

APPLICATION FOR AUTHORISATION

LODGED BY: NSW MINERALS COUNCIL (ON BEHALF OF ITSELF AND ITS MEMBERS)

PUBLIC VERSION

5 MARCH 2020

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1. EXECUTIVE SUMMARY

a. Background

This application is brought by the New South Wales Minerals Council (NSWMC) on its own behalf and on behalf of the members listed in Schedule One to seek to collectively negotiate access terms with Port of Newcastle Operations Pty Ltd (PNO) for access to the Port of Newcastle (Port) in the Hunter Valley in New South Wales.

b. ACCC should allow application

This application is for the NSWMC to seek to collectively discuss and negotiate the terms and conditions of access, including price, relating to access to the Port including the Schedule of Service Charges as set out on PNO's website (<https://www.portofnewcastle.com.au/>).

Please refer to the supporting Submission as to why the ACCC should grant authorisation.

c. Contact details

NSWMC: Mr David Frith, Director Industry and Environment
Level 3, 12 O'Connell Street, Sydney NSW 2000

[e-i-c] [e-i-c]

PNO: Mr Craig Carmody, Chief Executive Officer
Level 4, Wharf Road, Newcastle, NSW 2300

[e-i-c] [e-i-c]

E: [REDACTED]

d. Interim authorisation

The NSWMC and its members listed in Schedule One are seeking interim authorisation as soon as possible, for the reasons as set out in the supporting Submission.

Identify and/or provide names and, where possible, contact details (phone number and email address) for likely interested parties such as actual or potential competitors, key customers and suppliers, trade or industry associations and regulators.

2. BACKGROUND

a. Parties involved

Provide details of the applicants for authorisation, including:

- *name, address (registered office), telephone number and ACN*
- *contact person's name, position, telephone number and email address*
- *a description of business activities*
- *email address for service of documents in Australia.*

The NSWMC is the leading industry association representing NSW's minerals industry, providing a united voice for its members. The NSWMC's members include many of the largest exporters from the Port, and the Port is the only practical means for those members to export their products from the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle and parts of the Western Coalfield.

Address in Australia for service of documents on the Applicant:

NSWMC: Mr Dave Poddar, Partner, Clifford Chance
Level 16, No. 1 O'Connell Street, Sydney NSW 2000
email: [REDACTED]

If applicable, provide details of the other persons and/or classes of persons who also propose to engage, or become engaged, in the proposed conduct and on whose behalf authorisation is sought. Where relevant provide:

- *name, address (registered office), telephone number and ACN*
- *contact person's name, telephone number and email address*
- *a description of business activities.*

Please see Schedule One.

b. Proposed conduct

Provide details of the proposed conduct, including:

- *a description of the proposed conduct and any documents that detail the terms of the proposed conduct*
- *the relevant provisions of the Competition and Consumer Act 2010 (Cth) (the Act) which might apply to the proposed conduct, ie:*
 - cartel conduct (Division 1 of Part IV)
 - contracts, arrangements or understandings that restrict dealings or affect competition (s. 45)
 - concerted practices (s. 45)
 - secondary boycotts (sections 45D, 45DA, 45DB, 45E, 45EA)
 - misuse of market power (s. 46)
 - exclusive dealing (s. 47)
 - resale price maintenance (s. 48) and/or
 - a dual listed company arrangement (s. 49)
- *the rationale for the proposed conduct*

- *the term of authorisation sought and reasons for seeking this period. By default, the ACCC will assume you are seeking authorisation for five years. If a different period is being sought, please specify and explain why.*

The proposed conduct involves NSWMC on behalf of the members described in Schedule One seeking authorisation to:

- collectively discuss and negotiate the terms and conditions of access, including price, to the Port for the export of minerals through the Port;
- discuss amongst themselves matters relating to the above discussion and negotiations; and
- enter into and give effect to contracts, arrangements or understandings with PNO containing common terms which relate to access to the Port and the export of minerals through the Port.

The application does not involve any collective boycott activity. Please refer to the supporting Submission for further information.

Provide documents submitted to the applicant's board or prepared by or for the applicant's senior management for purposes of assessing or making a decision in relation to the proposed conduct and any minutes or record of the decision made.

Please see attached [c-i-c] [c-i-c].

Provide the names of persons, or classes of persons, who may be directly impacted by the proposed conduct (e.g. targets of a proposed collective bargaining arrangement; suppliers or acquirers of the relevant products or services) and detail how or why they might be impacted.

The only impacted party for the relevant conduct is considered to be PNO, but please refer to the supporting Submission for further information.

3. MARKET INFORMATION AND CONCENTRATION

a. Background

Describe the products and/or services, and the geographic areas, supplied by the applicants. Identify all products and services in which two or more parties to the proposed conduct overlap (compete with each other) or have a vertical relationship (e.g. supplier-customer).

Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.

In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.

Please refer to the supporting Submission for further information.

b. Competition assessment

In assessing an application for authorisation, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously. For example, describe:

- *existing competitors*
- *likely entry by new competitors*
- *any countervailing power of customers and/or suppliers*
- *any other relevant factors.*

Please refer to the supporting Submission for further information.

4. SIGNIFICANT PUBLIC BENEFITS

Describe the benefits to the public that are likely to result from the proposed conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.

Please refer to the supporting Submission for further information.

5. MINIMAL PUBLIC DETRIMENTS

Describe any detriments to the public likely to result from the proposed conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments.

Please refer to the supporting Submission for further information.

6. ADDITIONAL INFORMATION

Provide any other information or documents you consider relevant to the ACCC's assessment of the application.

Please refer to the supporting Submission for further information.

Schedule One

Organisation (registered office address, telephone number, ACN)	Contact (name, telephone number, email address)	Description of business activities
<p>Glencore Coal Assets Australia Pty Limited (Glencore) Level 44, Gateway Building 1 Macquarie Place Sydney, NSW 2000. Telephone: +61(2) 8247 6300 ACN: 163 821 298</p>	<p>Anthony Pitt Telephone: [c-i-c] [c-i-c] Email: [REDACTED]</p>	<p>Glencore is one of Australia's largest coal producers. The majority of Glencore's coal is exported to overseas markets, particularly in Asia.</p>
<p>Yancoal Australia Limited (Yancoal) Level 18, Darling Park Tower 2 201 Sussex Street, SYDNEY NSW 2000 Telephone: (02) 8103 5000 ACN: 111 859 119</p>	<p>Mike Dodd Telephone: [c-i-c] [c-i-c] Email: [REDACTED]</p>	<p>Yancoal is Australia's largest pure-coal producer, operating several mines in the Hunter Valley region including the Moolarben coal mine, the Ashton underground mine, the Austar coal mine, the Abel underground mine, the Tasman underground mine, and the Donaldson open cut mine.</p>
<p>Peabody Energy Australia Pty Ltd (Peabody) 100 Melbourne Street South Brisbane, Qld, 4101 Telephone: +61 7 3225 5500 ACN: 096 909 410</p>	<p>Mark Smith Telephone: [c-i-c] [c-i-c] Email: [REDACTED]</p>	<p>Peabody operates the Wambo and Wilpinjong coal mines in the Hunter Valley. Wambo is a combined open-cut and underground mine, operating in the upper Hunter Valley since 1969.</p>
<p>Bloomfield Collieries Pty Ltd Four Mile Creek Road, Ashtonfield, 2323 Telephone: 02 4930 2622 ACN: 000 106 972</p>	<p>Brett Lewis Telephone: [c-i-c] [c-i-c] Email: [REDACTED]</p>	<p>The Bloomfield Group is an Australian owned group of private companies which operates in the Hunter Valley. It operates two open cut coal mines: Bloomfield at East Maitland and Rix's Creek at Singleton.</p>

<p>Centennial Coal Company Limited (Centennial Coal) BT Tower, Level 18 1 Market Street Sydney NSW 2000 +61(2) 9266 2700 ACN: 003 714 538</p>	<p>Brendon Wilson Telephone: [c-i-c] [c-i-c] Email: brendon.wilson@centennialcoal.com.au</p>	<p>Centennial Coal is a mining company wholly owned by Banpu Pcl, a Thailand company listed on the Stock Exchange of Thailand, supplying Australian domestic and export markets. Centennial Coal operates the Mandalong mine near Morriset, Myuna mine, near Wangi Wangi, Clarence, Springvale and Airly mines in the Western Coalfields near Lithgow NSW.</p>
<p>Malabar Coal Limited Level 26, 259 George St Sydney NSW 2000 Telephone: 02 8248 1272 ACN: 151 691 468</p>	<p>Wayne Seabrook Telephone: [c-i-c] [c-i-c] Email: [REDACTED]</p>	<p>Malabar Coal is an independent Australian-owned mining company based in the Hunter Valley. It owns the Spur Hill Project exploration licence, and the Maxwell Project exploration licence.</p>
<p>Whitehaven Coal Mining Limited (Whitehaven) Level 28, 257 George Street Sydney NSW 2000 02 8222 1100 ACN: 086 426 253</p>	<p>Keiron Rochester Telephone: [c-i-c] [c-i-c] Email: [REDACTED]</p>	<p>Whitehaven operates several mines including its Narrabri underground operation which commenced longwall production in October 2012, and three open cut mines - all situated in NSW's Gunnedah Basin and the Maules Creek mine.</p>
<p>Hunter Valley Energy Coal Pty Ltd (Hunter Valley Energy Coal) Level 14 480 Queen Street Brisbane QLD 4000 Australia (07) 3835 2000</p>	<p>Tim Edwards [REDACTED] Telephone: [c-i-c] [c-i-c] Telephone: [c-i-c] [c-i-c]</p>	<p>BHP Billiton (through its wholly owned subsidiary, Hunter Valley Energy Coal) operates the Mount Arthur complex, the largest mine in the Hunter Valley region. Mount Arthur is an open-cut coal mine located near Muswellbrook.</p>

<p>ACN: 062 894 464</p> <p>Idemitsu Australia Resources Pty Ltd Level 9, 175 Eagle Street Brisbane QLD Telephone: +61 7 3222 5600 ACN: 010 236 27</p>	<p>Chris Walsh Telephone: [e-i-c] [e-i-c] Email: [REDACTED]</p>	<p>Idemitsu Australia has been operating in Australia since 1978 and owns coal mining operations in Queensland and New South Wales. In the Hunter Valley region, Idemitsu Australia owns the Boggabri and Muswellbrook coal mines.</p>
<p>MACH Energy Australia Pty Ltd (MACH Energy) Suite 1, Level 3, 426 King St, Newcastle West NSW 2302 (02) 5517 1150 ACN: 608 495 441</p>	<p>Chris Lauritzen Telephone: [e-i-c] [e-i-c] Email: [REDACTED]</p>	<p>MACH Energy is owned by Droxford International. In 2018, MACH Energy formed the Mount Pleasant Joint Venture with Japan Coal Development Australia Pty Ltd, and currently operates the Mount Pleasant mine in the Hunter Valley region.</p>

Declaration by Applicant(s)

Authorised persons of the applicant(s) must complete the following declaration. Where there are multiple applicants, a separate declaration should be completed by each applicant.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).

Signature of authorised person



Dave Poddar

(Print) Name of authorised person

Office held

Partner, Clifford Chance

This [*5th*] day of March 2020

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.

NEW SOUTH WALES MINERALS COUNCIL

Supporting Submission

March 2020



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1. OVERVIEW

Applicants

- 1.1 The New South Wales Minerals Council (**NSWMC**) is the leading mining industry association in the State of New South Wales (**NSW**). Many of the NSWMC's members are exporters of coal (and other commodities) from the Hunter Valley region through the Port of Newcastle (**Port**). The Port is located at the end of a multi-user export supply chain that involves an extensive rail network from multiple mine sites that culminates at coal loading terminals located at the Port.
- 1.2 As a practical matter the Port is the only economically efficient means for mining companies to export bulk commodities such as coal from the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle and parts of the Western coalfield. Accordingly, as a result of the privatisation of the Port by the NSW Government in 2014, Port of Newcastle Operations Pty Ltd (**PNO**) which now operates the Port under a long term lease from the State of NSW, has an effective monopoly in relation to providing access to the miners' only export pathway that exists at the end of their export supply chains.
- 1.3 In these circumstances, the NSWMC and the other mining companies listed in Schedule One (**Applicants**) to this authorisation application to the Australian Competition and Consumer Commission (**ACCC**), are seeking to negotiate collectively with PNO for access to the channels and berthing facilities required for the export of coal from the Port.

Scope of Application

- 1.4 The task of exporting coal from the Port involves vessels entering the Port, transiting the channels in the Port, tying up at the berths to load coal at the coal terminals and then once again transiting the channels before exiting the Port for delivery of the coal to its ultimate destination. The destination of the coal is another port or ports located in the country where the coal exporters' customer is located, such as Japan, Korea or China. For the avoidance of any doubt, particularly given the long history of the access dispute between the coal exporter Glencore and PNO and some of the technical arguments that have arisen, the Applicants are seeking to negotiate all terms of access to the Port that are practically necessary or otherwise desirable for their export task involving the use of the channel and berth facilities at the Port. Accordingly, nothing in this general description of the export task should be taken as narrowing what the Applicants are seeking to be negotiated with PNO (e.g. because it is not expressed in detail) having regard to this practical perspective of coal export operations. In other words, the Applicants are seeking to be able to negotiate with PNO all terms and conditions of access that are necessary or desirable for export operations of coal from the Port.
- 1.5 Further, also having regard to the various disputes between PNO and Glencore in relation to access arrangements at the Port, the Applicants wish to make clear this application is in relation to the broad range of contractual arrangements involved in the coal export task. Specifically, what the Applicants are seeking to negotiate is in respect of terms and conditions for the export of coal from mines from which they sell coal (i.e. depending on joint venture arrangements, miners may sell coal from mines

that they own themselves or they operate in different forms) and they may export the coal under various different contractual arrangements. For example, they may export the coal themselves by loading the coal onto chartered vessels where title transfers to the customer at the destination port or in the more usual situation, where the coal is simply loaded onto vessels at loading berths and title passes to their customers at the vessel rail.

- 1.6 While again in the past there has been various issues in the access dispute between PNO and Glencore over whether Glencore is entitled to negotiate with PNO in relation to these type of access arrangements (i.e. the scope of access), it would appear from PNO's proposed new long term pricing proposals as canvassed in the Deed and discussed later in this Submission, that PNO now recognises that directly or indirectly coal exporters bear the cost of the infrastructure service charges imposed by PNO irrespective of the form of contractual arrangement with the customer. Therefore the Applicants seek to be able to negotiate these various types of access arrangements. The Applicants in this Submission are seeking to ensure that the practical elements and contractual concepts involved in exporting coal from the Port are clear and broadly framed so that there should not be any legal disputes subsequently arising as to the scope of any authorisation that may be granted by the ACCC.

Background to Application

- 1.7 As is well known publicly, in 2015, Glencore sought a declaration of the shipping channel at the Port from the National Competition Council (NCC). While the NCC did not recommend declaration of the channel services and the relevant Minister did not decide to declare the services, Glencore was successful in the Australian Competition Tribunal (**Tribunal**) in 2016 (**Tribunal Determination No. 1**).¹ Tribunal Determination No. 1 was upheld on appeal to the Full Federal Court and the High Court did not grant special leave on application by PNO and the NCC.
- 1.8 Glencore brought an access dispute to the ACCC which issued an access determination in 2018 for access charges of \$0.6075 per gross tonne (**ACCC Determination**).² PNO appealed that ACCC arbitration determination to the Tribunal on 8 October 2018 and the Tribunal in 2019 issued a determination increasing access prices to \$1.0058 per gross tonne (**Tribunal Determination No. 2**).³ The most significant reason for the differential in charges from the ACCC Determination and the Tribunal Determination No. 2 was the inclusion in the regulated asset base of past industry expenditure of approximately \$912 million, that mostly related to dredging of the channels at the Port.
- 1.9 It is noted that Glencore and the ACCC have challenged the Tribunal Determination No. 2.⁴ However, even if the ACCC and Glencore are successful, while such a decision will have precedent value as to whether user funding can be included in the

¹ Application by Glencore Coal Pty Ltd [2016] ACompT 6.

² Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, Final Determination: Statement of Reasons, 18 September 2018.

³ Application by Port of Newcastle Operations Pty Ltd [2019] ACompT1.

⁴ See PNO Media Release dated 28 November 2019: <https://www.portofnewcastle.com.au/news/further-investment-uncertainty-for-hunter-coal-industry/>.

asset base, it will as a practical matter have no impact on other access seekers to the Port because the ACCC Determination is specific to Glencore. Further, even though the ACCC Determination as to the regulated asset base for PNO was to, in principle, apply to any other access seekers, this is now no longer possible. This is because in 2019, the declaration of the Port was deemed to be revoked because the Australian Treasurer did not make a decision in relation to the NCC's recommendation to revoke the declaration.⁵

- 1.10 Following the revocation of the declaration of the Port, in November/December 2019 PNO sought to increase channel and berthing charges at the Port. Having regard to Tribunal Determination No. 2, PNO has increased the channel charges effective 1 January 2020 to include the user funded channel dredging expenditure in its asset base (i.e. approximately \$912m in channel dredging costs). While PNO has offered mining companies an alternative 10 year pricing deal if they agree to terms of a deed (a copy of the *pro forma* deed from the PNO website (**Deed**) is annexed to this Submission as **Annexure 1**),⁶ the Applicants have concerns with the Deed as it includes in PNO's asset base industry expenditure. Specifically, the industry does not wish to see it having to double pay for past channel dredging. In any event, PNO's future pricing is subject to significant pricing re-openers which, while making the initial pricing superficially more attractive than the terms otherwise applying from 1 January 2020, make this lower price likely to be illusory in reality for the reasons explained in this Submission.

Application by NSWMC on behalf of Mining Industry

- 1.11 In these circumstances where:

- 1.11.1 the mining industry does not benefit from the ACCC's appeal of Tribunal Determination No. 2; and
- 1.11.2 because of the NCC's recommendation to revoke the declaration, the mining industry has no ability to have any access disputes arbitrated by the ACCC to address the imbalance in negotiating power between the mining companies and PNO,

the Applicants are seeking to collectively negotiate as an industry, to achieve a long term commercial solution for channel and berthing charges that provides the industry with certainty for long term investment in the Hunter Valley region. The PNO media release dated 28 November 2019 has stated that PNO wishes to "sit down with our customers to discuss our services and pricing"; this application is consistent with permitting that on an industry basis.⁷

⁵ See http://ncc.gov.au/images/uploads/Port_of_Newcastle_-_Recommendation_22.7.2019.pdf for the NCC's recommendation to revoke the declaration of the Port which is deemed to be a decision of the Treasurer in these circumstances.

⁶ See: <https://www.portofnewcastle.com.au/wp-content/uploads/2019/12/PORT-USER-PRO-FORMA-LONG-TERM-PRICING-DEED.pdf>.

⁷ See PNO Media Release dated 28 November 2019: <https://www.portofnewcastle.com.au/news/further-investment-uncertainty-for-hunter-coal-industry/>.

- 1.12 PNO has also indicated that they desire long term certainty for investments in the Port. Specifically, PNO has suggested that the removal of the declaration allows PNO to invest in the Port; the coal industry has raised concerns that there is no evidence that the increase in charges to the coal industry will involve any investment in the Port which benefits those export operations. For example, since privatisation the Port has substantially increased charges with no changes to the nature or quality of services provided. PNO has also announced the intention to develop a container terminal at the Port and while the mining industry welcomes such investment in the Hunter Valley, the industry seeks the opportunity to understand the nature of the expenditure that PNO states it intends to make and the associated basis of how costs and charges are proposed to be allocated among Port users, as such an understanding would be beneficial for efficient investment.⁸

Nature of proposed conduct for which authorisation is sought

- 1.13 The proposed conduct involves NSWMC on behalf of the members described in Schedule One seeking authorisation under the *Competition & Consumer Act 2010* (Cth) (CCA) to:
- 1.13.1 collectively discuss and negotiate the terms and conditions of access, including price to the Port for the export of coal (and any other minerals) through the Port;
 - 1.13.2 discuss amongst themselves matters relating to the above discussion and negotiations; and
 - 1.13.3 enter into and give effect to contracts, arrangements or understandings with PNO containing common terms which relate to access to the Port and the export of minerals through the Port (the **Proposed Conduct**).

The Proposed Conduct does not involve any collective boycott activity.

Port of Newcastle

- 1.14 The Port has been used for commercial shipping for over 220 years. It handles more than 25 different cargoes and approximately 2300 ship movements per annum. There are 200 hectares of vacant port land available for development at the port, and the total land holdings of the port are 792 hectares.
- 1.15 Coal is the primary commodity exported through the Port. Other commodities which pass through the port include: imports of alumina, cement, fertiliser, fuels, machinery, project cargo and vehicles, grains, petroleum coke, pitch and tar products and steel; exports of aluminium, concentrates, machinery, project cargo and vehicles, pitch and tar products, steel and grains.
- 1.16 Although the development of terminals within the Port precinct has been undertaken by private companies, until 2014 the Port Authority NSW, a government owned corporation of the State of New South Wales, was responsible for the overall

⁸ See PNO Media Release dated 1 August 2018: <https://www.portofnewcastle.com.au/news/new-ceo-commits-port-of-newcastle-to-developing-world-class-container-terminal/>.

development and operation of the Port. This position reflected the fact that the development of the Port had historically been a function of the State.

Privatisation process and background as to PNO as Port lessee

- 1.17 As from 30 May 2014, certain functions which had previously been carried out by the Port Authority NSW were transferred to the new port operator, PNO as trustee for the Port of Newcastle Unit Trust ("**Port of Newcastle Ops**") through a long term lease arrangement.
- 1.18 Port of Newcastle Ops is jointly owned by investors The Infrastructure Fund (**TIF**) and China Merchants Port Holdings Company (**CMPort**). TIF is an Australian infrastructure fund with a portfolio of Australian and overseas assets worth more than \$2.4 billion. TIF's portfolio is managed by Macquarie Infrastructure and Real Assets. CMPort is part of the China Merchants Group (**China Merchants**), and is a global port developer, investor and operator, with a ports network portfolio spanning across 18 countries and regions. China Merchants is headquartered in Hong Kong with business sectors which extend beyond infrastructure to property development and financial investment. In 2018, China Merchants had total assets in the value of 8 trillion RMB, with 649 billion RMB in revenue. Currently, China Merchants operates 53 ports in 20 countries and districts, and in 2017, its container throughput exceeded over 100 million TEU for the first time.
- 1.19 The privatisation transaction was completed in May 2014 and generated gross proceeds of approximately \$1.75 billion for the State of New South Wales.

Price rises

- 1.20 NSW port operators have statutory power to fix charges for certain port services (this is discussed in greater detail below). Shortly after assuming its role as port operator, PNO published price increases and changes to the charging regime which came into effect on 1 January 2015 (a copy of the notification of the price revisions is annexed to this application as **Annexure 2**), and re-valued the Port assets from \$1.75 billion to \$2.4 billion.
- 1.21 As noted by the Tribunal in Tribunal Determination No. 1:

*"After PNO assumed the role of Port operator, the price for coal ships using the channels to enter and exit the Port was increased by between approximately 40% and 60% for some vessel types – particularly the larger more efficient vessels. Price increases also occurred for non-coal vessels. It is said, without demur, that those price increases were not accompanied by any change in the nature or quality of the Service. It is also said, again without demur, that the price increases were imposed by PNO without significant consultation with users of the Service."*⁹
- 1.22 The following table sets out the percentage price increases in relation to the navigation service charge (**NSC**) and the wharfage charge (**WC**), from 2014-2020, and from

⁹ Tribunal Determination No. 1, [16].

2019-2020 respectively. The pricing schedules for 2019 and 2020 have been annexed to this submission as **Annexures 3** and **4** respectively.

	2014 – 2020 (% price increase)	2019 – 2020 (% price increase)
NSC¹⁰	142.9 ¹¹	33.5
WC¹²	21.6	3.95

- 1.23 These significant price increases and associated uncertainty in relation to future pricing are the primary catalysts for this application. The Applicants draw particular attention to the significant price increase for NSCs levied on vessels at the time of port entry for the general use of the Port and its infrastructure.
- 1.24 As noted earlier in this Submission, the Applicants understand that the price increases are not associated with or offset by any increase in productivity, efficiency or service to be provided by PNO, and nor are they required for the purpose of funding any further investment in the services provided to the mining industry as far as the Applicants are aware.

Lack of regulatory constraint on PNO in relation to price increases

- 1.25 The Applicants understand that there is no intention of the New South Wales Government to put in place any form of regulatory oversight for cost increases or importantly for any future fixing of price increases for the channels or any associated infrastructure. This creates considerable uncertainty for the operation and commercial viability of existing and future coal mines in the Hunter Valley region.
- 1.26 As noted in Tribunal Determination No. 1, in some cases of bottleneck infrastructure, there is a certified access regime or other effective regulatory framework to 'manage' the prices set by the monopoly owner or operator of that infrastructure for the use of the particular infrastructure. There is no such regime in place in relation to the Port and given that it is no longer declared under Part IIIA of the CCA, there is now no longer any constraint on PNO's pricing that arises from ACCC oversight. The underpinnings of the NCC's recommendation in 2019 for revocation of the declaration that PNO would be constrained commercially by its relationships with its customers do not seem to have eventuated given the significant further price increases for 2020. The ACCC's assessment that PNO as a monopoly infrastructure provider would seek to maximize returns have in fact transpired.
- 1.27 As the port operator from May 2014 onwards, PNO has controlled the terms and conditions of access to the Port. PNO has and may exercise the statutory powers conferred under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW)

¹⁰ NSC applicable for coal vessel over 600GT.

¹¹ This figure reflects the percentage increase from the 2014 price of \$0.4292 for the first 50,000 gross tonnes. The 2014 price for every tonne after the first 50,000GT was \$0.9656, and was capped at a maximum charge of \$45,633.68.

¹² WCs vary across different dykes at the Port. Percentages set out in this table reflect an average of the percentage price increases.

(PMAA) in order to levy charges on the vessels which use the Port. On each occasion a vessel enters the shipping channels, it incurs liability to pay usage charges for the use of the Port at rates determined by PNO, which has the express entitlement under the lease of the Port from the State of NSW, to exclude access to the channels if the shipping charges are not paid.

- 1.28 While the prices levied by PNO are subject to price reporting to the relevant Minister of the State of NSW under Part 6 of the PMAA, and the Minister may refer the pricing for investigation to the New South Wales Independent Pricing and Regulatory Tribunal (IPART), it is "*common ground that the IPART regime is not a certified or effective access regime: if it were, s 44G(2)(e)(ii) of the Act would mean that the NCC could not recommend the Service.*"¹³
- 1.29 PNO has in the past claimed that there are some existing constraints on PNO in relation to its pricing structures (e.g. the price reporting mechanism under the PMAA). However, the fact is that at present, there are no direct regulatory constraints on its pricing structures.
- 1.30 Moreover, the existing practical price 'constraints' on PNO under legislation and under the contractual leasing arrangement between PNO and the State of NSW do not provide an effective substitute for access regulation. As noted by the Tribunal:

*"the understandable commercial incentive to maximise its profitability, and its revenue, may be served in different ways at different times, depending upon the strength of the coal export market. The fact remains (as noted above) that coal miners supplying coal into that market from mines in the Hunter Valley have no real practical alternative to using the Service, and in more profitable times (accepting what has been said about the present state of that industry) be vulnerable to charging changes imposed by PNO for access to the Service to absorb to a significant degree the profitability of exporting coal produced from the Hunter Valley."*¹⁴

Authorisation sought

- 1.31 As noted above, the Proposed Conduct involves NSWMC on behalf of the described members seeking authorisation under the CCA to:
- 1.31.1 collectively discuss and negotiate the terms and conditions of access, including price, to the Port for the export of coal (and other minerals) through the Port;
- 1.31.2 discuss amongst themselves matters relating to the above discussion and negotiations; and
- 1.31.3 enter into and give effect to contracts, arrangements or understandings with PNO continuing common terms which relate to access to the Port and the export of minerals through the Port.

¹³ Tribunal Determination No. 1, paragraph 14.

¹⁴ Tribunal Determination No. 1, paragraph 166.

- 1.32 As also noted above, the Proposed Conduct does not involve any collective boycott activity.

Authorisation should be granted

- 1.33 This authorisation application seeks to allow each applicant to independently determine for themselves whether to accept the negotiated terms and conditions offered by PNO following the collective negotiations. Each applicant is also able to freely undertake independent negotiations with PNO at any time they wish to do so. The application also does not involve any collective boycott activity.
- 1.34 Authorisation is sought for a period of 10 years. This reflects the prospective term of an access agreement and is consistent with the length of time that PNO has proposed in its long term agreement reflected in the Deed. It also allows for renegotiation of prices associated with review events that PNO is seeking under its proposed Deed.

Public benefits

- 1.35 The Applicants consider that there are substantial public benefits that would arise if the authorisation were to be granted including the following:
- 1.35.1 the key public benefit is that given that the coal exporters account for the majority of exports from the Port, an agreement with the coal exporters creates certainty for investment in the Hunter Valley, and that investment would facilitate employment and growth in the Hunter Valley region;
 - 1.35.2 a significant public benefit that would arise through the collective negotiations facilitated by NSWMC would be that smaller miners (as well as larger miners) would also have the benefit of collective negotiations and the opportunity for a long term agreement that they may otherwise not be able to negotiate with PNO. The NSWMC believes that would assist these smaller miners in managing uncertainty that may otherwise arise for their investments;
 - 1.35.3 PNO's proposed long term access arrangements (as indicated in the proposed Deed) contemplate industry wide issues such as capital expenditure in the Port and are matters that are therefore appropriate to be discussed and negotiated at an industry level;
 - 1.35.4 a long-term agreement with the coal industry as to future investment as well as the basis on which any user funded expenditure is included in PNO's cost base at both the current time and in the future would lead to more certainty in future pricing and efficient investment;
 - 1.35.5 industry discussions will promote increased transparency on expenditure and cost allocation, which will lead to more efficient investment and therefore the promotion of improved pricing outcomes for the mining industry over time.
- 1.36 The Proposed Conduct is likely to result in minimal, if any public detriment because of the following:
- 1.36.1 the voluntary nature of the participation by the coal mining industry in the application;

- 1.36.2 the absence of any requirement on PNO to collectively negotiate;
 - 1.36.3 there is no collective boycott activity proposed;
 - 1.36.4 as PNO already publishes its access terms and because it has also publicly provided its proposed long term access arrangements in the form of the proposed Deed, this transparency of PNO's pricing arrangements means that the Applicants are merely seeking to engage with PNO on the basis of such terms and conditions which are already in the public domain, so there is no risk of any information sharing between the Applicants that would be prohibited under the CCA.
- 1.37 PNO has already indicated as noted above that it would like to discuss future pricing and charges with its customers and this application facilitates such discussions with the industry.
- 1.38 Further, while many of the companies participating in this application are large mining companies, given PNO's monopoly position at the Port, their size is irrelevant to this matter given that they have no practical option other than to use the Port given it has been privatised at the end of their export supply chains in circumstances where they have invested substantial sunk costs in mines, rail and coal terminal operations.

