf delays, war, terrorism, sabotage, epidemic, quarantine restriction, labour dispute or shortage, act or omission of air traffic control, airline pilot or any third person or public authority.

'**Further Term**' means the period in item 11.

'Goods' means the goods, materials, supplies, equipment, plant and other things to be transported as part of the Services.

'GST' means a tax on goods, services and other things including any value added tax, broad based consumption tax or other similar tax introduced in any jurisdiction in Australia, and includes taxes levied under the *A New Tax System (Goods and Services Tax) Act 1999*.

'GST Law' includes *A New Tax System (Goods and Services Tax) Act 1999* and any other Act, order, ruling or regulation that imposes or otherwise deals with the administration or imposition of a GST in any jurisdiction in Australia.

'Initial Term' means the number of years or the period in item 10.

'Item' means an item on the front section of this agreement.

'Place of delivery' means the place referred to in item 12.

'Ramp' means the roll on / roll off landing ramp at Gove (marked as area A in Schedule 2A).

'Gove Wharf Rates' means the rates published by Sea Swift for each Financial Year for the Access Service and Additional Services at Gove Wharf.

'Related Body Corporate' has the meaning given in section 9 of the *Corporations Act 2001* (Cth).

'Sea Swift's Service Conditions' means the Standard Domestic Sea Carriage Conditions, Standard International Sea Carriage Conditions, Standard Freight Forwarding Conditions, Standard Stevedoring Conditions, Standard Land Transport Conditions and Standard Warehousing Conditions as amended from time to time published on the website at [www.seaswift.com.au](http://www.seaswift.com.au) or any other website nominated by Sea Swift or attached to this agreement applicable to the services.

'Services' means the Access Service and such of the Additional Services referred to in item 2 as the Shipper elects to acquire, and any Ancillary Services if applicable.

'Shipper' means the shipper identified in item 1.

'Term' means the initial term and any further term.

'Wharf Facilities' means the Ramp and the terminal at Gove operated by Sea Swift.

'Writing' means any representation of words, figures or symbols capable of being rendered in visible form.

## 2.2 Interpretation

In this agreement:

- (a) headings and clause numbers are for convenience only and do not form part of the document or affect its interpretation;
- (b) the singular number includes the plural and vice versa, unless the context requires otherwise;
- (c) a reference to a party includes that party's executors, administrators, trustees, successors and permitted assigns;
- (d) a reference to a person includes an individual, corporation, unincorporated association, partnership, joint venture or government body;

- (e) a reference to a statute, ordinance or other law includes all regulations and other instruments under it and all consolidations, amendments, re-enactments or replacements of it;
  - (f) money references are in Australian dollars, unless otherwise provided;
  - (g) a reference to a "month" means a calendar month; and
  - (h) if a party is a corporation, a reference to that party's authorised officer includes an "officer" of the corporation as defined in the *Corporations Act 2001* (Cth), or any other person authorised to act on its behalf.
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### 3 The services

- (a) The Shipper may acquire:
  - (i) the Access Service;
  - (ii) if applicable, Additional Services; and
  - (iii) if applicable, Ancillary Services.
- (b) Sea Swift shall provide the Services at the Ramp on the Access Day(s) nominated in item 5.
- (c) Sea Swift shall use its reasonable endeavours to provide the Services to Shipper immediately upon arrival at the Ramp subject to tide, weather conditions and use of the Ramp.
- (d) Terminal opening times are 8am to 4pm, Monday to Friday.
- (e) The provision of stevedoring services is subject to availability, and must at all times be in compliance with Sea Swift Health & Safety and Fatigue Management policies.
- (f) The Access Service will be provided for a 6 hour period, unless otherwise agreed. The provision of such services for longer than 6 hours will attract additional charges on a pro-rata basis.
- (g) If sufficient labour is not available for additional hours, additional labour may be flown in from Darwin with all associated costs including but not limited to flights, accommodation, meals, transfers, and overtime, charged to the Shipper's account.
- (h) Sea Swift is not a common carrier, does not accept any liability as a common carrier and may refuse to provide the Services for any Goods for any reason.
- (i) Sea Swift may refuse to provide the Services for any Goods Sea Swift considers provide an unacceptable risk to the safety of Sea Swift's employees or its property.
- (j) Both parties agree to appoint and maintain representatives to manage the working relationship between the parties and to act as the point of first contact for the other party.
- (k) All vessels requesting access to Gove Wharf will be subject to a Sea Swift assessment and/or inspection prior to access being granted. Vessels/ Owners/ Operators requesting access will be screened using some or all of the below

resources to determine if the Vessel/Operator/Owner is of a standard acceptable to Sea Swift:

- (i) Classification Society;
- (ii) Class Notations;
- (iii) Vessel Flag state reports and deficiencies;
- (iv) Vessel Port State reports and deficiencies;
- (v) Market Intelligence;
- (vi) Vessel Owner's detailed risk assessment;
- (vii) Vessel Owners/Operators Fleet Safety Statistics;
- (viii) Vessel Owners/Operators Fleet Port State records;
- (ix) Qualifications and experience of all staff;
- (x) Compliance with Australian Marine Orders;
- (xi) Compliance with Australian Navigation Act 2012; and
- (xii) Compliance with other international conventions and acts, including but not limited to, ISPS, ISM, MARPOL, SOLAS, STCW 95.

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#### **4 Service Conditions**

Sea Swift's Service Conditions referred to in item 5 form part of this agreement. If there is any conflict between the provisions contained in this document and the applicable Service Conditions, the terms of this document prevail.

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#### **5 Shipper's Obligations**

- (a) The Shipper shall:
  - (i) arrive at the Ramp on the access day detailed in item 6 between the hours of 0800 hours – 1000 hours ready in all respects to commence unloading and loading of cargo;
  - (ii) ensure all containers for loading and unloading are not heavier than 12 tonne;
  - (iii) provide Sea Swift with a full manifest of cargo volumes to be handled 48 hours prior to arrival at the Ramp;
  - (iv) provide Sea Swift with a manifest of cargo to be loaded and unloaded clearly detailing dangerous goods consignments;
  - (v) immediately after arrival complete a Declaration of Security;
  - (vi) upon completion of all stevedoring operations or on the instructions of Sea Swift immediately depart the Ramp, unless otherwise agreed; and

- (vii) ensure all cargo unloaded are picked up by Shipper or the Shipper's nominated transport provider on the day of unloading.
  - (b) Any cargo not collected on the day of unloading may be repositioned by Sea Swift at the Shipper's cost to Sea Swift's nominated holding yard, where storage fees will apply.
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## **6 Charges**

- (a) The Shipper must pay Sea Swift's Gove Wharf Rates for the Services.
  - (b) The Access Service Charges are payable regardless of whether or not the Shipper's nominated vessels arrive at the Ramp.
  - (c) The amount of Additional Services Charges and Ancillary Services Charges will depend on the equipment and personnel ordered at each visit.
  - (d) The parties agree to negotiate in good faith to determine the appropriate rates where Sea Swift is engaged to provide additional, alternate or varied services from those to be supplied under this agreement.
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## **7 Payment**

- (a) The Shipper must pay the Access Service Charge in advance of each vessel call at the Ramp.
  - (b) The Shipper must pay Charges relating to any Additional Services and Ancillary Services within 14 days of the date of Sea Swift's invoice.
  - (c) Sea Swift will separately itemise the charges for Ancillary Services on Sea Swift's invoice.
  - (d) The Shipper must make any claim that it has been charged incorrectly for the services or has overpaid any invoice within 6 months of the date of performance of the relevant services or of the alleged overpayment.
  - (e) Sea Swift may refuse to provide services to the Shipper if any invoice is not paid as required under this clause 6.
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## **8 Goods and Services Tax (GST)**

- (a) If GST applies to any supplies, where the parties have not agreed upon a GST inclusive price, the consideration payable or provided for that supply will be increased by an amount equal to the GST liability properly incurred by the party making the supply.
- (b) Despite any other provision of this agreement, if either party is required to reimburse or indemnify the other party for any cost, expense or other amount, the amount to be reimbursed or indemnified must be reduced by any part which is recoverable as an input tax credit by the party which incurred it (or representative member of that party's GST group).

