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# Ausbarge Marine Services Pty Ltd – Terms and Conditions

These Conditions apply to all services (Services) provided by the Company. You should read these Conditions carefully. We draw your particular attention to a number of Conditions which give the Company material rights and liberties and/or reduce or exclude rights that you ("the Customer") might otherwise have, but for these Conditions.

## 1. Definitions and Interpretation

**Company** means AusBarge Marine Services Pty Ltd, its servants and agents and sub-contractors. **Customer** means the Person with whom these Conditions are made or who otherwise becomes bound by these Conditions.

**Equipment** means tug boats, lighters, cranes (including floating cranes), work vessels, hopper barges and any other vessels, moorings, plant or machinery of whatsoever nature.

**Goods** includes goods, wares, merchandise, baggage, cargo, moorings and bins.

**GST** means the goods and services tax imposed by or under GST Law.

**GST Law** means the same as in A New Tax System (Goods and Services Tax) Act (Cth) 1999.

**GST Rate** means the rate of GST under the GST Law.

**Invoices** means all invoices issued by the Company to the Customer in relation to any Equipment, Goods and/or Services.

**Person** includes living persons, firms, Companies, Governments, Governmental authorities, Boards, Departments and Statutory Corporations.

**Services** means the whole of the operations undertaken by the company including but not limited to work incidental to the use, supply, installation, maintenance or inspection of Equipment and/or Goods, salvage, towage, supply of floating plant for events, lighterage, construction, diving services, carriage of Goods, hiring of Equipment, storage of Goods, construction and repairs and the hiring of bins, cartage of bins and waste from bins.

**Subcontractor** means any Person, their servants and agents, who, pursuant to a contract or arrangement with any other person (whether or not the Company), provides or agrees to provide the Services or any part of the Services and includes subcontractors of the Subcontractor.

**Taxable Supply** has the meaning given to it in Clause 12.

### Interpretation

#### Headings

The headings of the various section and clauses of these Conditions are for the convenience of reference only and shall not modify, define, expand or limit any of the terms of provisions of these Conditions.

#### Plurals, Genders and Persons

The singular includes the plural and vice versa. Words importing one gender include every gender. A reference to a person includes corporation and vice versa.

## 2. Provision of Services

2.1 The Company is not a common carrier and accepts no liability as such. The Company reserves the right to agree or refuse to provide the Services (or any part of them) in respect of the Goods at its sole discretion.

2.2 Except where the parties have agreed that the Services are subject to TOWCON, TOWHIRE or United Kingdom Standard conditions for Towage and Other Services (Revised 1986), all Services are provided to the Customer subject only to these Conditions, which shall prevail at all times over any conditions of contract of the Customer.

2.3 Except where the parties have agreed that the Services are subject to TOWCON, TOWHIRE or United Kingdom Standard conditions for Towage and Other Services (Revised 1986), in the event of and to the extent of any inconsistency between these Conditions and conditions included any other document issued by the Company, these Conditions shall prevail Except

where the parties have agreed that the Services are subject to TOWCON, TOWHIRE or United Kingdom Standard conditions for Towage and Other Services (Revised 1986), the Company shall not be bound by any agreement purporting to waive or vary these Conditions unless such agreement to so waive or vary shall be in writing and signed by an executive of the Company and shall have been entered into prior to the commencement of the provision of Services by the Company.

2.4 Where the parties have agreed that the Services are subject to TOWCON, TOWHIRE or United Kingdom Standard conditions for Towage and Other Services (Revised 1986), such agreements shall prevail over these Conditions in the event of any inconsistency between such agreement and these Conditions.

## 3. Customer's Warranties and Undertakings

3.1 The Customer warrants that it is either the owner or the authorised agent of the person owning or having an interest in the Goods or Equipment or utilises the Services and enters into these Conditions on its own behalf or as authorised agent of that person, provided always that the Customer will only be deemed to have entered into these Conditions as agent if the identity of the Customer's principal is disclosed to the Company in writing prior to the Customer and the Company entering into these Conditions.