Interim authorisation

- 1.39 The Applicants are seeking interim authorisation on the basis that:
- 1.39.1 the Proposed Conduct is likely to have minimal impact on competition given the voluntary nature of the arrangements and that sensitive information such as downstream customers, customer pricing, volume projections, or marketing strategies will not be shared between the Applicants;
 - 1.39.2 PNO has already sought to commence negotiations with many of the larger miners in relation to long term arrangements;
 - 1.39.3 consistent with the ACCC Determination which establishes access pricing that would apply to each user (and not on a volume basis), there is no need for the Applicants to exchange sensitive information such as volume projections, or marketing strategies and such production information (or information as to their customers) will not be shared between the Applicants. Given this, issues relating to information exchange do not arise;
 - 1.39.4 the interim authorisation will assist the Applicants in assessing the benefits and consequences of the terms and conditions offered by PNO under the Deed, particularly in circumstances where there is significant information asymmetry between the Port users and PNO, with the latter having substantially more bargaining power flowing from its position as the infrastructure monopolist with control over the relevant data.

- 1.40 PNO is not compelled to enter into the collective negotiations unless it chooses to do so but an interim collective authorisation will facilitate the opportunity for the Applicants to start discussions with PNO (if PNO so wishes).
- 1.41 The NSWMC is seeking an interim authorisation from the ACCC on an urgent basis, given the uncertainty Port users and the industry is currently facing in relation to the terms and conditions of access, including price. The industry is concerned that the 'alternative' terms and conditions as set out under the Deed are offered completely at PNO's discretion, particularly as the 2020 Schedule of Charges came into effect on 1 January 2020. By requesting an urgent interim authorisation, the industry is seeking an opportunity to engage in constructive negotiations with PNO in relation to the terms and conditions of the Deed, so as to consider whether mutually acceptable outcomes may be reached in the most efficient way possible.

2. BACKGROUND INFORMATION

- 2.1 The Hunter Valley export supply chain is the largest coal export operation in the world. In 2018-19, NSW exported 168 million tonnes of coal. 161 million tonnes of this, or 96%, was exported through Newcastle, with the remainder exported through Port Kembla (Coal Services). Newcastle is the only practical way through which coal can be exported from the Hunter, Gunnedah, Gloucester, Newcastle and parts of the Western coalfield
- 2.2 The coal mines exporting through the Hunter Valley employ the vast majority of the 22,300 people directly employed by the NSW coal mining industry (Coal Services). Data collected by NSWMC indicates the NSW coal industry directly spent \$9.8 billion on wages, suppliers, community groups and government payments in 2017-18, including \$1.9 billion in royalties to the NSW Government.

Figure 1: Map of Hunter Valley Coal Chain network



Source: Port Waratah Coal Services

- 2.3 Coal from Newcastle is exported to around 20 countries primarily in the Asian region. Japan has the largest customer base, receiving 44% of exports from Newcastle during 2018-19. China, Korea and Taiwan accounted for a further 44%. Most of the coal mines in the Hunter Valley are open cut mines and both soft coking and thermal coal products are produced in the region.
- 2.4 The Hunter Valley Coal Chain is made up of coal producers (or mines), rail haulage providers, the Australian Rail Track Corporation ("ARTC"), three export terminals, port managers and the Hunter Valley Coal Chain Coordinator ("HVCCC"). These are described below.

Coal producers exporting through the Hunter Valley Coal Chain

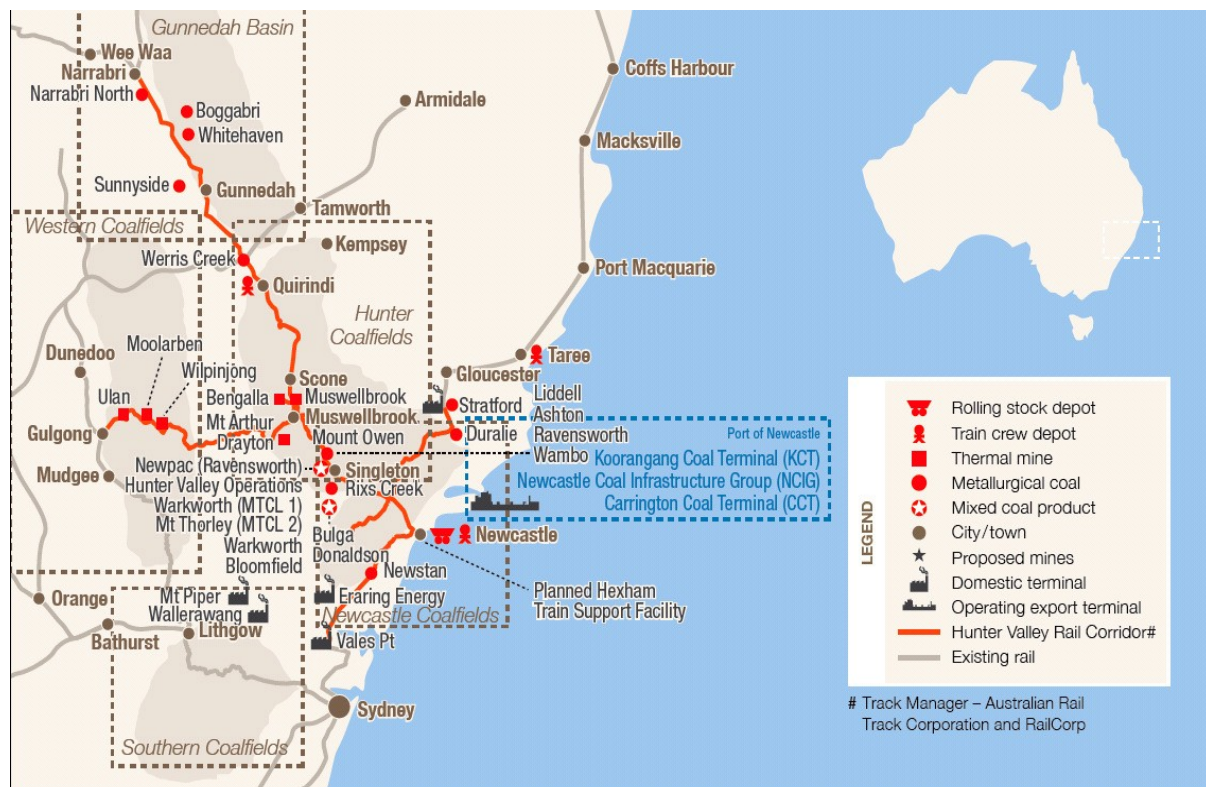
- 2.5 There are more than 35 operating coal mines operated by 11 coal producers that export through Newcastle, with as well as other coal projects in various stages of exploration and development.
- 2.6 Coal producers exporting through the port include:
 - 2.6.1 Glencore, which is New South Wales' largest coal producer and operates several mines and mining complexes across the Newcastle, Hunter Valley and Western Coalfields
 - 2.6.2 BHP, which operates the Mt Arthur complex, the largest mine in the Hunter Valley, located near Muswellbrook.
 - 2.6.3 Peabody Energy Australia, which operates the Wambo mine in the Hunter Valley and the Wilpinjong mines in the Western Coalfield.
 - 2.6.4 Yancoal Australia Limited, which operates several mines in the Hunter Valley, Newcastle and Western Coalfields.
 - 2.6.5 Whitehaven Coal, which operates several mines in the Gunnedah Basin.
 - 2.6.6 MACH Energy, which operates the Mt Pleasant mine in the Hunter Valley.
 - 2.6.7 New Hope Group, which operates the Bengalla Mine in the Hunter Valley.
 - 2.6.8 The Bloomfield Group, which is an Australian owned group of private companies which operates in the Hunter Valley that operates two open cut coal mines: Bloomfield at East Maitland and Rix's Creek at Singleton.
 - 2.6.9 Centennial, which operates the Mandalong, Myuna and Newstan mines in the Newcastle coalfield.
 - 2.6.10 Idemitsu, which owns the Boggabri mine in the Gunnedah Basin and the Muswellbrook mine in the Hunter Valley.
 - 2.6.11 Delta Coal, which owns the Chain Valley mine approximately 60km south of Newcastle and directly adjacent to the Vales Point Power Station.

- 2.7 Other mines at various stages of planning may export through the port in the future, including Malabar Coal's Spur Hill and Maxwell proposals.

Railway infrastructure

- 2.8 Rail infrastructure in the Hunter Valley is extensive. It involves in general terms:
- 2.8.1 coal producers entering into access agreements with ARTC which provide a contractual commitment for below rail path availability and use of ARTC's rail track network;
 - 2.8.2 operator agreements entered into between ARTC and accredited above rail operators to operate on the ARTC rail track; and
 - 2.8.3 rail haulage agreements between coal producers and above rail operators for the haulage of coal from mine to port.
- 2.9 The railway corridor used is part of the Main North railway line. The Hunter Valley rail infrastructure is owned by the State Government-owned RailCorp and managed by the Federal Government-owned ARTC under a 60 year lease until 2064. The other infrastructure associated with coal transport, such as load points, is privately owned, usually by a mine or a coal loader.
- 2.10 The Hunter Valley coal network consists of a dedicated double track 'coal line' between Port Waratah and Maitland, a shared double track line (with increasingly significant stretches of third track) from Maitland to Muswellbrook, and a shared single track with passing loops from that point north and west.
- 2.11 ARTC is vertically separated, providing 'below-rail' services (such as the rail track infrastructure) but not 'above-rail' services (such as haulage). ARTC provides a single point of contact for parties seeking to run trains on the Hunter Valley Rail Network.
- 2.12 ARTC is responsible for managing the network and granting access to the network.

Figure 2: Rail infrastructure in the Hunter Valley Corridor



Source: Aurizon

2.13 All but a very small proportion of the export coal shipped through the Port is transported via rail. Most of this coal comes from a series of mines and coal loaders throughout the Hunter Valley, Gunnedah, Western, Gloucester and Newcastle coal basins. Domestic coal is also transported over the same network.

2.14 Export coal also arrives at the terminal from a small number of mines to the south of Newcastle. This traffic operates on the RailCorp network as far as Broadmeadow.

Rail operators

2.15 There are four operators currently providing rail haulage services to coal producers in the Hunter Valley Coal Chain:

2.15.1 Pacific National (fully owned by the Asciano Group), which is the largest coal hauler in NSW.

2.15.2 Aurizon, which commenced operations in the Hunter Valley in 2005.

2.15.3 Genesee & Wyoming, which acquired Glencore Rail in December 2016.

2.15.4 Southern Shorthaul Railroad (SSR), which entered the coal haulage market in 2010.

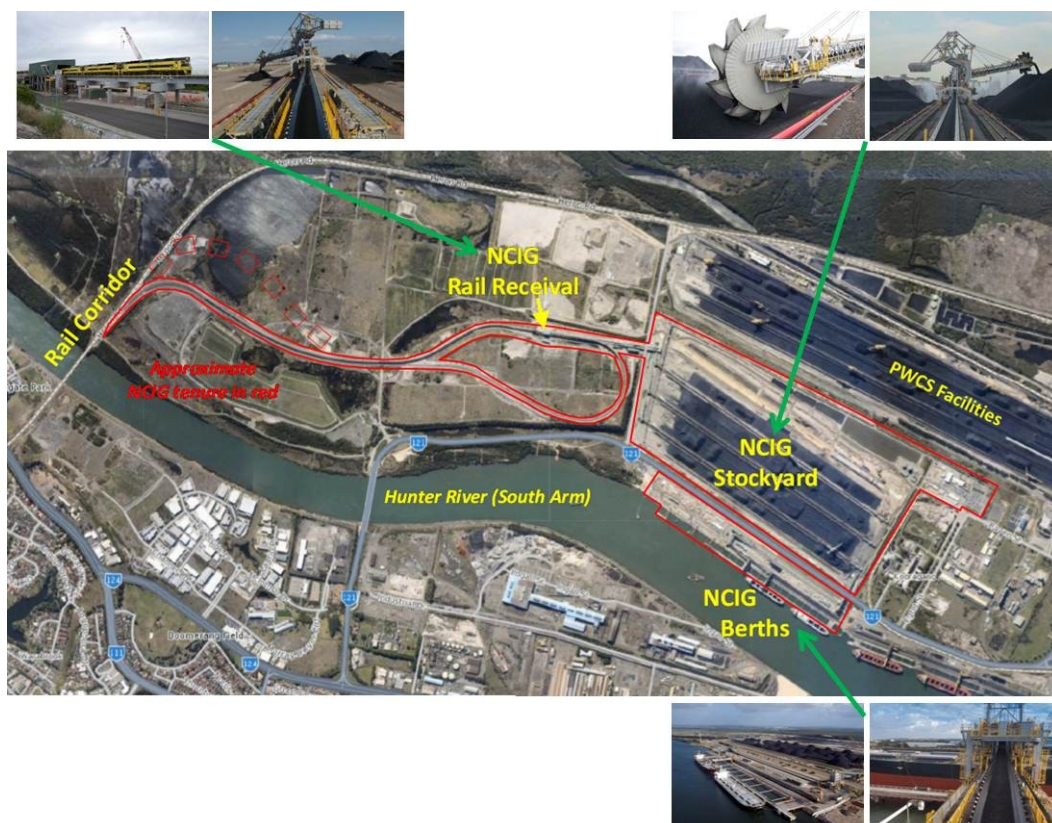
2.16 All of these above and below rail operators participate in the Hunter Valley Coal Chain exporting coal to the two main coal export terminals, NCIG and PWCS.

Loading and unloading of coal at the coal loading terminals

2.17 There are three coal terminals at Newcastle Port, which receive coal from the mines, stockpile it and load it to vessels for export. The terminals are owned by coal producers and investors. Two of these terminals are located on Kooragang Island, with a third at Carrington. The significant operations of these coal terminals are dependent on coal vessels accessing the shipping channels and utilising the Port. The terminals are:

- 2.17.1 Newcastle Coal Infrastructure Group (NCIG) – NCIG is located on Kooragang Island and is the newest of the three terminals, beginning operations in 2010. NCIG has a total handling capacity of 66 million tonnes per annum.
- 2.17.2 Port Waratah Coal Services (PWCS) Carrington Coal Terminal – PWCS began operating what is now Carrington Coal Terminal in 1976. It has a total handling capacity of 25 million tonnes per annum.
- 2.17.3 PWCS Kooragang Island Coal Terminal – Kooragang Island began operating in 1984 and has expanded to reach a total handling capacity of 120 million tonnes per annum.

Figure 3: Aerial map of NCIG operations



Source: NCIG

Figure 4: Shiploaders and berths at NCIG Terminal



Source: NCIG

Specialist services providers

- 2.18 Coal mining in the Hunter Valley region is supported by a significant array of related mining services from exploration services in the nature of geological and drilling services, to equipment provision services, mining safety services and mining technology services. Construction, project management and machinery manufacturing represent further industries in this area.
- 2.19 Service providers to the infrastructure (rail track, port terminals, berths) and co-ordination of the supply chain also make up a considerable portion of the wider specialist services industry.

Challenges for the Hunter Valley Coal Industry

- 2.20 Coal exports from Newcastle remain strong as demand for NSW's high quality thermal and metallurgical coal from both traditional and emerging markets continues. Nonetheless there is significant cost pressures on the coal industry to be efficient in all aspects of their mining operations as coal from Australia competes with coal from other countries such as Indonesia. Therefore, it is important that infrastructure charges whether for rail or at the Port are efficient and facilitate the competitiveness of Australia's coal exports.
- 2.21 In particular, the industry view is that infrastructure charges (especially port infrastructure charges) have a material impact on the competitiveness of the relevant markets and the commercial ability / incentive for industry participants to invest in the region. PNO's pricing practices of including user funded expenditure in its asset

base and charging Port users for it is a clear example of unfettered rent seeking, and it is not economically efficient for PNO to charge Port users for the cost of assets already funded by users. This is also not a mere transfer of wealth from Port users to PNO as the unfettered ability to extract infrastructure access charges from users creates a substantial challenge for the industry given the significant uncertainty associated with the access pricing (in circumstances where declaration of the Port has been revoked). This uncertainty in future pricing for accessing the Port creates a chilling effect on investment by the mining industry in the Hunter Valley and this chilling effect has a far greater economic and social impact than what PNO may portray as a mere wealth transfer in the access charges.