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## 9 Termination

- (a) Either party may end this agreement at any time by giving written notice to the other party if:
  - (i) the other party breaches any of its material obligations under this agreement and has failed to remedy the breach or perform the obligation or pay compensation to the other party's reasonable satisfaction within fifteen (15) business days after receiving written notice of the breach;
  - (ii) the other party:
    - (A) is, becomes or is deemed to be, insolvent;
    - (B) makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors; or
    - (C) goes into receivership or liquidation, or has appointed an administrator, official manager, provisional liquidator, liquidator, receiver, or any person having a similar function under the *Corporations Act 2001* (Cth);
  - (iii) any resolution is passed, or proceedings are commenced, for the other party's winding up, dissolution, amalgamation, or liquidation; or
  - (iv) the other party suffers any execution against any of its assets which materially restricts, prevents or has an adverse effect on, that party's ability to perform its obligations under this agreement.
- (b) The ending of this agreement under this clause 8, will be without prejudice to any existing claims (or right to claims) either party may have against the other arising from breaches which occurred prior to the date the agreement ends.

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## 10 Use of the Wharf Facilities

- (a) The Shipper must:
  - (i) repair any damage Shipper causes to the Wharf Facilities;
  - (ii) repair any damage Shipper causes to Sea Swift's equipment;
  - (iii) repair any damage Shipper causes to any adjoining property of Sea Swift;
  - (iv) comply with the reasonable directions of Sea Swift; and
  - (v) keep the Wharf Facilities in a clean and tidy condition.
- (b) The Shipper must have current insurance policies covering:
  - (i) public liability insurance for the Wharf Facilities in an amount of not less than \$20 million;
  - (ii) industrial special risk or similar policy covering Sea Swift's improvements at the Wharf Facilities for their full insurable value; and
  - (iii) any other risk that Sea Swift reasonably requires.

- (c) The Shipper uses and occupies the Wharf Facilities at its own risk.
- (d) The Shipper releases Sea Swift from all claims resulting from any:
  - (i) loss of or damage to any property in or near the Wharf Facilities;
  - (ii) death or injury of any person occurring on or near any part of the Wharf Facilities;
  - (iii) act or omission on Sea Swift's part; and
  - (iv) failure of any services at the Wharf Facilities.
- (e) The Shipper indemnifies Sea Swift against all claims resulting from:
  - (i) any damage or loss of property; and
  - (ii) the death of or injury to any person, which is or may be suffered or sustained in or near the Wharf Facilities whether occupied by Shipper or not, in circumstances which relate in any way to the use and occupation of the Wharf Facilities by Shipper.
- (f) Sea Swift is not liable to Shipper for, and Shipper indemnifies Sea Swift against any loss or damage incurred by Shipper for:
  - (i) any damage to the Wharf Facilities;
  - (ii) the failure of any of Sea Swift's improvements to operate properly;
  - (iii) Shipper's acts, omissions or negligence;
  - (iv) a breach of these terms by Shipper; and
  - (v) Shipper's access to and use or occupation of the Wharf Facilities.

An indemnity or release provided by Shipper under these terms, does not apply to the extent that any damage, expense, loss, claim or liability is caused by Sea Swift's negligence.

- (g) Shipper acknowledges that Sea Swift does not represent that the Wharf Facilities are suitable for Shipper's proposed use and Shipper relies on its own enquiries.
- (h) Shipper must comply with all laws in relation to its proposed use of the Wharf Facilities.

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## 11 Notice

- (a) Notice to a party under this agreement must be:
  - (i) in writing;
  - (ii) addressed to the address of the party specified in item 1 or on the front of this agreement as applicable or as varied by notice given under this clause; and
  - (iii) left at or sent by post, facsimile or email to that address.

- (b) A notice given in accordance with clause 10(a) will be taken to have been received:
    - (i) if delivered by hand to the recipient's address before 4:00 PM on a business day, on the date of delivery, otherwise, on the business day following delivery;
    - (ii) if sent by post, 3 working days after the posting;
    - (iii) if sent by facsimile on before 4:00 PM on a business day, on or the date of transmission, or otherwise on the business day following transmission, provided in both cases that the sender's facsimile machine records a successful transmission of the notice; and
    - (iv) if sent by email, at the time shown in the email as the time the email was sent.
- 

## 12 Assignment

- (a) If the Shipper transfers or assigns the business, or any part of it, to which Sea Swift provides services then the Shipper will use its best endeavours to ensure that it is a condition of the transfer or assignment that the assignee is bound by this agreement or that Shipper procures the agreement of the assignee to the terms of this agreement.
  - (b) The Shipper must not assign its rights or obligations under this agreement without Sea Swift's written consent which may be withheld in its absolute discretion.
- 