3.2 The Customer warrants that no claim or allegation will be made against the Company by any person (other than the Customer or the Customer's disclosed principal) who is or may subsequently be interested in the Goods or part of them or Equipment or the Services and the Customer undertakes to indemnify the Company in respect of any liability whatsoever and howsoever arising (including but not limited to liability arising from negligence or breach of contract, whether fundamental or otherwise, or wilful act or default of the Company or others) in respect of any such claim or allegation

3.3 The Customer warrants that it has complied with all laws and regulations relating to the nature, condition, packaging, handling, storage, and carriage of the Goods and/or use of Equipment. Further, the Customer shall provide to the Company all such assistance, information and documentation that may be necessary to enable the Company to comply with such laws and regulations

3.4 The Customer warrants that the Goods are not dangerous and are packed to withstand the ordinary risk of handling, storage and carriage, having regard to their nature.

3.5 The Customer warrants that it will not overload or exceed safe working specifications of any Equipment or breach any law or licence condition applicable to any Equipment and that the Goods will not damage or cause loss to any shipping containers, other goods, or other equipment.

3.6 The Customer shall hold the Company harmless and indemnify it, its directors, officers, employees and agents against any loss, damage or penalties arising from or relating to all forms of pollution (including water, air or noise pollution) caused by or resulting from the Goods or by the Customer's breach of these Conditions or its negligence.

3.7 The Customer agrees to make good any damage to, or loss of, any Equipment (including any wreck removal) or Goods suffered during the period of the hire as a result of or arising out of the Customer's breach of these Conditions or negligence. Alternatively, the Company shall be entitled to effect repairs or wreck removal rendered necessary as a result of such damage and the Customer agrees to indemnify the Company for the cost of those repairs and/or wreck removal.

3.8 The Customer undertakes to indemnify the Company in respect of any liability of the Company whatsoever and howsoever arising and any expenses incurred by the Company as a result of or arising out of a breach by the Customer of the warranties and undertakings contained in Clause 3.

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### 4. Subcontracting and Himalaya Clause

- 4.1 The Customer authorises the Company to subcontract, at its sole discretion, on any terms the whole or any part of the Services
- 4.2 The Customer undertakes:
- 4.2.1 that no claim or allegation shall be made, whether by the Customer or any other person who is or may be subsequently be interested in the Services and/or the Goods and/or Equipment, against any Subcontractor which imposes or attempts to impose upon such Subcontractor any liability whatsoever and howsoever arising (including but not limited to liability arising from negligence or breach of contract, whether fundamental or otherwise, or wilful act of default of the Company or others) in connection with the provision of the Services and/or the Goods and/or Equipment.
- 4.2.2 that, if such claim or allegation should nevertheless be made, the Customer shall indemnify the Company and the Subcontractor against whom a claim or allegation is made against the consequences of such claim or allegation.
- 4.3 Every exemption, limitation, conditions, liberty, defence and immunity of whatsoever nature applicable to the Company or to which the Company is entitled in accordance with these Conditions shall also be applicable and shall extend to protect
- 4.3.1 all subcontractors;
- 4.3.2 every other person (other than the Company) by whom the Services or any part of the Services are provided, their servants and agents;
- 4.3.3 all persons who are or may be vicariously liable for the acts or omissions of any persons falling within sub-paragraphs 4.3.1 and 4.3.2.
- 4.4 For the purpose of Clauses 4.2 and 4.3, the Company is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of such persons and each of them shall to this extent be or be deemed to be parties to this contract.

### 5. Deviation

- 5.1 The Customer authorises any deviation from the usual manner in which the Services are provided which may in the absolute discretion of the Company.
- 5.2 If the Customer expressly or impliedly instructs the Company to use or it is expressly or impliedly agreed that the Company will use a particular method of providing the Services, the Company will give priority to that method but its adoption remains at the sole discretion of the Company and the Customer authorises the Company to provide the Services by another method.