- 2.22 Moreover, PNO has sought to leverage its infrastructure monopoly to the fullest extent in various other rent seeking ways, in a deregulated environment ripe for such conduct. For example, as discussed further below, the Deed seeks to:
- 2.22.1 protect PNO from changes in tax and other laws by enabling it to pass on any adverse effects of those changes to users who have no alternative to the Port for the export of coal;
 - 2.22.2 keep PNO's shareholders harmless from any "material" changes in the operating environment in the mining industry that would allow PNO to increase charges to maintain the rate of return for its shareholders;
 - 2.22.3 veil from objective scrutiny PNO's further investments in the Port which may have the effect of preventing Port users from being able to access data and assess whether such investments / expenditures by PNO are justified and efficient (and even related to coal export).
- 2.23 The NSWMC and the Applicants believe that the encouragement of long-term investment solutions underpinned by pricing certainty for infrastructure is crucial to securing a future for efficient coal exports in the Hunter Valley region. Without this, and in contemplation of the heavily skewed terms and conditions offered by PNO, it is likely that there will be a significant detrimental effect on individual investment decisions on the coal production side.

Users have no pricing certainty

- 2.24 As noted above, PNO has materially increased prices since taking over as the Port operator in 2014. By way of example, the price increase just from 2019-2020 in relation to the NSC was 33.5%. In December 2019, PNO released its price schedule for 2020 which purported to offer users with a "long term" pricing offer under the Deed. The Deed offered "discounted" rates of \$0.8121 per gross tonne in relation to the NSC, and \$0.0802 per gross tonne in relation to the WC, for an initial term of 10 years.
- 2.25 However, the pricing mechanism set out under the Deed does not actually provide users with pricing certainty. The Deed provides PNO with a number of "re-openers" and mechanisms by which it may adjust the price for use of the Port based on factors that are not detailed and based on capital expenditure that is solely within the determination of PNO. The Applicants also believe that the Deed provides very unclear mechanisms for users to ascertain the data needed to understand such changes

or to dispute those charges. While it is anticipated PNO may take a contrary view of those provisions, the Applicants are seeking the ability to discuss those provisions as an industry and having an industry discussion is considered the most efficient manner to discuss these concepts.

2.26 Item 6 of the annexure to the Deed relevantly provides that the "*Covered Vessel Specific Charges will not be varied by PON during the Initial Term, except for the following variations:*

(a) *Annual Adjustment*

At the beginning of each Contract Year (other than the beginning of the first Contract Year) (each an Adjustment Date) each Covered Vessel Specific Charge will be adjusted to the amount which is the greater of Amount A and Amount B, where:

$$\text{Amount A} = C_1 + (C_1 \times 4\%)$$

$$\text{Amount B} = \left\{ C_1 \times \frac{\text{Current CPI}}{\text{Previous CPI}} \right\}$$

Where:

C₁ is the amount of the relevant Covered Vessel Specific Charge (excluding GST) immediately before the Adjustment Date

CPI means the consumer price index number published by the Australian Statistician for Australia-All Groups

Current CPI means the CPI for the quarter ending 30 September in the calendar year immediately preceding the Adjustment Date (**Current Contract Year**)

Previous CPI means the CPI for the quarter ending 30 September in the calendar year immediately before the Current Contract Year

(b) *Change in Tax or law*

If during the Initial Term there is a change in any Tax (including any new Tax) or a change in any law (including any new law) which:

(i) *PON pays or bears, or is required to pay or bear; or*

(ii) *will result in PON bearing increased costs or being able to recover less revenue,*

PON may vary the Covered Vessel Specific Charges to pass through the net effect of such changes on PON's costs or revenue in accordance with the Pricing Principles.

(c) *Material change event*

On the occurrence of any material change during the Initial Term which will:

(a) *increase the costs (including operating and capital expenditure costs) to PON of providing the Vessel Services; or*

(b) *reduce the equity rate of return (ERR) for the equity investors in PON,*

PON may increase the Covered Vessel Specific Charges to recover the additional costs or to sustain the ERR in accordance with the Pricing Principles.

(d) *Capex investment*

PON may increase the Covered Vessel Specific Charges at the end of each Contract Year to provide for a reasonable rate of return on any capital expenditure incurred by PON during the applicable Contract Year in accordance with the Pricing Principles."

2.27 Authorisation will allow the Applicants to negotiate an efficient price with PNO.

Background on the Glencore / PNO access dispute

2.28 The background to the Glencore / PNO access dispute sets the scene for the difficulties faced by the mining industry in negotiating with PNO and why in the absence of the authorisation, it would be very difficult for the mining industry to negotiate an industry solution with PNO.

2.29 The history of the access dispute is noted in the ACCC Determination:

2.29.1 on 10 November 2015, the NCC recommended to the Minister that the Service not be declared under section 44F of the CCA;

2.29.2 on 8 January 2016, the Minister decided not to declare the Service as recommended by the NCC, and published his decision under section 44H(1) CCA;

2.29.3 on 29 January 2016, Glencore applied to the Tribunal under section 44K(2) CCA for review of the Minister's decision;

2.29.4 on 31 May 2016, the Tribunal gave its reasons for setting aside the decision of the Minister that was made under section 44H(1) CCA;

2.29.5 on 16 June 2016, the Tribunal made its orders setting aside the decision of the Minister and declared the Service pursuant to section 44K(8) CCA for the period commencing on 8 July 2016 and expiring on 7 July 2031;

2.29.6 on 14 July 2016, PNO applied for judicial review of the Tribunal's decision;

2.29.7 on 4 November 2016, Glencore notified the ACCC of an access dispute under section 44S CCA and the arbitration process commenced;

- 2.29.8 on 16 August 2017, the Full Federal Court dismissed PNO's application for judicial review of the Tribunal's decision;
- 2.29.9 on 12 September 2017, PNO filed an application for special leave to appeal the Full Federal Court's decision before the High court;
- 2.29.10 on 23 March 2018, PNO's special leave application was dismissed by the High Court;
- 2.29.11 on 2 July 2018, PNO applied to the NCC to recommend that the Minister revoke the declaration of the Port;
- (a) on 26 July 2019, the NCC made a recommendation to the Minister under section 44J(1) CCA that the declaration of the Port be revoked;
 - (b) following the expiration of the 60-day period¹⁵ during which the Minister may make its decision as to whether or not to revoke the declaration of the Port and the Minister not doing so, it was taken that a decision to revoke the declaration of the Port was made by the Minister on 24 September 2019;
- 2.29.12 on 18 September 2018, the ACCC released the ACCC Determination, noting *inter alia* that user funded contributions should not be included in the calculation of PNO's initial regulated asset base, as this will ensure that users do not pay for the same assets twice – once through their initial investment and again through PNO's charges.
- 2.30 Subsequently, PNO appealed the ACCC's findings to the Tribunal. On 30 December 2019, the Tribunal concluded that user funding cannot be deducted from calculations of the regulated asset base, which has effectively resulted in a material price increase¹⁶ and the perverse situation of users having to pay twice for the use of the Port.
- 2.31 Glencore has filed an appeal of the Tribunal's decision to the Federal Court. However, even if it were to be successful in having the Tribunal's finding in relation to user funding overturned, any favourable pricing adjustments would apply only to Glencore, and not to all the users of the Port (some of whom have contributed significantly to its development, as outlined in the below section).
- 2.32 Without authorisation of the Proposed Conduct, the Applicants would not be able to discuss relevant matters (including price) relating to use of the Port with each other. Moreover, these users would not be able to collectively discuss and negotiate the terms and conditions of access with PNO, which is particularly critical in circumstances where the Port charges are now not subject to declaration and PNO's pricing is not subject to any material regulatory constraints as would have arisen if the declaration

¹⁵ Pursuant to section 44J(7) of the CCA, if the Minister has not published a decision on a revocation recommendation within the period starting at the start of the day the recommendation is received and ending 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:

- (a) to have made a decision that the declaration be revoked; and
- (b) to have published that decision in accordance with this section.

¹⁶ For example, the NSC has increased 33.5% from 2019 to 2020.

remained in place and access seekers could have had any access dispute subject to independent arbitration by the ACCC, which would have acted as a constraint on PNO's pricing.

Users have contributed significantly to the development of assets and infrastructure at the Port of Newcastle

- 2.33 As explained above, the Hunter Valley coal supply chain is made up of coal producers, above rail haulage providers, the Australian Rail Track Corporation which provides below rail (track) infrastructure, three export port terminals (being Carrington and Koorangang Island Terminals) operated by Port Waratah Coal Services and the Newcastle Coal Infrastructure Group Terminal, port managers and the HVCCC.
- 2.34 In the decades prior to the privatisation of the Port in May 2014, the users contributed very significant sums to the State of NSW to develop the port assets and infrastructure. Such user funded contributions were accepted by the ACCC to amount to \$912 million.
- 2.35 As noted in the ACCC Determination, there were two major tranches of user funded works, being the Harbour Deepening Project (1977-83) and the South Arm channel and berth pocket dredging (primarily 1989-2010) that included development works of land reclamation, wharf construction and terminal development, as well as a number of comparatively smaller user funded works.
- 2.36 User funded (and combined user and State funded) contributions to assets have increased the Port's capacity significantly. Notably, the port assets that were developed through user funded contributions are perpetual assets (i.e. channel and berth boxes, riverwalls and revetments), and so continue to provide value to users in perpetuity. Authorisation of the proposed conduct will enable users to negotiate more effectively with PNO and incentivise continued use and development of the Port.

3. AUTHORISATION SOUGHT

Proposed Conduct

- 3.1 As noted above, the Proposed Conduct involves Applicants seeking authorisation under the CCA to:
 - 3.1.1 collectively discuss and negotiate the terms and conditions of access, including price, to the Port for the export of minerals through the Port;
 - 3.1.2 discuss amongst themselves matters relating to the above discussion and negotiations; and
 - 3.1.3 enter into and give effect to contracts, arrangements or understandings with PNO containing common terms which relate to access to the Port and the export of minerals through the Port.
- 3.2 The Proposed Conduct does not involve any collective boycott activity.

Scope

- 3.3 In this application, "Applicants" includes successors, assignees, related body corporates and associated entities and joint venture partners of each Applicant. This will ensure that the authorisation properly provides statutory immunity for all relevant parties.
- 3.4 Participation in the conduct authorised by the ACCC will be voluntary:
- 3.4.1 PNO will not be required to negotiate collectively with the Applicants – authorisation merely provides the opportunity to do so;
- 3.4.2 The Applicants retain complete discretion on whether or not to negotiate collectively with PNO – authorisation merely provides the opportunity to do so.
- 3.5 The class of parties able to collectively negotiate under the proposed authorisation is not closed. Pursuant to section 88(1) of the CCA, the authorisation is sought on terms that would allow other access seekers / Port users to have the benefit of the authorisation if it chooses to participate in the collective negotiation.
- 3.6 The Applicants acknowledge that the proposed authorisation will not operate to permit any collusion or information sharing that would allow them to agree prices or other terms and conditions in respect of the coal production services which they offer in competition with one another as the proposed conduct relates to pricing by PNO that is public and in respect of a proposed Deed that is also public.

Reasons for the Proposed Conduct

- 3.7 The reasons for the Proposed Conduct have been set out above in this Submission but derive from the need for the NSW mining industry to have a means to collectively negotiate with PNO, consistent with and compliant with the provisions of the CCA since some of those miners could be considered to be in competition with each other.
- 3.8 The need for collective negotiations with PNO arise because it is an infrastructure monopoly service provider that enjoys the commercial benefits of that position in circumstances where the Port was privatised at the end of a multi user export supply chain, and in the absence of any regulatory constraints that ought to have been put into place by the NSW Government on privatisation to address PNO's bargaining power that arises from its monopoly position. Further, with the revocation of the declaration of the Port that Glencore achieved that allowed all users to seek an access arbitration with PNO administered by the ACCC, there is now no other form of constraint on PNO's pricing power which had existed following declaration in 2016, after the 2015 price increases. It is noted that after revocation of the declaration, PNO increased its prices significantly once again and in particular, based on the inclusion of user contributions that PNO did not itself actually expend. That expenditure was made by users (including through the coal terminals in respect of which the users are the owners).

Duration

- 3.9 As set out in this Submission authorisation is sought for a period of 10 years for the purposes of allowing collective negotiations during the time period contemplated by

PNO's proposed Deed and given that the pricing contained therein involves various re-openers during that time period.

Interim authorisation

3.10 As set out in this Submission interim authorisation is being sought on an urgent basis.

4. THE TEST FOR AUTHORISATION

Weighing public benefits and detriments

4.1 The CCA sets out the relevant provisions that the ACCC must follow in relation to this authorisation application for the Applicants to be able to engage in the Proposed Conduct. This section of the Submission sets out the factual matters that the Applicants believe that the ACCC should consider in the weighing process that is required under the CCA having regard to the applicable sections of the CCA.

The counterfactual

4.2 In the absence of authorisation of the Proposed Conduct, the Applicants would not be able to collectively discuss with PNO industry issues relating to access to the Port and the provisions of the proposed Deed that PNO has issued, particularly in relation to capital expenditure and PNO's investment in the Port. Given that the Port is at the end of a multi user export supply chain it is considered important for the industry to be able to have such collective discussions, recognising that PNO is free to decline to collectively negotiate if it so chooses.

Relevant markets

4.3 The Applicants are seeking to negotiate terms of access to the Port so that the primary market affected by the application is the market for the provision of infrastructure access at the Port, although there are in theory other affected markets that have been canvassed in the Tribunal Determination No. 1 and the NCC Revocation Recommendation, those markets were relevant because of the particular terms of Part IIIA of the CCA dealing with impacts on other affected markets arising from the access declaration. Accordingly, unless the ACCC requests otherwise this Submission will primarily focus upon the market for infrastructure services at the Port. The other affected markets are not addressed in this Submission in any detail but are dealt with in summary form at paragraph 5.5.

5. SIGNIFICANT PUBLIC BENEFITS

Improving efficiency

5.1 Having regard to the nature of the services provided by PNO and that it is a monopoly infrastructure service provider where it sets terms and conditions for access, the Applicants submit that there are substantial efficiencies arising from collective negotiations. Further, because PNO has issued a draft Deed for access to the Port for a period of 10 years that includes aspects that affect all users and not just some users individually (e.g. capital expenditure at the Port), the Applicants submit that there should be an industry response, and one facilitated by the NSWMC is the most sensible and efficient.

Improving pricing outcomes

- 5.2 The Applicants note that the proposed collective bargaining conduct for which authorisation is sought is voluntary in nature and PNO is not mandatorily compelled to engage in collective negotiations as part of the proposed arrangement. However, although PNO's position as an infrastructure monopoly means that there can be no certainty that PNO will agree to make any concessions as to price of access, the authorisation will, *inter alia*, enable users to collectively, as an industry, discuss with PNO the basis on which costs will be allocated by PNO and means for PNO to more efficiently engage in capital expenditure on a transparent basis. It is hoped that such increased transparency on expenditure and how costs are allocated, will lead to more efficient investment and therefore the potential for reduced charges being imposed on the mining industry over time.

Improving commercial outcomes

- 5.3 The Applicant submits that the authorisation will facilitate an industry discussion on industry issues relevant to the Port as the only practical export gateway from the Hunter Valley, as to capital expenditure relating to services to be provided by the Port for the mining industry, and as to how user funding should be treated within that framework. Any outcomes from negotiations would apply across the industry and would benefit both PNO's customers and itself in terms of creating certainty for investment and a long term pricing path.

Transaction cost savings

- 5.4 The NSWMC believes that industry negotiations with PNO would lead to transaction cost savings for both PNO and also the mining industry as they would focus on key industry issues that would otherwise be inefficient if PNO sought to negotiate mining company by mining company – for example, PNO's proposed capital investment program that would affect the coal industry as a whole. Over the proposed 10 year period these efficiencies would likely be substantial.

Promoting competition in the relevant markets

- 5.5 The authorisation if granted would provide increased certainty in investment that would facilitate increased usage of PNO's services on a more efficient basis. It is the efficiencies derived from the requested authorisation that are likely to be most important in dealing with PNO as a monopoly provider of services at the Port, as they will foster the ability of the mining companies to export coal more efficiently (and thereby compete with each other more effectively).