## 13 Dispute Resolution

- (a) Except where a party seeks urgent interim relief, a party must not commence court proceedings in relation to any dispute or disagreement arising out of or relating to this agreement (**Dispute**) unless it has complied with the provisions of this clause 13.
- (b) A party claiming that a Dispute has arisen must notify the other party accordingly, which notice must describe the nature of the Dispute (**Dispute Notice**).
- (c) Within 5 Business Days after receipt of a Dispute Notice, each party must nominate a representative who has express authority to resolve the Dispute, and those representatives must meet to seek to resolve the Dispute by negotiation. All aspects of the negotiation must be kept confidential, and all communications between representatives during the negotiation are made on a without prejudice basis.
- (d) If the Dispute has not been resolved within 10 Business Days after receipt of the Dispute Notice, either party may refer the Dispute for mediation in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Mediation Rules, by notifying the other party accordingly.
- (e) If, within 20 Business Days after receipt of the Dispute Notice, neither party has referred the Dispute for mediation in accordance with paragraph (d), or the Dispute has not been resolved, either party may commence court proceedings in relation to the Dispute.

- (f) Notwithstanding the existence of a Dispute, each party must continue to perform its obligations under this agreement.
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## **14 General**

- (a) This agreement may only be amended in writing, signed by the parties.
- (b) Sea Swift is not bound by any waiver, discharge or release of a condition or any agreement which changes the contract, unless it is in writing and is signed by or for Sea Swift.
- (c) This agreement is the entire agreement of the parties on the subject matter.
- (d) If a clause or part of a clause is unenforceable, it must be severed from and does not affect the rest of the agreement.
- (e) Each party must do, sign, execute and deliver all deeds, documents, instruments and acts reasonably required to carry out and give full effect to this agreement.
- (f) This agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.
- (g) The laws of the Northern Territory apply to the agreement and the Shipper must bring any proceedings against Sea Swift in a court of the Northern Territory.

# Schedule 3 – Gove Wharf & Depot Diagram & Rate Cards

## 1 Gove Wharf & Depot Diagram



Area	Description
A	Landing ramp (roll-on, roll-off)
B	Public wharf (only for small fishing vessels)
C	Heavy lift Wharf (lift-on, lift off)
D	Covered lay down
E	Lay down

## 2 Commercial Shippers Rate Card

Commercial Shippers Rate Card	Unit	Rates (Ex GST)
<b><u>Wharf Access</u></b>		
Access Fee (i.e. fee for access to area A or area C)	Visit	\$7,401.32
Terminal Security	/hr	\$121.70
Wharf Mooring Gang (relevant to access to the Heavy Lift Wharf)	Visit	\$524.91
<b><u>Tonnage Dues</u></b>		
General Cargo	> of T/CBM	\$17.32
<b><u>Optional Storage Services</u></b>		
per Cubic Meter (CBM) per day	> of T/CBM	\$2.94
<b><u>Additional Terminal Access (for access over 6 Hours)</u></b>		
	each	
<b><u>STEVEDORING SERVICES</u></b>		
<b><u>Labour</u></b>		
Stevedore	/hr	\$102.88
Supervisor	/hr	\$124.93
<b><u>Machinery</u></b>		
Fork truck, inclusive of Operator up to 4 Tonnes	/hr	\$131.23
Fork truck, inclusive of Operator up to 7 Tonnes	/hr	\$155.38
Fork truck, inclusive of Operator up to 16 Tonnes	/hr	\$218.37
Fork truck, inclusive of Operator up to 42 Tonnes	/hr	\$298.15
Moffett Type Fork Truck 3 Tonnes	/hr	\$131.23
Prime Mover Including Driver	/hr	\$225.72
Nissan UD Type Truck	/hr	\$115.48
Semi-Trailer	/hr	\$146.97

## Schedule 4 Annual Price Adjustment

- 1 The Gove Wharf Rates outlined in Schedule 3 may be adjusted annually with effect on the first day of each Financial Year
- 2 The Gove Wharf Rates will be subject to indexation by application of the following indices, where:
  - (a) weightings represent the percentage of the total rates that this cost component comprises;
  - (b) when rates are adjusted, the relevant proportion of the rate will be adjusted in accordance with any movement in the relevant index or source.