### 6. Company's Liability

- 6.1 Subject to clause 15 and / or any compulsory applicable international Conventions or national laws, the Goods and Equipment are at all times at the risk of the Customer and not of the Company and the Company shall not be responsible in tort or contract or bailment or statute or otherwise for any, and the consequences of any, loss or damage to or deterioration of the Goods or Equipment or misdelivery or failure to deliver or delay in delivery of the Goods or Equipment or failure to provide or delay in providing the Services for any reason whatsoever howsoever caused (including but not limited to the negligence or breach of contract, or wilful act or default of the Company). This clause shall apply to all, and the consequences of all, such loss of or damage to or deterioration or destruction of the Goods and/or Equipment or misdelivery or failure to deliver or delay in delivery of the Goods and/or Equipment or failure to provide or delay in providing Services, whether or not the same occurs in the course of performance by or on behalf of the Company of the Services or events which are in the contemplation of the Company and/or the Customer or events which are foreseeable by them or either of them or events which could constitute a breach of these Conditions.

- 6.2 The Company shall not be liable in any event for any special, incidental, or consequential damages, including, but not limited to, loss of profits, income, utility, interest, or loss of market, whether or not the Company had knowledge that such damage might be incurred.
- 6.3 In all cases where these Conditions, statute, international convention or otherwise do not exclude the liability of the Company, the liability of the Company whatsoever and howsoever caused shall be limited to whichever is the lesser between the value of the Goods the subject of these Conditions at the time the Goods were delivered to the Customer or A\$1,000.
- 6.4 The liability of the Company arising out of any one incident for breach of any guarantees under the Competition and Consumer Act 2010 and the Australian Consumer Law, or comparable legislation in each of the States and Territories of Australia, or howsoever arising, is limited to any of the following as determined by the Company:
- 6.4.1 the supplying of the Services again; or
- 6.4.2 the payment of the cost of having the Services supplied again; or
- 6.4.3 or the value of the Goods the subject of these Conditions at the time the Goods were received by the Company.
- 6.5 Force Majeure  
The Company shall not be liable to the Customer for any breach or failure to perform its obligations under these Conditions or any damage or loss to Goods resulting from one of the following:
- (1) perils, dangers and accidents of the sea or other navigable waters;
- (2) act of God;
- (3) act of war;
- (4) act of public enemies;
- (5) arrest or restraint of princes, rulers or people, or seizure under legal process;
- (6) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
- (7) riots and civil commotions;
- (8) saving or attempting to save life or property at sea; or
- (9) any other cause whatsoever or howsoever arising beyond the reasonable control of the Company, without the actual fault or privity of the Company and without the actual fault or privity of the agents or servants of the Company.
- 6.6 The Customer agrees that it will indemnify and keep indemnified the Company against all loss, damage, claims, suits, fines, penalties, infringement notices, taxes, duties, levies, imposts, demands under statute or expenses including legal costs in respect of, arising out of or in connection with the Company terminating, cancelling or otherwise suspending these Conditions or performance of any obligation under these Conditions; including without prejudice to the generality of the foregoing any such matter, arising out of or in connection with injury to or death of any Person whatsoever or howsoever
- 7. Conditions of Towage**
- 7.1 The customer warrants that the owner of any Equipment required by the Customer to be towed by the Company will have in place their own insurance cover including Hull, Machinery and War Risk Insurance and Protection and Indemnity Insurance.
- 7.2 All towage undertaken by the Company is undertaken subject to either:
- 7.2.1 Standard form agreements issued by the Baltic and International Maritime Council (BIMCO), including TOWCON and TOWHIRE forms, as amended. In BIMCO forms, all references to Tug owner shall mean the Company and all references to the Hirer shall mean the Customer

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7.2.2 The United Kingdom Standard conditions for Towage and Other Services (Revised 1986) (“the UK Conditions (1986)”) a copy of which is attached to these Conditions and is also available on request to the Company, save and except the UK Conditions (1986) shall be governed by the laws of New South Wales and the parties submit to non-exclusive jurisdiction of the Courts of New South Wales. In the UK Conditions (1986), all references to Tug owner shall mean the Company and all references to Hirer shall mean the Customer.