- 5.6 In particular, the requested authorisation would promote a material increase in competition in a number of dependent markets, including the following:

5.6.1 the coal export market;

- (a) mining export infrastructure occupies a strategic position in the mineral export industry, and provides services required to compete in the dependent seaborne coal and other mineral markets;

- (b) considering the current economic climate and experience of Australian coal producers,¹⁷ even incremental cost increases at the margin may have the degree of impact to drive coal producers to exit the market, which would inevitably have repercussions for the related markets that support the coal export market. The requested authorisation would provide coal producers with the opportunity to negotiate such cost increases with PNO in a more effective and meaningful way, thereby driving competition in this market;
- 5.6.2 the markets for the acquisition and disposal of exploration and / or mining authorities (the **Tenements Market**);
- (a) with authorisation, owners of tenements will have increased incentives and confidence to invest in the exploration of their tenement(s), either for the purpose of developing the tenement itself or obtaining more information about the tenement to improve its prospective value;
 - (b) sellers will enjoy greater competition amongst buyers when selling their tenements, thereby driving up price and activity in the Tenements Market;
 - (c) the NSW Government (as the originating seller of tenements) will benefit from increased competition in the bidding for licences, underpinned by pricing certainty in relation to Port access prices;
- 5.6.3 the markets for services such as geological and drilling services, construction, operation and maintenance (the **Specialist Services Market**);
- (a) if competition is materially increased in the Tenements Market, this will likely have a positive flow-on effect to the Specialist Services Market, as there will be increased demand for the specialist services which would be involved in developing mining tenements.

6. MINIMAL (IF ANY) DETRIMENT

Voluntary participation

- 6.1 As set out in this Submission, PNO has already publicly indicated that it wishes to deal with its customers rather than have ongoing litigation as to the pricing at the Port. However, it is up to PNO if it wishes to engage in the collective negotiations. There is no suggestion of any collective boycott being sought by the Applicants (which would not be feasible in any event given the monopoly position of PNO) and accordingly it is difficult to see any public detriment arising from the application.

Information sharing will be restricted to the Proposed Conduct

- 6.2 The exchange of information between the Applicants and the reaching of an understanding only relates to the Proposed Conduct. Information will only be shared

¹⁷ See for example: <https://www.reuters.com/article/whitehaven-coal-results/whitehaven-coal-h1-profit-plunges-on-soft-coal-prices-shares-hit-over-3-year-low-idUKL4N2AK00W> .

to the extent that it is reasonably necessary for, and related to, this purpose. The Proposed Conduct does not involve the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume / capacity projections for individual users. This is because, consistent with the ACCC Determination, access pricing is not on a user basis and as such there is no reason to share production or customer information or industry data (which is already publicly available).

- 6.3 The NSWMC notes that in any event the companies listed in Schedule One are generally large and sophisticated mining companies which have compliance processes in place to ensure that no information is exchanged that would be problematic under the CCA. In any event there would be no reason to exchange such information for the reasons noted in paragraph 6.2.

7. WHY AUTHORISATION SHOULD BE GRANTED

- 7.1 The NSWMC strongly submits that the application should be granted by the ACCC for the reasons set out in this Submission. Since privatisation of the Port in 2014 and the subsequent price increases, the Port has not been subject to any form of regulatory oversight and the price increases have led to a fractious commercial relationship with the Port's customers.
- 7.2 The application provides the opportunity for the industry to seek a solution to issues such as long term pricing at the Port, and in particular, creating certainty as to user funded expenditures and for investment in the future by both PNO and the mining industry which uses the Port on terms and conditions of access that raise industry issues.
- 7.3 While there is no certainty that there will be an industry agreement with PNO as to access issues at the Port, the authorisation would allow conditions to allow the mining companies to have such discussions that would facilitate certainty for long term investments. If the ACCC were to grant the authorisation it would still be in the hands of PNO as the monopoly infrastructure provider whether it wished to agree to an industry solution or chose to still proceed with individual miners; but in any event the authorisation would facilitate that opportunity for the Hunter Valley region.



NSW Minerals Council – collective bargaining application for authorisation AA1000473

Annexure 1 – Port User Pro Forma Long Term Pricing Deed

The ACCC wants to clarify that the Applicants to the above application for authorisation have not sought to exclude Annexure 1 to their application from the ACCC's public register, even though the document is marked 'confidential and privileged' in the header.

This document is publicly available from the Port of Newcastle's website [as viewed by the ACCC on 6 March 2020] at: <https://www.portofnewcastle.com.au/wp-content/uploads/2019/12/PORT-USER-PRO-FORMA-LONG-TERM-PRICING-DEED.pdf>

Annexure 1 has been published on the ACCC public register as it was provided to the ACCC by the Applicants on 5 March 2020.

PORT USER PRO FORMA LONG TERM PRICING DEED

PON encourages Vessel Agents, Vessel Operators, Coal Producers and FOB coal consignees involved in the shipment of coal from the Port to contact PON directly to discuss entering into longer term discounted pricing arrangements with PON, based on the terms of this pro forma deed. Please refer in particular to Schedule 2 of this deed for discounted navigation service charge pricing available.

This document is not binding on PON or the relevant Port User unless and until PON and the Port User have each agreed, executed and delivered the final form of the deed.

[date]

[Name]
[Position]
[Port User name]
[Address]

Dear [name]

Long term pricing arrangements: NSC and Wharfage for Covered Vessels

This document (executed as a deed) sets out the following long term charges agreed between PON and [Port User name] which will apply during the Initial Term with respect to certain coal loaded onto Covered Vessels at the Port:

- navigation service charge to be imposed by PON under Division 2 of Part 5 of the PAMA Act; and
- wharfage charge to be imposed by PON under Division 5 of Part 5 of the PAMA Act.

The agreed special pricing arrangements are set out in more detail in the **Annexure** to this deed.

Please confirm [Port User name] agreement to these special arrangements by executing and returning to me a copy of this deed.

Following our receipt of your executed version of this deed, PON will implement those arrangements from the Commencement Date as set out in the Annexure.

This deed does not apply with respect to nor affect any provision of the terms and conditions of the supply of services at the Port, whether with respect to Covered Vessels, coal loaded onto Covered Vessels or otherwise other than the navigation service charge and wharfage charge applicable to Covered Vessels in accordance with its terms.

Yours sincerely

[PON contact officer]

Executed as a deed

Signed, sealed and delivered for and on behalf of **Port of Newcastle Operations Pty Limited (ACN 165 332 990) as trustee for the Port of Newcastle Unit Trust ABN (97 539 122 070)** by its attorneys under a power of attorney dated 11 February 2015 in the presence of:

Signature of witness

Full name of witness

Signature of witness

Full name of witness

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Full name of attorney

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Full name of attorney

Executed by [name and ABN of Port User] in accordance with section 127 of the *Corporations Act 2001* (Cth):

Signature of director

Full name of director

Signature of company secretary/director

Full name of company secretary/director

Annexure

Item	Matter	Provision
1.	Parties	Port of Newcastle Operations Pty Limited (ACN 165 332 990) as trustee for the Port of Newcastle Unit Trust (ABN 97 539 122 070) trading as Port of Newcastle (PON). The entity named in Paragraph 1 of Schedule 1 (Port User).
2.	Initial Term	The Covered Vessel Specific Charges will commence on the Commencement Date and continue for 10 years (unless terminated earlier under Item 13) (Initial Term).
3.	Extension of Initial Term	Not later than 36 months prior to the expiry of the Initial Term, PON or the Port User may issue written notice to the other requesting that the parties enter into discussions with respect to agreeing any special pricing arrangements to apply following the expiry of the Initial Term (Extension Notice). Following the issue of an Extension Notice, PON and the Port User will promptly commence discussions regarding any special pricing arrangements to apply following the expiry of the Initial Term and will continue such discussions in good faith for a period of up to 6 months (or such other period as the parties agree in writing).
4.	Covered Vessel Specific Charges	Schedule 2 sets out the Covered Vessel Specific Charges agreed by PON and the Port User to apply during the Initial Term in respect of: (a) the Navigation Service Charge for Covered Vessels; and (b) the Wharfage Charge in respect of [coal ¹] loaded onto a Covered Vessel. For the avoidance of doubt, the Covered Vessel Specific Charges are in addition to any other fees or charges payable to PON in respect of a Covered Vessel's visit to the Port pursuant to the Published Vessel Standard Terms and Conditions and PON's published fees and charges for Port services, and are in substitution (only) for the Navigation Service Charge and the Wharfage Charge which would otherwise be payable in respect of the Covered Vessel and [coal ²] loaded onto the Covered Vessel under PON's published standard fees and charges for Port services.
5.	Provision of vessel and cargo information to PON	The Port User must promptly provide to PON such information as PON may reasonably require from time to time to verify that a vessel is a Covered Vessel for the purposes of receiving the benefit of Covered Vessel Specific Charges. Without limitation, the Port User must ensure that the following information is provided to PON for each Covered Vessel within the timeframes specified below: (a) at least 14 days prior to the Covered Vessel entering the Port Channel, the vessel and cargo details prescribed by

¹Delete "coal" and insert "Producer Coal" if the Port User is a Producer.

²Delete "coal" and insert "Producer Coal" if the Port User is a Producer.

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Item	Matter	Provision
		<p>PON that are provided to the relevant coal terminal as part of the nomination process; and</p> <p>(b) at least 24 hours before the Covered Vessel enters the Port Channel, the following information:</p> <ul style="list-style-type: none"> (i) the name of the Covered Vessel; (ii) the Covered Vessel's International Maritime Organization (IMO) Number; (iii) [name and contact details of the Covered Vessel's agent]³; (iv) proposed berth; (v) coal destination port and country; (vi) contracted tonnes to be loaded; (vii) the mine(s) the coal has been mined from and the owner of each identified mine; (viii) the name and contact details of the Covered Vessel owner; (ix) [the charterer of the Covered Vessel]; (x) the name and contact details of each consignee of coal to be loaded onto the Covered Vessel [and, if not previously provided to PON, an original executed copy of the Consignee Commitment Document for each such consignee duly executed by that consignee]⁴; and (xi) the operator of the Covered Vessel (if different from Covered Vessel's owner); and <p>(c) within 24 hours of the Covered Vessel's departure from the Port Channel:</p> <ul style="list-style-type: none"> (i) the Vessel Manifest; (ii) Draft Survey Report; (iii) Mates Receipt; and (iv) vessel demurrage hours and costs incurred by vessel charterer (in \$US) and the nominated cause of the demurrage. <p>If the Port User fails to provide such information to PON within the time periods specified above, PON may, if it is not reasonably satisfied that the vessel is a Covered Vessel, decline to apply the Covered Vessel Specific Charges to that vessel and PON's published standard charges will apply to that vessel and</p>

³ To be deleted if the Port User is a Vessel Agent.

⁴ To be included if the Port User is a Vessel Agent.

Item	Matter	Provision
		such amount is a debt due and payable by the Port User in accordance with the Published Vessel Standard Terms and Conditions.
6.	Variations to Covered Vessel Specific Charges	<p>The Covered Vessel Specific Charges will not be varied by PON during the Initial Term, except for the following variations:</p> <p>(a) Annual Adjustment</p> <p>At the beginning of each Contract Year (other than the beginning of the first Contract Year) (each an Adjustment Date) each Covered Vessel Specific Charge will be adjusted to the amount which is the greater of Amount A and Amount B, where:</p> $\text{Amount A} = C_1 + (C_1 \times 4\%)$ $\text{Amount B} = \left\{ C_1 \times \frac{\text{Current CPI}}{\text{Previous CPI}} \right\}$ <p>Where:</p> <p>C₁ is the amount of the relevant Covered Vessel Specific Charge (excluding GST) immediately before the Adjustment Date</p> <p>CPI means the consumer price index number published by the Australian Statistician for Australia-All Groups</p> <p>Current CPI means the CPI for the quarter ending 30 September in the calendar year immediately preceding the Adjustment Date (Current Contract Year)</p> <p>Previous CPI means the CPI for the quarter ending 30 September in the calendar year immediately before the Current Contract Year</p> <p>(b) Change in Tax or law</p> <p>If during the Initial Term there is a change in any Tax (including any new Tax) or a change in any law (including any new law) which:</p> <ul style="list-style-type: none"> (i) PON pays or bears, or is required to pay or bear; or (ii) will result in PON bearing increased costs or being able to recover less revenue, <p>PON may vary the Covered Vessel Specific Charges to pass through the net effect of such changes on PON's costs or revenue in accordance with the Pricing Principles.</p> <p>(c) Material change event</p> <p>On the occurrence of any material change during the Initial Term which will:</p>

Item	Matter	Provision
		<p>(i) increase the costs (including operating and capital expenditure costs) to PON of providing the Vessel Services; or</p> <p>(ii) reduce the equity rate of return (ERR) for the equity investors in PON,</p> <p>PON may increase the Covered Vessel Specific Charges to recover the additional costs or to sustain the ERR in accordance with the Pricing Principles.</p> <p>(d) Capex investment</p> <p>PON may increase the Covered Vessel Specific Charges at the end of each of each Contract Year to provide for a reasonable rate of return on any capital expenditure incurred by PON during the applicable Contract Year in accordance with the Pricing Principles.</p>
7.	Notice of proposed variations to Covered Vessel Specific Charges	<p>PON must provide the Port User with written notice of any proposed variations to the Covered Vessel Specific Charges pursuant to Item 6 not later than 45 days before the proposed date for commencement of the proposed variation (Notified Price Change).</p> <p>If the Port User objects to any Notified Price Change, the Port User must issue a price objection notice to PON within 14 days of receipt of the Notified Price Change (Price Variation Objection Notice).</p> <p>The Port User must not object to any Annual Adjustment made by PON in accordance with Item 6 and may not issue a Price Variation Objection Notice or raise a Dispute in respect of the same unless it is clear on its face that PON has failed to correctly calculate the proposed increase in accordance with the requirements of Item 6 for calculating the Annual Adjustment.</p> <p>All variations the subject of a Notified Price Change will take effect on and from the date notified by PON (provided that the parties will retrospectively make such adjustments as may be necessary to take account of the resolution of any dispute notified by the Port User in any Price Variation Objection Notice).</p>
8.	Disputes in regard to Price Variation Objection Notice and other Disputes	<p>Where PON receives a Price Variation Objection Notice in accordance with Item 7, the Dispute is to be resolved pursuant to the Dispute Resolution Process.</p> <p>The Dispute Resolution Process will also apply in respect of all other Disputes.</p>
9.	Consultation in relation to efficiency improvements and other matters	<p>PON and the Port User will meet at least twice in each Contract Year (or at such other frequency as PON and the Port User may agree from time to time) to consult on the following matters:</p> <p>(a) measures that can be introduced to improve the efficiency of delivery of any Vessel Services to Covered Vessels;</p> <p>(b) PON's delivery of Vessel Services, including (as they relate to the delivery of the Vessel Services):</p> <p>(i) PON's capital expenditure;</p>

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Item	Matter	Provision
		<p>(ii) any proposed variation to PON's fees and charges;</p> <p>(iii) PON's costs of operations;</p> <p>(iv) the Port User's future needs, including the Port User's estimates of [coal⁵] to be shipped from the Port on Covered Vessels in the next 6 month period;</p> <p>(v) the application of these special pricing arrangements; and</p> <p>(vi) any other matters agreed between PON and the Port User (each acting reasonably); and</p> <p>(c) respective market insights of the parties, including volume forecasts and shipment destinations.</p>
10.	GST	<p>Unless expressly stated otherwise, all amounts specified in this deed are exclusive of GST and any GST payable must be paid in accordance with PON's standard terms. Words and expressions used in this Item 10 which have a defined meaning in the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) (GST Act) have the same meaning in this Item as in the GST Act.</p>
11.	Assignment	<p>Neither party may assign or novate its rights and obligations under this deed to any person without the prior written consent of the other party in its absolute discretion.</p>
12.	Published Vessel Standard Terms and Conditions	<p>For the avoidance of any doubt, the Published Vessel Standard Terms and Conditions apply to Covered Vessels entering and using the Port, except that this deed will prevail to the extent of any inconsistency between the terms of this deed and the terms of the Published Vessel Standard Terms and Conditions.</p>
13.	Termination	<p>Termination by PON</p> <p>If the Port User is in default of this deed and the default is not remedied within a period of 14 days from the date PON provides notice of the breach to the Port User, PON may terminate this deed by written notice to the Port User. For the purposes of this Item, failure by the Port User to pay any amount due and payable to PON in respect of a Covered Vessel, or to comply with any other material obligation owed to PON in respect of a Covered Vessel, within 7 days of receiving written notice of the outstanding payment or breach from PON will be deemed to constitute a breach by the Port User of this deed.</p> <p>Termination by the Port User</p> <p>The Port User may terminate this deed by written notice to PON if PON is in default of a material obligation and such default has not been remedied within 21 days of the Port User giving written notice of the default to PON.</p>
14.	Trustee limitations	<p>PON is the trustee for the Port of Newcastle Unit Trust (in this Item 14, the Trustee) and is a party to this deed only in its capacity as trustee for the Port of Newcastle Unit Trust (in this Item 14, the Trust).</p>

⁵ Delete "coal" and insert "Producer Coal" if the Port User is a Producer.