Cost Component	Weight	Index / Source
Wages	37%	Annual labour rate percentage increase as set out in the Sea Swift Collective Agreement.
Equipment	30%	<i>Consumer Price Index: All groups, Australia</i> published by ABS (base index June 2015)
Maintenance	10%	<i>Consumer Price Index: All groups, Australia</i> , published by ABS (base index June 2015)
Administration/Property	23%	<i>Consumer Price Index: All groups, Australia</i> published by ABS (base index June 2015)
<b>Total</b>	<b>100%</b>	

- 3 Where the Gove Wharf Rates are adjusted, the adjustment of all rates is to be in accordance with the application of the combined indices.
- 4 For example, if the rise in the *Consumer Price Index: All groups, Australia* for a particular year is 3% and the labour rate percentage increase as set out in the Sea Swift Collective Agreement for that year is 2.5% the increase in fees that Sea Swift may apply is:

$$(0.37 \times 2.5\%) + (0.63 \times 3\%) = 2.82\%$$

- 5 In that example, Sea Swift would be entitled to raise each of the Gove Wharf Rates set out in Schedule 3 by 2.82%.

## Schedule 5 Independent Price Review Process

### 1 Appointment of an Independent Price Expert

- (a) Prior to the Commencement Date, Sea Swift must appoint an Independent Price Expert for, subject to paragraph 1(c) of this Schedule 5, the duration of this Condition.
- (b) The Independent Price Expert must have the qualifications and experience necessary to carry out its functions independently of Sea Swift and must not be:
  - (i) an employee or officer of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate, whether current or in the past 3 years;
  - (ii) a professional adviser of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate, whether current or in the past 3 years;
  - (iii) a person who holds a material interest in Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate;
  - (iv) a person who has a contractual relationship with Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate (other than the terms of appointment of the Independent Price Expert);
  - (v) a customer, material supplier or material customer of Sea Swift or its Related Bodies Corporate or of Toll or its Related Bodies Corporate; or
  - (vi) an employee or contractor of a firm or company referred to in paragraphs 1(b)(iii) to 1(b)(v) of this Schedule 5.
- (c) Sea Swift must, as soon as practicable, appoint a replacement Independent Price Expert who meets the requirements set out in paragraph 1(b) of this Schedule 5 in the following circumstances:
  - (i) if the Independent Price Expert resigns or otherwise stops or is unable to act as the Independent Price Expert; or
  - (ii) if Sea Swift has terminated the Independent Price Expert's terms of appointment in accordance with those terms of appointment.
- (d) Where the Independent Price Expert is unable to act for a period of time, Sea Swift may appoint a replacement Independent Price Expert to act as the Independent Price Expert for that period of time only.

- (e) Within 2 Business Days of the appointment of the Independent Price Expert under paragraph 1(a) of this Schedule 5 or replacement of the Independent Price Expert under paragraph 1(c) of this Schedule 5, Sea Swift must:
  - (i) forward to the ACCC a copy of the executed terms of appointment; and
  - (ii) publish the name and contact details of the Independent Price Expert on Sea Swift's website.

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## 2 Conditions relating to the Independent Price Expert's functions

Sea Swift must:

- (a) procure that the terms of appointment of the Independent Price Expert include obligations on the Independent Price Expert to:
  - (i) continue to satisfy the independence criteria in paragraph 1(b) of this Schedule 5 for the period of his or her appointment;
  - (ii) provide any information or documents requested by the ACCC about Sea Swift's compliance with this Price Related Dispute Resolution Process directly to the ACCC; and
  - (iii) report or otherwise inform the ACCC directly of any issues that arise in the performance of his or her functions as the Independent Price Expert or in relation to any matter that may arise in connection with this Price Related Dispute Resolution Process;
- (b) comply with and enforce the terms of appointment for the Independent Price Expert;
- (c) maintain and fund the Independent Price Expert to carry out his or her functions;
- (d) indemnify the Independent Price Expert for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Independent Price Expert of his or her functions as the Independent Price Expert except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Independent Price Expert;
- (e) not interfere with, or otherwise hinder, the Independent Price Expert's ability to carry out his or her functions as the Independent Price Expert;

- (f) provide and pay for any external expertise, assistance or advice required by the Independent Price Expert to perform his or her functions as the Independent Price Expert;
- (g) provide to the Independent Price Expert any information or documents requested by the Independent Price Expert that he or she considers necessary for carrying his or her functions as the Independent Price Expert or for reporting to or otherwise advising the ACCC; and
- (h) ensure that the Independent Price Expert will provide information or documents requested by the ACCC directly to the ACCC.