### **8. Interest and no right of set-off**

8.1 Interest on overdue Invoices shall accrue from the date when payment becomes due, daily until the date of payment at a rate of 2.5% simple interest per calendar month and shall accrue at such a rate after as well as before any judgement.

8.2 The Customer shall not set off against the price owing to the Company for the hire, sale, performance or supply of any Equipment, Goods and/or Services any amounts due from the Company or its sub-contractors to the customer for any reason.

### **9. Customer Insolvency**

- 9.1.1 any money payable to the Company becomes overdue, or
- 9.1.2 in the Company’s opinion, the Customer will be unable to meet its payments as they fall due; or
- 9.1.3 The Customer becomes insolvent, convenes, a meeting with its creditors or proposes or enters an arrangement with creditors, or makes an assignment for the benefit of its creditors; or a receiver, administrator, manager, liquidator (provisional or otherwise) or similar Person is appointed in respect of the Customer, the Customer’s principal or any asset of the Customer’s or the Customer’s principal;
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the Company shall be entitled to cancel all or any part of any order for the Company to hire, sell perform or supply any Equipment, Goods and/or Services which remains unperformed in addition to and without prejudice to any other remedies; and

all amounts owing to the Company shall, whether or not due for payment, immediately become due and payable.

### **10. Company’s Charges, Lien and Security Interest**

10.1 The charges of the Company for providing the Services or any part of them shall be earned as soon as the Goods and Equipment are delivered to the Company and under no circumstances shall any of those charges be refunded (whether or not the Services are performed or there is a breach of these Conditions by the Company). The Customer is and remains responsible to the Company for all of its proper charges whether or not Goods and Equipment are delivered, lost, damaged or destroyed and/or whether or not the Services are performed.

10.2 The Company shall have a lien on the Goods and Equipment and any documents relating to those Goods and/or Equipment and/or any other Goods or Equipment of the Customer in the possession or control of the Company and any other documents relating to those other Goods and/or Equipment for all sums payable by the Customer to the Company. The Company shall have the right to sell such Goods or Equipment by public auction or private treaty without notice to the Customer. The Company shall be entitled to retain the sums due to it, in addition to the charges incurred in detention and sale of such Goods or cargo, from the proceeds of the sale and shall render any surplus to the entitled person.

#### **10.3 Security Interest**

10.3.1 The Customer grants a security interest (by way of charge) in favour of the Company in all Goods and Equipment as security for the performance by the Customer of its obligations under these Conditions (the Security Interest).

10.3.2 The Security Interest may be enforced by the Company if the Customer breaches any obligation under these Conditions.

10.3.3 The Customer acknowledges and agrees that the Company may register the Security Interest on the Personal Property Securities Register against the Customer.

10.3.4 The Customer agrees that the Security Interest has priority over any other interest the Customer may have in the Goods and Equipment.

10.3.5 The Customer agrees that it will not assert that any other security it has or may obtain has priority other than the Security Interest and that any such interest shall be subordinate to the Security Interest.

10.3.6 The Parties will not make any claim, assertion or raise any defence and/or counter or cross claim that is inconsistent with this clause, including any court proceeding, and these Conditions may be pleaded as a bar to any such claim, assertion, defence, counterclaim and/or cross claim.

10.3.7 Nothing in the preceding sub-clauses shall affect or otherwise limit in any way any other contractual, statutory, common law or equitable rights or remedies that the Company may have against the Customer in respect of any loss or damage that the Company suffers in respect of the Goods and Equipment.

10.4 Every special instruction to the effect that charges shall be paid by a person other than the Customer shall be deemed to include a stipulation that, if that other person does not pay those charges within seven (7) days of delivery or attempted delivery of the Goods or Equipment, then the Customer shall pay those charges to the Company within seven (7) days of being notified of that other person’s failure to pay.

### **11. Company May Terminate, Suspend or Cancel Any Part of these Conditions**

11.1 The Company may cancel these Conditions or cancel the hire, sale, performance, supply or delivery of any Equipment, Goods and/or Services at any time before the Equipment, Goods and/or Services are delivered, supplied or performance is completed by giving written notice.