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Item	Matter	Provision
		<p>(a) A Liability arising under this deed is limited to and can be enforced against the Trustee only to the extent to which it can be satisfied out of the property of the Trust out of which the Trustee is actually indemnified for the Liability.</p> <p>(b) No person will be entitled to:</p> <p>(i) Claim from or commence proceedings against the Trustee in respect of any Liability under this deed in any capacity other than as trustee for the Trust;</p> <p>(ii) seek the appointment of a receiver, receiver and manager, liquidator, an administrator or any similar office-holder to any property of the Trustee, or prove in any liquidation, administration or arrangement of or affecting the Trustee, except in relation to the property of the Trust; or</p> <p>(iii) enforce or seek to enforce any judgment in respect of a Liability under this deed against the Trustee in any capacity other than as trustee of the Trust.</p> <p>(c) The limitations of Liability and restrictions in this Item 14 will not apply in respect of any obligation or Liability of the Trustee to the extent that it is not satisfied because under the agreement governing the Trust or by operation of law there is a reduction in the extent of the indemnification of the Trustee out of the assets of the Trust as a result of fraud, negligence or breach of trust of the Trustee or the Trustee waiving or agreeing to amend the rights of indemnification it would otherwise have out of the assets of the Trust.</p> <p>(d) The limitation of liability in this Item 14 applies despite any other provision of this deed.</p> <p>(e) In this Item 14:</p> <p>(i) Claim includes a claim, cause of action, notice, demand, action, proceeding, litigation, investigation, judgement, damage, loss, cost, expense or liability however arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort (including negligence), statute or otherwise and whether involving a third party or a party to this deed; and</p> <p>(ii) Liability includes all liabilities, losses, damages, costs, charges and expenses however arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort (including negligence), statute or otherwise including where arising under any Claim.</p>
15.	Variation	This deed may only be varied by a document signed by or on behalf of PON and the Port User.
16.	Confidentiality	(a) (Confidentiality) The existence of and the terms of this deed, and any information disclosed to a party pursuant to this deed, is confidential (Confidential Information).

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Item	Matter	Provision
		<p>(b) (Keep confidential) Subject to Item 16(c), each party must keep the Confidential Information confidential and not themselves nor through their servants, agents or employees directly or indirectly disclose Confidential Information to another person.</p> <p>(c) (Exceptions) A party may disclose Confidential Information:</p> <ul style="list-style-type: none"> (i) to a professional adviser, financial adviser, banker, financier or auditor if that other person is obliged to keep the information confidential; (ii) to comply with any applicable law, or any requirement of any regulatory body (including any relevant stock exchange); (iii) to any of its employees on a confidential basis to whom it is necessary to disclose the information; (iv) to obtain the consent of any third party to any term of, or to any act pursuant to, this deed; (v) to enforce its rights or to defend any claim or action under this deed; (vi) to a related body corporate on a confidential basis; (vii) [to a party who proposes to enter into a Consignee Commitment Document⁶;] or (viii) if the information has come into the public domain through no fault of that party.
17.	Definitions	In this deed, defined terms have the meaning given in this Annexure and Schedule 4.

⁶ To be included if the Port User is a Vessel Agent.

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Schedule 1 - Reference Schedule

Paragraph	Reference	Details
1.	Port User	[insert name and ABN of Port User]
2.	Commencement Date	[1 January 2020]. [*Note: the drafting of this deed assumes a 01/01/2020 effective commencement date for the deed. If this is not agreed by PON and the Port User -consequential amendments to this pro forma deed will be made by PON prior to execution]

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Schedule 2 - Covered Vessel Specific Charges

1. **Navigation Service Charge**

\$0.8121 (exclusive of GST) per vessel gross tonne from the Commencement Date calculated by reference to the gross tonnage of the relevant Covered Vessel, adjusted over the Initial Term pursuant to Item 6 of this deed.

2. **Wharfage Charge**

\$0.0802 (exclusive of GST) from the Commencement Date per Revenue Tonne of [coal⁷] loaded onto the relevant Covered Vessel, adjusted over the Initial Term pursuant to Item 6 of this deed.

Illustrative example

By way of illustration with respect to the Navigation Service Charge and the Wharfage Charge only, and without limiting Item 6 of this deed, an example of the adjusted Navigation Service Charge (exclusive of GST) and adjusted Wharfage Charge (exclusive of GST) each Contract Year during the Initial Term applying the Annual Adjustment under Item 6 if the increase in CPI for the relevant Contract Year is less than 4%, assuming no other adjustments apply under Item 6:

Scenario	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029
CPI increase	2.37%	2.37%	2.37%	2.37%	2.37%	2.39%	2.50%	2.50%	2.50%	2.50%
NSC + 4% (A\$)	0.8121	0.8446	0.8784	0.9135	0.9501	0.9881	1.0276	1.0687	1.1115	1.1559
Wharfage + 4% (A\$)	0.0802	0.0834	0.0867	0.0902	0.0938	0.0976	0.1015	0.1056	0.1098	0.1142

⁷ Delete "coal" and insert "Producer Coal" if the Port User is a Producer.

Schedule 3 - Dispute Resolution Process

This Dispute Resolution Process forms part of and binds the parties to the Contract.

1. Objective

- 1.1 PON and the Port User are committed to the fair and final resolution of commercial disputes proactively and constructively without unnecessary delay or expense and, where possible, informally and quickly in a cost effective manner.

2. Raising a Dispute

2.1 Where:

- (a) the Port User wishes to raise a Dispute with PON; or
- (b) PON wishes to raise a Dispute with the Port User,

that party must do so within 21 days after the circumstance giving rise to that Dispute by providing a Dispute Notice to the other party for the purpose of endeavouring to resolve the Dispute.

2.2 The Dispute Notice must be in writing and include details of:

- (a) the nature of the Dispute;
- (b) the outcome sought by the party in relation to the Dispute; and
- (c) the action on the part of the other party which the party believes will resolve the Dispute.

2.3 The parties agree and the Port User accepts that no Dispute may be raised by the Port User that is an Excluded Dispute.

3. Resolving the Dispute

- 3.1 Within 7 days of a party providing the other party with a Dispute Notice, senior representatives of each party must meet and undertake genuine and good faith negotiations with a view to resolving the Dispute expeditiously by joint discussion.

3.2 If the Dispute is not resolved in accordance with clause 3.1 within 14 days of a party providing the Dispute Notice to the other, then the Dispute shall be mediated in accordance with the ACICA Mediation Rules. The mediation shall take place in Sydney, Australia and be administered by ACICA.

3.3 If the Dispute has not been settled pursuant to the ACICA Mediation Rules within 28 days of a party providing the Dispute Notice to the other or within such other period as the parties may agree in writing, the Dispute shall be resolved by arbitration in accordance with the ACICA Arbitration Rules, and:

- (a) the seat of arbitration shall be Sydney, Australia;
- (b) the language of the arbitration shall be English;
- (c) the number of arbitrators shall be one; and
- (d) the parties designate the laws applicable in the State of New South Wales as applicable to the substance of the Dispute.

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4. Matters to be taken into account in Permitted Price Disputes

4.1 To the extent the Dispute to be resolved is a Permitted Price Dispute:

- (a) a mediator in conducting a mediation must take into account; and
- (b) an arbitrator in making any award must apply,

the Pricing Principles set out in clause 4.2.

Pricing Principles

4.2 The matters that must be taken into account by a mediator and applied by the arbitrator in resolving a Permitted Price Dispute are:

- (a) the provisions in Item 6 of this deed;
- (b) PON's legitimate business interests and investment in the port or port facilities, including a reasonable opportunity to recover over the Leasehold Period the efficient cost of the service provided at the Port of Newcastle, which recovery shall include:
 - (i) the value of its Initial Capital Base and any updates thereof;
 - (ii) a reasonable rate of return on the value of all assets comprising its Initial Capital Base and any updates thereof; and
 - (iii) the return over the Leasehold Period of the total value of the assets comprising its Initial Capital Base and any updates thereof;
- (c) the costs to PON of providing the service (including the costs of any necessary modification to, or extension of, a port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (d) the economic value to PON of any additional investment that the Port User or PON has agreed to undertake;
- (e) the interests of all persons holding contracts for use of any relevant port facility;
- (f) firm and binding contractual obligations of PON or other persons (or both) already using any relevant port facility;
- (g) the operational and technical requirements necessary for the safe and reliable provision of the service;
- (h) the economically efficient operation of any relevant port facility;
- (i) the benefit to the public from having competitive markets;
- (j) that prices should allow multi-part pricing and price discrimination when it aids efficiency;
- (k) that prices should not allow a vertically integrated service provider to set terms and conditions that would discriminate in favour of either its upstream

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or downstream operations, except to the extent that the cost of providing services to others would be higher; and

- (l) that prices should provide incentives to reduce costs or otherwise improve productivity.

5. General

5.1 The terms of this Dispute Resolution Process govern the resolution of all Disputes to the exclusion of other forms of dispute resolution unless agreed to by the parties. Neither the Port User, PON, nor any person acting on their behalf, may commence any court proceedings in relation to a Dispute, except where:

- (a) an Insolvency Event affects, or is reasonably likely to affect imminently, either PON or the Port User, and the other party reasonably considers it necessary to commence court proceedings in relation to a Dispute to preserve its position with respect to creditors of the other party;
- (b) PON or the Port User is seeking to enforce unpaid debts;
- (c) PON or the Port User is seeking urgent interlocutory relief; or
- (d) the relevant Dispute relates to a material failure by PON or the Port User to comply with this Dispute Resolution Process.

5.2 The parties agree that no appeal may be made to the Court on a question of law arising out of an award of the arbitrator appointed under this Dispute Resolution Process.

5.3 The particulars of the Dispute, any negotiation, mediation or arbitration and any terms of resolution including any Award must be kept strictly confidential by PON and the Port User.

6. DEFINITIONS

In this Dispute Resolution Process, capitalised terms have the meaning given in Schedule 4 of this deed and the following meanings will apply (unless the context otherwise indicates):

ACICA means the Australian Centre for International Commercial Arbitration.

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

Dispute Notice means a notice given by a party of a Dispute under clause 2.1 in a form which complies with clause 2.2.

Excluded Dispute means a Dispute relating to:

- (a) the amount of the Navigation Service Charge for Covered Vessels, where the amount of the Navigation Service Charge per gross tonne for Covered Vessels does not exceed \$0.8121 (exclusive of GST) per vessel gross tonne in 2020, and each subsequent Annual Adjustment in the amount of the Navigation Service Charge for Covered Vessels from 1 January 2020; and
- (b) the amount of the Wharfage Charge in respect of [coal⁸] loaded onto Covered Vessels, where the amount of that Wharfage Charge does not exceed \$0.0802 (exclusive of GST) per revenue tonne in 2020, and each

⁸ Delete "coal" and insert "Producer Coal" if the Port User is a Producer.

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subsequent Annual Adjustment in the amount of that Wharfage Charge for coal⁹ loaded onto Covered Vessels.

Initial Capital Base means the value established by reference to the depreciated optimised replacement cost as at 31 December 2014 of the assets used in the provision of all of the services at the Port of Newcastle and, unless otherwise agreed by PON, without deduction for user contributions.

Insolvency Event means, in respect of a person:

- (a) the person states that it is unable to pay its debts or becomes insolvent within the meaning of section 95A of the Corporations Act or insolvent under administration within the meaning of section 9 of the Corporations Act, or circumstances exist such that the court must presume insolvency under section 459C of the Corporations Act (regardless of whether or not an application has been made as referred to in that section);
- (b) an application being made to a court for an order to appoint, or a step is taken to appoint, a controller, administrator, receiver, provisional liquidator, trustee for creditors in bankruptcy or analogous person to the person or any of the person's property or such an appointment being made;
- (c) the person suspends payment of its debts or enters, or takes any step towards entering, a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors;
- (d) any event under any law which is analogous to, or which has a substantially similar effect to, any of the events referred to in paragraphs (a) to (c),

unless this takes place as part of a solvent reconstruction, amalgamation, merger or consolidation.

Leasehold Period means the term of the Port Lease which expires on 30 May 2112, at which time the land and improvements to the land on which the Port is situate will revert to the lessor for nil consideration.

Permitted Price Dispute means a Dispute which is not an Excluded Dispute and relates to:

- (a) the amount of the Navigation Service Charge for Covered Vessels; and
- (b) the amount of the Wharfage Charge in respect of [coal¹⁰] loaded onto Covered Vessels.

Port Lease means the 98-year leasehold interest dated 30 May 2014 granted by Port of Newcastle Lessor Pty Limited to Port of Newcastle Investments (Property) Pty Limited in the land on which the Port is situate.

⁹ Delete "coal" and insert "Producer Coal" if the Port User is a Producer.

¹⁰ Delete "coal" and insert "Producer Coal" if the Port User is a Producer.

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Schedule 4 - Defined Terms

Annual Adjustment	each annual price adjustment of the Covered Vessel Specific Charges provided for in paragraph (a) of Item 6.
Commencement Date	the date specified in Paragraph 2 of Schedule 1.
[Consignee Commitment Document]	[a document in the form of the deed poll attached as Schedule 5 or such other form of document as may be approved by PON in writing.] ¹¹
Contract Year	each year in the Initial Term comprising 1 January to 31 December.
Covered Vessel	<p><i>[where the Port User is a Vessel Agent. [PON note: PON has assumed that vessel charterers will contract with PON through agents - but PON is happy to consider direct contractual arrangements with the principal charterer]]</i></p> <p>a vessel that:</p> <ul style="list-style-type: none">(a) is loaded with coal at the Port in respect of which the Vessel Agent is a person referred to in section 48(4)(b) of the PAMA Act for that vessel's visit to the Port or is the charterer of the vessel for that vessel's visit to the Port for the purposes of section 48(2) (b) of the PAMA Act (Calling Coal Vessel); and(b) unless otherwise agreed in writing by PON, where each consignee of coal loaded onto the Calling Coal Vessel has duly executed and provided to PON not later than 24 hours before the Vessel enters the Port Channel a Consignee Commitment Document. <p><i>[OR where the Port User is a Vessel Operator]</i></p> <p>a vessel that is owned by the Vessel Operator within the meaning of section 48(2)(a) of the PAMA that is to be loaded with coal at the Port during the applicable visit to the Port.</p> <p><i>[OR where the Port User is a Producer]</i></p>

¹¹ To be included if the Port User is a Vessel Agent.