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### 3 Raising an Additional Proposed Price Increase

- (a) Sea Swift may seek a price increase in excess of the Annual Price Adjustment in Schedule 4 (**Additional Proposed Price Increase**) by providing written notice to the Independent Price Expert (**Additional Proposed Price Increase Notice**).
- (b) An Additional Proposed Price Increase Notice must detail:
  - (i) the specific Access Services, Additional Services and / or Ancillary Services to which the Additional Proposed Price Increase relates;
  - (ii) the specific amount of the Additional Proposed Price Increase; and
  - (iii) Sea Swift's reasons for the Additional Proposed Price Increase.

By submitting an Additional Proposed Price Increase Notice, Sea Swift agrees to comply with this Price Related Dispute Resolution Process.

- (c) Sea Swift may at any time withdraw an Additional Proposed Price Increase Notice by written notice to the Independent Price Expert, in which case the powers and authority of the Independent Price Expert to make a determination of that Additional Proposed Price Increase Notice under paragraph 4 of this Schedule 5 shall forthwith cease.

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### 4 Independent Price Expert Determination

- (a) Where the Independent Price Expert has received an Additional Proposed Price Increase Notice in relation to a proposed price increase, the Independent Price Expert must:
  - (i) determine whether Sea Swift's proposed price increase is reasonable and appropriate having regard to the principles listed in paragraph 5 below; and

- (ii) decide whether to accept, reject or vary Sea Swift's proposed price increase.
- (b) The Independent Price Expert will make his or her determination within:
  - (i) 30 days of the receipt of the Additional Proposed Price Increase Notice from the Sea Swift; or
  - (ii) such further period as necessary for the Independent Price Expert to consider information requested under paragraph 4(c) of this Schedule 5, as the Independent Price Expert reasonably requires.
- (c) Sea Swift must provide the Independent Price Expert with any information he or she requires to make a determination under this paragraph 4 of this Schedule 5 within a timeframe reasonably determined by the Independent Price Expert.
- (d) In the event that more than one Additional Proposed Price Increase Notice is received in relation to a proposed new Additional Proposed Price Increase for a particular Service, the Independent Price Expert will only make a single determination about that proposed or applied price.
- (e) The Independent Price Expert's decision is final and binding on Sea Swift.
- (f) When making a determination under this paragraph 4 of this Schedule 5, the Independent Price Expert is acting as an expert and not as an arbitrator.

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## 5 Relevant considerations

In determining whether an Additional Proposed Price Increase is reasonable and appropriate, the Independent Price Expert will have regard to the following principles:

- (a) that the Additional Proposed Price Increase should be set taking into account:
  - (i) all efficient input costs;
  - (ii) an appropriate allocation of Sea Swift's relevant overhead costs.
  - (iii) whether the "weighting factors" referred to in the calculation in Schedule 4 continue to accurately reflect the cost component weighting of these costs;
  - (iv) a rate of return that utilises a weighted average cost of capital which would be required by a benchmark efficient entity providing services with a similar degree of risk as that which applies to Sea Swift; and
  - (v) the long-term interests of users.

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## 6 Notice and Publication of Decision

- (a) The Independent Price Expert must notify Sea Swift of the decision within seven days.
- (b) Within 30 days of receiving the decision:
  - (i) Sea Swift must notify its affected Shippers of the Independent Price Expert's determination by writing to or emailing customers, or publishing the information about the determination on its website;
  - (ii) if a retrospective adjustment is necessary to comply with the Independent Price Expert's determination, Sea Swift must refund the relevant adjustment amount to the relevant Shipper(s).
- (c) Whatever the outcome, the cost of the expert determination will be borne by Sea Swift.

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## 7 Date Price Increase Takes Effect

- (a) If the Independent Price Expert makes a determination under paragraph 4 of Schedule 4, then the new price increase as determined by the Independent Price Expert takes effect on the date that Sea Swift is notified under paragraph 6(a) of Schedule 4 that the new price would take effect.