11.2 If the Customer defaults in payment of any Invoices when due, the Customer shall indemnify the Company from and against all the Company’s costs and disbursements including legal fees and including all costs of engaging a licensed commercial agent for collection of payment of any outstanding Invoices.

11.3 Without prejudice to any other remedies the Company may have, if at any time the Customer is in breach of any obligation to the Company (including those relating to payment), the Company may suspend or terminate the hire, sale, performance or supply of all Equipment, Goods and/or Services to the Customer and of any other obligation of the Company under these Conditions.

### **12. GST**

12.1 Clause 12 applies if the Company is or may become liable to pay GST in relation to any Supply under these Conditions (a “Taxable Supply”). A Taxable Supply may compromise the whole or any part of the Services.

12.2 Unless otherwise stated, all charges are quoted by the Company are exclusive of GST. In addition to such charges, the Customer must pay to the Company GST on a Taxable Supply of an amount equal to the Company’s GST exclusive charge for the Taxable Supply multiplied by the GST Rate. GST shall be payable to the Customer without any deduction or set off for any other amount at the same rate as the Company’s GST exclusive charge is payable under these Conditions.

12.3 The Company must issue an Invoice to the Customer for the amount of GST referable to as a Taxable Supply. The Company must include in such Invoice such particulars as are required by the GST Law in order that the Customer may obtain an input tax credit for the amount of GST payable on the Taxable Supply



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12.4 If the Customer makes default in the payment on the due date of any GST payable pursuant to Clause 12 or pursuant to any GST Law, then without Prejudice to any other remedies of the Company, the Customer shall pay to the Company upon demand the GST payable and an amount equal to the amount of any damages, penalty, interest or additional GST that may become payable by the Company arising out of the default of the Customer

### **13. Notice of Loss and Time Bar**

13.1 Any claim for loss or damage to the Goods or Equipment must be notified in writing to the Company within seven (7) days of delivery of the Goods or Equipment or of the date upon which the Goods or Equipment should have been delivered. The absence of such notice shall be prima facie evidence of the delivery of the Goods and Equipment by the Company to or as instructed by the Customer in good order and condition.

13.2 In any event, the Company shall be discharged from all liability whatsoever in connection with these Conditions, the Services and/or the Goods and/or Equipment unless suit is brought and notice of such suit is given in writing to the Company within nine (9) months of the completion of the Services or delivery of Goods or Equipment or, in cases where the Services were not provided or the Goods or Equipment were not delivered, the date upon which the Services should have been completed or the Goods or Equipment should have been delivered, whichever is the earliest.

### **14. Conditions and Severability**

14.1 All the rights, immunities and exclusions from or limitations of liability in these Conditions shall continue to have their full force and effect in all circumstances and notwithstanding any breach, whether fundamental or otherwise, of these Conditions or of these Conditions by the Company or any other person entitled to the benefit of such provisions.

14.2 The provisions of these Conditions shall be severable and it is agreed that if any provision of these Conditions is held to be invalid, void or unenforceable, such holding shall not affect any other provision or any other part of such provision of these Conditions.

### **15. Competition and Consumer Act 2010 and the Australian Consumer Law**

If these Conditions are held to be subject to the laws of the Commonwealth of Australia or of any particular State or any other legislature then these Conditions shall continue to apply and shall be void only to the extent that they are inconsistent with or repugnant to those laws and no further. Nothing in these Conditions is intended to have the effect of contracting out of any applicable provisions of the Competition and Consumer Act 2010 and the Australian Consumer Law, or comparable legislation in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable. If any legislation is compulsorily applicable to any business undertaken, these Conditions shall, as regards such business, be read as subject to such legislation, and nothing in these Conditions shall be construed as a surrender by the Company of any of its rights or immunities or as an increase of any of its responsibilities or liabilities under such legislation, and if any part of these Conditions be repugnant to such legislation to any extent, such part shall as regards such business be overridden to that extent and no further.

### **16. Governing Law**

16.1 These Conditions are governed by the laws of New South Wales and any dispute concerning these Conditions is to be referred to the non-exclusive jurisdiction of the Courts of New South Wales.