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	a vessel that is loaded with and carries out of the Port:
	(a) Producer Coal and no other coal; or
	(b) Producer Coal and other coal in respect of which PON has agreed that the Navigation Service Charge and Wharfage Charge are the same for that other coal as the Covered Vessel Specific Charges, and, unless otherwise agreed in writing by PON, no other coal.
Covered Vessel Specific Charges	the charges set out in Schedule 2, as varied pursuant to Item 6.
Dispute	means any dispute, controversy or claim arising out of, relating to or in connection with this deed, including any question regarding its existence, validity or termination.
Dispute Resolution Process	the dispute resolution process set out in Schedule 3.
Initial Term	has the meaning given in Item 2.
Navigation Service Charge	a navigation service charge imposed by PON for standard vessel movements under Division 2 of Part 5 of the PAMA Act.
PAMA Act	<i>Ports and Maritime Administration Act 1995</i> (NSW).
Parties	the parties named in Item 1.
Port	the Port of Newcastle.
Pricing Principles	the principles set out in clause 4.2 of Schedule 3.
[Producer Coal] ¹²	any coal to be loaded at the Port which has been mined from a Producer Mine.
[Producer Mine] ¹³	the following operating coal mines owned and operated by the Producer as at the Commencement Date: [<i>*Note: details of covered mines to be discussed and agreed with PON prior to execution of this deed</i>] <i>[insert mines]</i> and any further mines owned and operated by the Producer that become operational after the Commencement Date (as may be

¹² To be included if the Port User is a Producer.

¹³ To be included if the Port User is a Producer.

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approved by PON from time to time acting reasonably in writing for the purposes of this definition).

Published Vessel Standard Terms and Conditions

PON's Vessel Standard Terms and Conditions for vessels entering the Port as published (and varied) by PON from time to time.

Revenue Tonne

a mass of 1,000 kilograms or a volume of 1 cubic metre or 1 kilolitre, whichever gives the largest number of units of quantity cargo.

Tax

all forms of taxes, duties, imposts, charges, withholdings, rates, levies, royalties or other governmental impositions of whatever nature and by whatever authority imposed, assessed or charged (but excluding any tax on income or profits).

Vessel Services

the provision of the right to access and use the shipping channels (including berths next to the wharves as part of the channels) at the Port, by virtue of which vessels may enter the Port precinct and load and unload coal at the relevant terminals located within the Port precinct and then depart the Port precinct.

Wharfage Charge

a wharfage charge imposed by PON for standard wharfage access under Division 5 of Part 5 of the PAMA Act.

Schedule 5 - Consignee Deed Poll¹⁴

Consignee Deed Poll

Date

Parties

This deed poll is given by:

[insert consignee] of [insert address] (Consignee)

in favour of:

Port of Newcastle Operations Pty Limited (ACN 165 332 990) as trustee for the Port of Newcastle Unit Trust ABN (97 539 122 070) of Level 4, 251 Wharf Road, Newcastle NSW 2300 (PON)

Background

- A. PON and the Vessel Agent have entered into a deed to provide for certain pricing arrangements in respect of the navigation service charge and the wharfage charge to apply during the Initial Term with respect to coal loaded onto Covered Vessels (**Primary Deed**).
- B. The Consignee has agreed to enter into this deed poll to give certain undertakings for the benefit of PON in connection with the Primary Deed.
- C. This deed poll commences operation on and from the date a duly executed original copy of this deed poll is delivered to PON (or such earlier date requested by the Consignee as PON may agree in writing) (**Effective Date**).

Operative provisions

1. Term

This deed poll takes effect on and from the Effective Date and will continue in force until the earlier of the expiry of the Initial Term or the date of any earlier termination of the Primary Deed.

2. Consignee's undertakings

- (a) The Consignee:
 - (i) acknowledges and confirms to PON that it has been provided with a copy of the Primary Deed; and
 - (ii) the Consignee covenants to PON that:
 - A. it accepts and agrees that the Covered Vessel Specific Charges will apply in respect of Consignee

¹⁴ To be included if the Port User is a Vessel Agent.

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coal loaded onto Covered Vessels and to such Covered Vessels, in accordance with the terms of the Primary Deed; and

- B. it agrees that the Dispute Resolution Process as set out in Schedule 3 of the Primary Deed will apply (as if references to the "Port User" are to the "Consignee") and be the exclusive dispute resolution process to resolve any Dispute between PON and the Consignee in respect of the subject matter of this deed poll or the Primary Deed, including any dispute in respect of the amount of the navigation service charge or wharfage charge charged or proposed to be charged by PON.

3. Warranties

The Consignee:

- (a) warrants to PON that each of the following warranties is true and correct:
- (i) the Consignee is properly incorporated and validly existing under the laws of its jurisdiction of incorporation or registration;
 - (ii) the Consignee has the legal right and full power and capacity to:
 - A. execute and deliver this deed poll; and
 - B. perform its obligations under this deed poll,and has obtained all necessary authorisations and consents and taken all other actions necessary to enable it to do so; and
 - (iii) this deed poll constitutes valid legal and binding obligations of the Consignee and is enforceable against the Consignee in accordance with its terms; and
- (b) acknowledges that PON has accepted this deed poll in reliance on the warranties given in this clause 3.

4. Miscellaneous

4.1 Definitions and interpretation

Terms used in this deed poll which are defined in the Primary Deed will have the meaning given to them in the Primary Deed and this deed poll will be interpreted in accordance with the same rules of interpretation as apply to the Primary Deed.

4.2 Governing law

This deed poll is governed by and is to be construed in accordance with the laws of New South Wales. The Consignee submits to the non-exclusive jurisdiction of the courts of New South Wales and courts of appeal from them.

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4.3 Amendment or revocation

This deed poll cannot be amended or revoked by the Consignee without the prior written consent of PON.

4.4 Further acts and documents

The Consignee must do all further acts and execute and deliver all further documents (in the form and content reasonably satisfactory to PON) required by law or reasonably requested by PON to give effect to this deed poll.

EXECUTED as a deed poll on this ____ day of _____ .

Executed* by [insert consignee name] in accordance with section 127 of the *Corporations Act 2001* (Cth):

Signature of director

Signature of company secretary/director

Full name of director

Full name of company secretary/director

*[*Note: if the Consignee is not an Australian registered company - execution block to be substituted for appropriate legally binding execution under place of registration/incorporation]*



Port of Newcastle Operations Pty Ltd

**(ACN 165 332 990) as Trustee for the Port Of Newcastle Unit Trust (ABN 97 539 122 070)
(trading as Port of Newcastle)**

Schedule of Port Pricing

Effective from 1 January 2015

Port of Newcastle Schedule of Port Pricing

Set out below is the schedule of Port Pricing for Port of Newcastle Operations Pty Ltd (ACN 165 332 990) as Trustee for the Port Of Newcastle Unit Trust (ABN 97 539 122 070) trading as Port of Newcastle (“Port of Newcastle”) for the period from 1 January 2015 to 31 December 2016.

All prices are set out in this schedule are in Australian dollars and are exclusive of GST.

Types of Charges

Navigation Services Charge

The Navigation Services Charge is levied by Port Of Newcastle on vessels at the time of port entry for the general use of the Port and its infrastructure.

- **Payer** - Ship Owner (usually via Shipping Agent on port entry)
- **Calculation** - Calculated on basis of vessel's Gross Tonnage (**GT**) for each visit for all vessels greater than 600 GT.

Note: A removal to the offshore anchorage area followed by a subsequent re-entry to the port will be subject to an additional Navigation Services Charge.

Wharfage Charge

Wharfage charge is levied by Port of Newcastle for the provision of the following services and facilities:

Berthing Box	
Berth-specific Dredging & Surveying	Wharf Structure
Site Offices	Workers' Amenities
Utilities (excluding services to ship)	Pavements
Wharf & Area Maintenance	Wharf Management & Patrol
Wharf Sheds	Serviced Land

- Wharfage is charged for the availability of a site at which stevedoring operations may be carried out.
- The amount of the wharfage charge reflects the level of facilities or services provided at the particular berth.
- Wharfage is levied per revenue tonne or container of cargo traded. The charge is levied on the cargo owner.
 - **Payer** - Cargo owner (can be via Shipping Agent)
 - **Calculation:**
 - **Non-containerised Cargo** - on basis of greater of weight or volume and berth used regardless of type of commodity.
 - **Containerised Cargo** - on basis of size of container regardless of type or source and destination of cargo.

Note: A revenue tonne is a mass of 1,000 kilograms or a volume of 1 cubic metre or 1 kilolitre, whichever gives the largest number of units of cargo quantity.

Site Occupation Charge

Site Occupation Charge is levied by Port of Newcastle for the occupation of all or part of a site. The charge is levied per hour (or part thereof) for which a berth is reserved or occupied and is charged to the site occupant.

- **Payer** - Site Occupant (usually Stevedore)
- **Calculation** - Site Occupation charge commences from tie up of a vessel at a berth until departure of the vessel from the berth. This Site Occupation charge will be charged per hour or part thereof.

Ship Utility Charge

The Ship Utility Charge is levied by Port of Newcastle as a fixed fee on vessels for the supply and provision of facilities and services to supply water, electricity and telephones to vessels.

- **Payer** - Ship owner (usually via Shipping Agent).

Calculation - Per visit to Port Operator's berths where this service is provided.

Port Pricing Schedule

Port of Newcastle's Port Prices are exclusive of GST.

Navigation Service Charge Rates

From 1 January 2015, Port of Newcastle will charge a separate Navigation Services Charge for:

- vessels entering port to load coal at any of the dedicated coal export berths being Dyke 4 and 5, Kooragang 4, 5, 6, 7, 8, 9 and 10 ("Coal Vessels"); and
- all other vessels entering the port ("Non-Coal Vessels").

Vessel Gross Tonnage (GT)	Rate		
	2014	2015	2016
Non Coal Vessels			
Non-Coal Vessels from 601 GT to 50,000 GT	\$0.4292 per GT	\$0.4459 per GT	\$0.4633 per GT
Non-Coal Vessels over 50,000 GT	\$0.4292 per GT for the first 50,000 GT plus \$0.9656 per GT thereafter. Maximum charge \$45,633.68	\$0.4459 per GT for the first 50,000 GT plus \$1.0033 per GT thereafter.	\$0.4633 per GT for the first 50,000 GT plus \$1.0424 per GT thereafter.
Coal Vessels			
Coal vessels over 600 GT	\$0.4292 for the first 50,000 GT plus \$0.9656 per GT thereafter. Maximum charge \$45,633.68 per visit	\$0.6900 per GT	\$0.7169 per GT

Navigation Services Charge for Cruise Ships

Special arrangements may apply to cruise vessels. Please contact us for further details regarding cruise pricing.

Port Security Charge

An additional component of the Navigation Services Charge is the Port Security Charge. This levy is required to cover costs arising from implementing the *Australian Maritime Transport and Offshore Facilities Security Act & Regulation 2003*. This component of the charge will be applied to each trading vessel entering the port.

	2014	2015	2016
Port Security Charge	\$463.75	\$481.84	\$500.63

Ships Utility Charge

Per visit for Non-Coal vessels	\$179.55	\$186.56	\$193.83
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Site Occupation Charge Rates

Berth	Rate / hour		
	2014	2015	2016
Channel Berth – Cruise Vessels	\$210.95	\$219.17	\$227.72
Channel Berth – Non-Cruise Vessels	\$63.28	\$65.75	\$68.31
Dyke 1 and 2	\$63.28	\$65.75	\$68.31
Kooragang 2, 2.5 and 3	\$239.71	\$249.06	\$258.77
Mayfield 4	\$239.71	\$249.06	\$258.77
Western Basin 3 and 4	\$239.71	\$249.06	\$258.77
Tie-up rate	\$52.74	\$54.79	\$56.93

Note:

- Three (3) free days cargo storage will be provided prior to loading of export cargo and/or three (3) days after discharge of import cargo **subject to availability of wharf space at the time required**. The hourly rate will apply on completion of the three days.
- **Tie Up Berths** – When a vessel requests a tie up berth which is unavailable, then the vessel may be allowed to use another berth provided it does not interfere with the turnaround of any other vessel.
- **Partial Use of Berths** – Where the full berth is not being utilised the rate charged will be at the percentage utilised as determined by Port Operator. This will normally apply to cargo storage only after the ‘three (3) free days’ storage period.

Wharfage Charge Rates

Non- Containerised

Berth	Per Revenue Tonne		
	2014	2015	2016
Dyke 1	\$1.58	\$1.64	\$1.70
Dyke 2	\$0.84	\$0.87	\$0.90
Kooragang 2, 2.5 and 3	\$1.70	\$1.77	\$1.84
Mayfield 4	\$1.70	\$1.77	\$1.84
Western Basin 3 and 4	\$1.70	\$1.77	\$1.84
Eastern Basin 1 and 2	\$0.0656	\$0.0682	\$0.0709
Dyke 4 and 5	\$0.0656	\$0.0682	\$0.0709
Kooragang 4, 5, 6, 7, 8, 9, and 10	\$0.0656	\$0.0682	\$0.0709
BHP 6	\$0.0656	\$0.0682	\$0.0709

Containerised

Berth	Per 20'Container			Per 40'Container		
	2014	2015	2016	2014	2015	2016
Full	\$52.32	\$54.36	\$56.48	\$104.64	\$108.72	\$112.96
Empty	\$9.59	\$9.96	\$10.35	\$19.17	\$19.92	\$20.70

Container wharfage rates apply to conventional containers or full size frames. All other types of containers carrying cargo are invoiced at the appropriate tonnage rate based on the gross weight or volume of the cargo.

Kooragang 2 Crane Hire

Commodity	Per Revenue Tonne		
	2014	2015	2016
Fertiliser(s)	\$3.35	\$3.48	\$3.62
Soda Ash	\$3.35	\$3.48	\$3.62
Boutique Coal	\$3.35	\$3.48	\$3.62
Grain/Meals – import	\$3.35	\$3.48	\$3.62
Grain/Meals – export	\$0.21	\$0.22	\$0.23
Wheat	\$0.21	\$0.22	\$0.23
Woodchip	\$0.41	\$0.43	\$0.45

Crane hire is not a statutory charge. The provision of the crane at Kooragang 2 may be subject to review from time to time. The result of such a review could result in changes to the infrastructure that is provided and to charges for its use.

Terms of Trade

Port of Newcastle's terms of trade require that payment is made within fourteen days of departure of the vessel or seven days from delivery of the invoice, whichever is the earlier.



SCHEDULE OF SERVICE CHARGES

EFFECTIVE FROM 1 JANUARY 2019

NEWCASTLE, 11 SEPTEMBER 2019

[Revision / Document Number]

**LEVEL 4, 251 WHARF ROAD
NEWCASTLE NSW 2300 AUSTRALIA**

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**info@portofnewcastle.com.au
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ABOUT THIS SCHEDULE OF SERVICE CHARGES

This Schedule of Service Charges for Port of Newcastle Operations Pty Ltd (ACN 165 332 990) as Trustee for the Port of Newcastle Unit Trust (ABN 97 539 122 070) trading as Port of Newcastle ("Port of Newcastle") is a summary of the service charges applicable to the commercial use of the Port of Newcastle effective from 1 January 2019 in accordance with the Ports and Maritime Administration Act 1995 (NSW) ("the Ports Act") and Ports and Maritime Administration Regulation 2012.

All charges set out in this schedule are in Australian dollars and are exclusive of GST. The party liable for the Service Charge is identified in the relevant provisions of the Ports Act and Port of Newcastle may in its discretion agree to issue invoices to shipping agents engaged by a person who is liable to pay any Service Charge.

By using the Port or its facilities, you agree to be bound by the terms and conditions in this Schedule and all other relevant Port of Newcastle requirements.

This schedule is not exhaustive and does not detail all rules and requirements applicable to charges at the Port. If you are unfamiliar with these or this schedule please contact:

Name: Wayne Mabbott

Email: [REDACTED]

Phone: [REDACTED]

For details about Port of Newcastle's berths please visit our website

For details about other charges applicable to the use of the Port, including pilotage, contact the Port Authority of NSW.

PAYMENT TERMS

Port of Newcastle requires that payment is made within seven days from delivery of the invoice.

Port of Newcastle may charge interest on service charges that are unpaid by the due date for payment stated in PON's invoice at a rate not exceeding 5% per annum above the interest rate that in the ordinary course of business would be charged by the Commonwealth Bank for the relevant period on unsecured overdrafts of more than \$100,000.

TERMS USED IN THIS SCHEDULE

Unless otherwise defined terms in this schedule have the meaning in the Ports and Maritime Administration Act 1995 (NSW).

Coal vessel

A vessel which enters the Port of Newcastle to load coal at any dedicated coal berth within the Port of Newcastle, being Dyke 4 and Dyke 5 and Kooragang 4, 5, 6, 7, 8, 9 and 10.

Navigation Service Charge

The navigation service charge is payable on each entry by a vessel greater than 600GT into the Port of Newcastle and is calculated by reference to the gross tonnage of the vessel. The charge is payable by the owner of the vessel.

Non-coal vessel

Any vessel that is not a coal vessel.

Port security charge

The port security charge is a component of the navigation service charge payable on each entry by a vessel into the Port to cover costs associated with implementation of the Maritime Transport and Offshore Facilities Security Act 2003 (Cth). The charge is payable by the owner of the vessel.

Revenue Tonne

A revenue tonne is a mass of 1,000 kilograms or a volume of 1 cubic metre or 1 kilolitre, whichever gives the largest number of units of quantity cargo.

Ship Utility Charge

A fixed fee payable by non-coal vessels on each entry for the supply of utilities, including water and electricity. The charge is payable by the vessel owner.

Site Occupation Charge

The site occupation charge is calculated by reference to the amount of time during which a site, or part of it, is reserved or occupied for stevedoring purposes, or for the embarkation or disembarkation of passengers, or for the accommodation of a vessel for any purpose, or for any other purpose in connection with a vessel, its passengers or cargo. The charge is calculated per hour (or part thereof) and is payable by the occupier of the site which is the stevedore unless otherwise agreed by Port of Newcastle.

Wharfage Charge

The wharfage charge is calculated by reference to the quantity of cargo loaded or unloaded. The charge is payable by the cargo owner.

PORT CHARGES

Navigation Service Charge

Vessel Gross Tonnage (GT)	Rate (ex GST)
Non-coal vessels (over 600GT)	\$0.5046 per GT for the first 50,000 GT plus \$1.1356 per GT thereafter.
Coal vessels (over 600GT)	\$0.7809 per GT

Port Security Charge

Per visit all vessels	Rate (ex GST)
	\$545.41

Site occupation Charge

Berth name	Rate per hour (ex GST)
Channel Berth (cruise vessels)	\$248.08
Dyke 1 and 2 Channel Berth (non cruise vessels)	\$74.41
Kooragang 2 and 3, Mayfield 4, West Basin 3 and 4	\$281.92

Wharfage Charge

Non-containerised cargo by berth	Rate per Revenue Tonne (ex GST)
Dyke 1	\$1.84
Dyke 2	\$0.98
Kooragang 2 and 3, Mayfield 4, West Basin 3 and 4	\$1.99
East Basin 1 and 2, Dyke 4 and 5, Kooragang 4 - 10 BHP 6 and Mayfield 7	\$0.0771

Containerised cargo and cargo on platforms	Rate per Twenty Foot Equivalent Unit (TEUs) (ex GST)
Full	\$61.52
Empty	\$11.27

Note: Container wharfage rates apply to conventional containers or full-size frames. All other types of containers carrying cargo are invoiced at the appropriate tonnage rate based on the gross weight or volume of the cargo.

OTHER CHARGES

Ship Utility Charge

Per visit for non-coal vessels	Rate (ex GST)
	\$211.17

Kooragang 2 Bulk Cargo Unloading Infrastructure

Price on application



SCHEDULE OF SERVICE CHARGES

EFFECTIVE FROM 1 JANUARY 2020

VERSION: 16 DECEMBER 2019

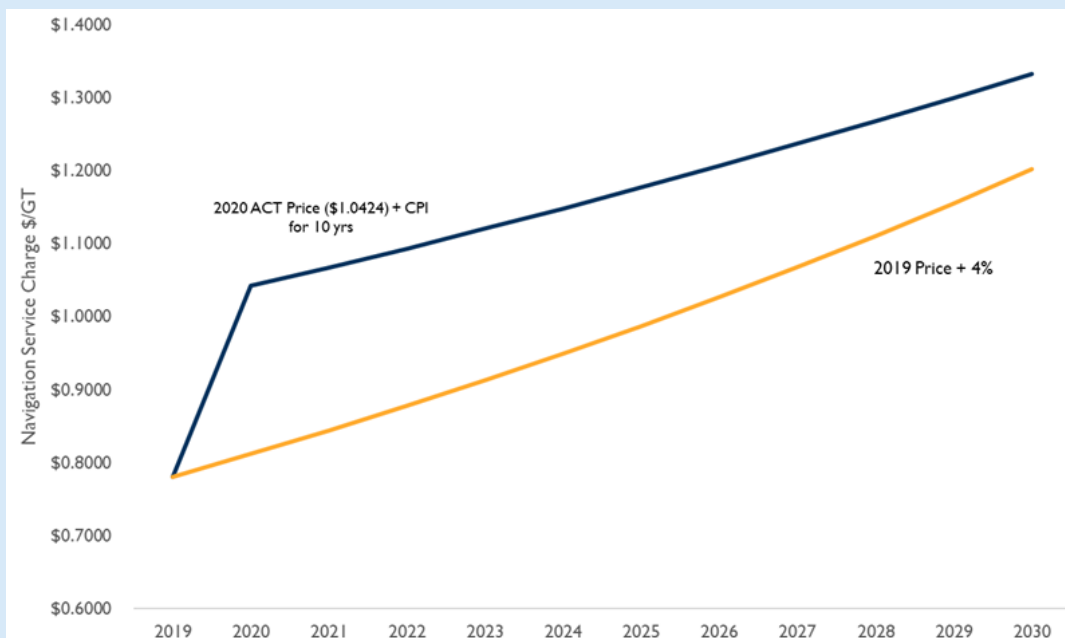
ABOUT THIS SCHEDULE OF SERVICE CHARGES

This Schedule of Service Charges for Port of Newcastle Operations Pty Ltd (ACN 165 332 990) as Trustee for the Port of Newcastle Unit Trust (ABN 97 539 122 070) trading as Port of Newcastle (**Port of Newcastle**) sets out the service charges applicable to the commercial use of the Port of Newcastle effective from 1 January 2020, including in accordance with the Ports and Maritime Administration Act 1995 (NSW) (**PAMA Act**) and Ports and Maritime Administration Regulation 2012 (**Service Charges**). The party liable for the applicable Service Charge is as identified in the relevant provisions of the PAMA Act or in this schedule. Port of Newcastle may in its discretion agree to issue invoices to shipping agents engaged by a person who is liable to pay any Service Charge.

Note: Longer term bilateral arrangements

PON encourages Vessel Agents, Vessel Operators, Coal Producers and FOB coal consignees involved in the shipment of coal from the Port to contact PON directly to discuss entering into longer term discounted pricing arrangements with PON, based on the terms of the [pro forma deed which is available here](#). Please refer in particular to Schedule 2 of this deed for discounted navigation service charge pricing available.

The graph below is indicative only of the forward 10 year price variance between standard coal vessel pricing and bilateral price deed coal vessel pricing (assuming CPI is 2.37 – 2.50%):



By using the Port or its facilities, you agree to be bound by the terms and conditions in this schedule and all other relevant Port of Newcastle requirements.

Port of Newcastle may vary this schedule from time to time, including varying or introducing any new fees or charges. Port of Newcastle will publish notice of the proposed change on its website at least 10 Business Days before the variation is proposed to take effect.

Unless expressly stated otherwise, all charges set out in this schedule are in Australian dollars and are exclusive of GST. If GST is payable on any supply made by Port of Newcastle under this schedule, then unless the consideration for that supply is expressly stated to be inclusive of GST, you agree to pay to Port of Newcastle (or must ensure that your agent or other party required to provide consideration for that supply pays to Port of Newcastle) an additional amount equal to the GST payable on the supply. The additional amount must be paid at the same time as the first part of any consideration is provided for that supply. Port of Newcastle will issue a tax invoice in respect of any taxable supply it makes under this schedule. Words and expressions used in this paragraph which have a defined meaning in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (**GST Act**) have the same meaning in this paragraph as in the GST Act.

To the extent that a charge is expressed in this schedule to be a fee or charge fixed by Port of Newcastle under Part 5 of the PAMA Act (**PAMA Charges**), for the avoidance of any doubt, those PAMA Charges are so fixed by Port of Newcastle under Part 5 of the PAMA Act and this schedule does not displace such determinations for the purposes of section 67 of the PAMA Act.

This schedule is not exhaustive and does not detail all charges, rules and requirements applicable to use of the Port. For further details please contact:

Email: trade@portofnewcastle.com.au

Phone: (02) 4908 8200

For details about our berths please visit our website [www. https://www.portofnewcastle.com.au/](https://www.portofnewcastle.com.au/).

For details about other charges applicable to the use of the Port, including pilotage, contact the Port Authority of NSW.

PORT CHARGES 2020

Navigation Service Charge (NSC)

Vessel Gross Tonnage (GT)	Rate (ex GST)
Non-coal vessels (over 600GT)	\$0.5247 per GT for the first 50,000 GT plus \$1.1810 per GT thereafter. (Subject to a maximum NSC for passenger cruise ships of \$55,816.82 per visit)
Standard price for coal vessel (over 600GT) where bilateral long term price deed does not apply to the vessel	\$1.0424 per GT
If bilateral long-term price deed applies for the coal vessel (over 600GT)	See schedule 2 of the deed found here

Port Security Charge

Per visit all vessels	Rate (ex GST)
	\$608.10

Site Occupation Charge

Berth name	Rate per hour (ex GST)
Channel Berth (cruise vessels)	\$258.00
Dyke 1 and 2 Channel Berth (non passenger cruise vessels)	\$77.39
Kooragang 2,2.5 and 3, Mayfield 4, West Basin 3 and 4	\$293.20

Wharfage Charge

Non-containerised cargo by berth	Rate per Revenue Tonne (ex GST)
Dyke 1	\$1.91
Dyke 2	\$1.02
Mayfield 4, West Basin 3 and 4, Kooragang 2 and 3	\$2.07
East Basin 1 and 2, Dyke 4 and 5, Kooragang 4 - 10, BHP 6 and Mayfield 7	\$0.0802

Containerised cargo and cargo on platforms	Rate per Twenty Foot Equivalent Unit (TEUs) (ex GST)
Full	\$63.98
Empty	\$11.72

Note: Container wharfage rates apply to conventional containers or full-size frames. All other types of containers carrying cargo are invoiced at the appropriate tonnage rate based on the gross weight or volume of the cargo.

OTHER CHARGES

Ship Utility Charge

Per visit for non-coal vessels	Rate (ex GST)
	\$219.62

Kooragang 2 Bulk Cargo Unloading Infrastructure

Price on application.

Non-Standard Vessel Charges

Charge	Rate (ex GST)
Non standard vessel movements	Additional fees and charges may be prescribed by Port of Newcastle for vessel movements which are not undertaken in accordance with standard vessel movement requirements and procedures required under the Vessel Standard Terms and Conditions, including any Port Rules or directions given by Port of Newcastle. These charges may include additional charges for late vessel arrivals or failure to berth in accordance with Port of Newcastle requirements.
Additional bespoke services requested by users	Price on application

FUTURE CHARGE INCREASES

PON's current intention is that from 1 January 2021, the published Navigation Service Charge and Wharfage Charge for Coal vessels will increase by CPI annually, and may also be increased to reflect additional investment by Port of Newcastle in port services, any increases in government charges or taxes or changes in law and any material change events.

PAYMENT TERMS

Port of Newcastle requires that payment for any Service Charge is made in full within seven days from the date of the Port of Newcastle's invoice.

All such invoiced monies payable to Port of Newcastle must be paid without any discount, deduction, counterclaim or set-off and regardless of any dispute between Port of Newcastle and the party liable for the Service Charge.

If any amounts payable by the party liable for the service charge to Port of Newcastle are not paid by the due date, the party liable for the Service Charge must pay to Port of Newcastle, by way of liquidated damages, interest accruing daily at the Default Rate on the amount outstanding calculated daily from the due date until payment is made in full.

The party liable for the Service Charge must ensure that all payments required to be made under the invoice are made by:

- a) direct transfer or immediately available funds by the due date for payment to the bank account nominated in writing by Port of Newcastle; or
- b) any other method of payment approved by Port of Newcastle in writing provided that payment is made no later than 3 Business Days before the due date for payment.

TERMS USED IN THIS SCHEDULE

Unless otherwise defined, terms in this schedule have the meaning set out in the PAMA Act and:

Business Day

Means a day on which banks are open for general banking business in the City of Newcastle, but does not include Saturdays, Sundays or public holidays in the City of Newcastle.

Coal vessel

A vessel which enters the Port of Newcastle to load coal at any dedicated coal berth within the Port of Newcastle, being Dyke 4 and Dyke 5 and Kooragang 4, 5, 6, 7, 8, 9 and 10.

Default Rate

Means the rate of 5% per annum above the interest rate at the applicable time charged by the Commonwealth Bank of Australia on unsecured overdrafts in excess of \$100,000.

Navigation service charge

The navigation service charge means the charge levied by Port of Newcastle under section 50 of the PAMA Act in consideration for the service described in that provision on vessels at the time of port entry and, for the avoidance of doubt, is in addition to any Wharfage Charge, any Site Occupation Charge and any other fee or charge (including Non-Standard Vessel Charges) provided for in this schedule, the Vessel

Standard Terms and Conditions or the PAMA Act arising from the relevant vessel's visit to the Port. The charge is payable by the owner of the vessel.

Non-coal vessel

Any vessel that is not a coal vessel.

Non-Standard Vessel charges

The additional fees and charges specified above under the heading "Non-Standard Vessel Charges" in "Other Charges" above payable by the owner of the vessel.

Port security charge

The port security charge is payable on each entry by a vessel into the Port to cover costs associated with implementation of the Maritime Transport and Offshore Facilities Security Act 2003 (Cth). The charge is payable by the owner of the vessel.

Revenue Tonne

A revenue tonne is a mass of 1,000 kilograms or a volume of 1 cubic metre or 1 kilolitre, whichever gives the largest number of units of quantity cargo.

Ship Utility Charge

A fixed fee payable by non-coal vessels on each entry for the supply of utilities, including water and electricity. The charge is payable by the vessel owner.

Site Occupation Charge

The site occupation charge means the charge levied by Port of Newcastle under section 60 of the PAMA Act in consideration for the service described in that provision and, for the avoidance of doubt, is in addition to any Navigation Service Charge, Wharfage Charge and any other fee or charge provided for in this schedule (including Non-Standard Vessel Charges), the Vessel Standard Terms and Conditions or the PAMA Act arising from the relevant vessel's visit to the Port. The charge is currently calculated per hour (or part thereof) during which the site, or a part of it, is reserved or is occupied without reservation. The charge is payable by the person whom Port of Newcastle recognises as the occupier of the relevant site.

Vessel Standard Terms and Conditions

The Vessel Standard Terms and Conditions published by Port of Newcastle on this website from time to time.

Wharfage Charge

The wharfage charge means the charge levied by Port of Newcastle under section 61 of the PAMA Act in consideration for the service described in that provision and, for the avoidance of doubt, is in addition to any Navigation Service Charge, any Site Occupation Charge, and any other fee or charge provided for in this schedule (including Non-Standard Vessel Charges), the Vessel Standard Terms and Conditions or the PAMA Act arising from the relevant vessel's visit to the Port. The charge is payable by the owner of the cargo, as determined under sections 61 and 48 of the PAMA Act.