

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Affidavit

File Number: ACT 2 of 2020

File Title: Re Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 25/06/2021 4:30 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

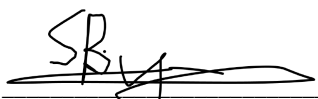
Applicant: Port of Newcastle Operations Pty Limited (ACN 165 332 990)

AFFIDAVIT

I, Simon Byrnes, of Level 4, 251 Wharf Road, Newcastle in the State of New South Wales, lawyer, affirm:

1. I am the Chief Commercial Officer and General Counsel for Port of Newcastle Operations Pty Limited (**PNO**), the applicant in this proceeding. I am authorised to make this affidavit on PNO's behalf.
2. Except where otherwise indicated, I make this affidavit from my own knowledge acquired from my personal experience, and from my examination of certain documents and records of PNO which are made and kept in the normal course, and for the purposes, of the business of PNO. Where I depose to matters from information or belief, I believe those matters to be true.
3. PNO claims confidentiality over the shaded parts of this affidavit on the basis that they contain commercially sensitive and confidential information concerning the business of PNO.
4. I have previously affirmed an affidavit in these proceedings on 15 March 2021 (**First Affidavit**). In this affidavit, I adopt terms defined in my First Affidavit.

Clayton Utz
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Sydney NSW 2000


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5. I make this second affidavit for the purpose of direction 2 of the directions made by the Tribunal on 18 May 2021 in this proceeding.
6. In this affidavit, I provide facts and information about:
 - a. forecasted coal export volumes through the Port for the period of collective bargaining authorisation to 2030-31, by reference to business records prepared in the ordinary course, and for the purpose of, PNO's business;
 - b. discussions that I recall with certain coal producer representatives in the period around 2 April 2020; and
 - c. typographical corrections to my First Affidavit.

Coal export trends and projections

7. In my First Affidavit, I deposed to recent trends in the coal export market and in the volume of coal exported through the Port, by reference to business records kept in the ordinary course of the business of PNO.
8. For example, at paragraph 17 of my First Affidavit, I referred to PNO's records of the coal volumes exported through the Port in each calendar year from 1997 to 2020.
9. PNO retains Wood Mackenzie, a global commodities research and consultancy business, to provide historical data, and projected forecasts, for domestic and global coal export and production trends. Wood Mackenzie describes itself on its website (www.woodmac.com) in the following terms:

We're the global research and consultancy business powering the natural resources industry. We have nearly 50 years of experience offering quality insights to a diverse range of customers.
10. In around January 2021, Wood Mackenzie prepared for PNO a confidential report titled *Scenario Development and Planning (WM Report)* which included forecasts for Port coal throughput, global thermal and metallurgical coal demand to 2035. A copy of the WM Report is annexed and marked **Confidential Annexure SB-1**. The WM Report was also produced by PNO to the Tribunal on 16 June 2021 in this proceeding in response to the notice under ss 90(6)(c) and 102(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) dated 2 June 2021.


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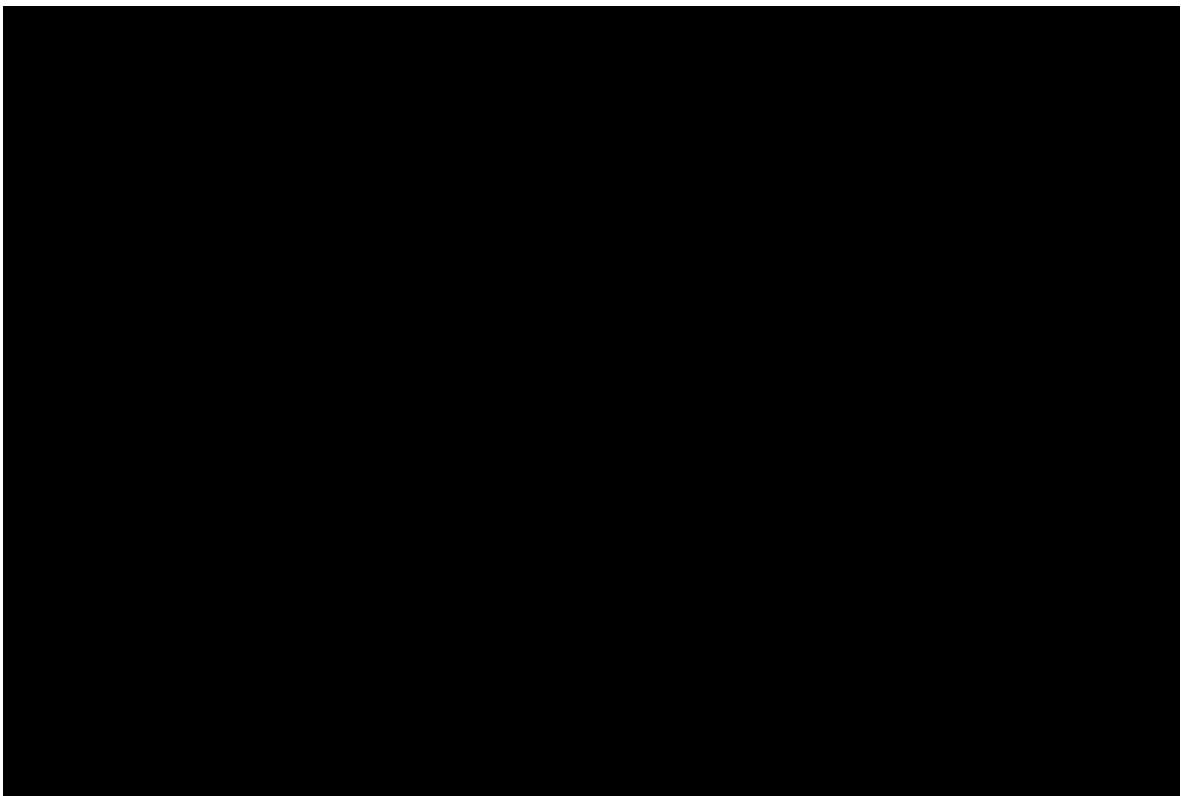
11. Page 20 of the WM Report states that:

[REDACTED]

12. Page 25 of the WM Report states that:


[REDACTED]

and includes the following graph of Wood Mackenzie's base case assumption for coal throughput at the Port from 2020 to 2035:




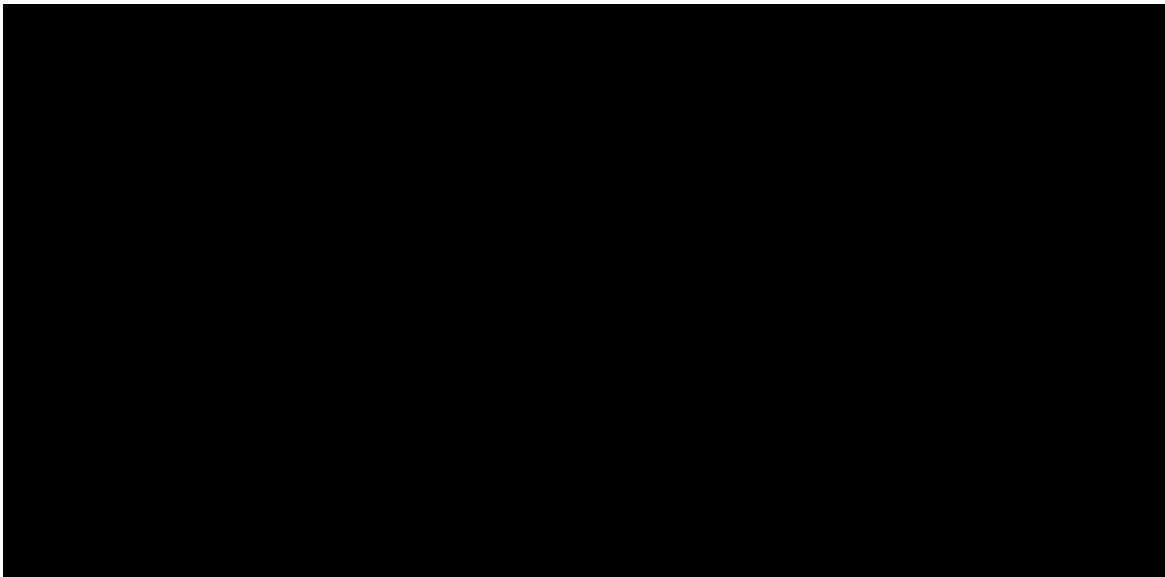
13. Page 36 of the WM Report includes the following commentary and graph in relation to the production costs for Port catchment mines relative to other suppliers:

[REDACTED]



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14. [Redacted]

a. [Redacted]

b. [Redacted]

c. [Redacted]

Bilateral negotiations with coal producers

15. In my First Affidavit, I deposed to negotiations between PNO and coal producers whose coal is exported through the Port from around November 2019 to 2 April 2020, in respect of proposed long term bilateral discounted pricing arrangements for certain charges levied by PNO at the Port pursuant to the terms of a Pro-forma Producer Deed.

16. In the course of those negotiations with coal producers between November 2019 and April 2020, as far as I am aware, no producer has ever raised a concern with me, or any of my colleagues at PNO, about the quantum of the wharfage charge paid by coal producers.
17. During the period in which services were declared at the Port under Part IIIA of the CCA, one dispute was notified to the ACCC (by Glencore Coal Pty Ltd) and that dispute concerned the navigation service charge, not the wharfage charge. In that dispute, the initial level of the wharfage charge was agreed for the purposes of the arbitration.
18. In the more recent application for declaration at the Port brought by NSWMC, the basis for the application predominantly concerned the quantum of the navigation service charge rather than the wharfage charge.
19. I set out below the wharfage charge (per revenue tonne) which has been charged by PNO in respect of coal since 2014:

2014	2015	2016	2017	2018	2019	2020	2021
\$0.0722	\$0.0682	\$0.0709	\$0.0722	\$0.0746	\$0.0771	\$0.0802	\$0.0814

20. At paragraph 81 of my First Affidavit, I said the following:

From the date of Interim Authorisation, I have not had any further bilateral, or collective, negotiations with any coal producers in relation to the Pro-forma Producer Deed. None of the individual producers with whom I had been in negotiations about the Pro-forma Producer Deed have contacted me to discuss progressing the Pro-forma Producer Deed since around 2 April 2020.

21. Since affirming my First Affidavit, I have caused to be conducted further searches of my email and electronic diary records. The results of those searches confirmed to me that no further progress was made in progressing the Pro-forma Producer Deed since around 2 April 2020. Those searches indicated that I had some limited contact with representatives of Bloomfield and Peabody, described below, which I had not recalled when I affirmed my First Affidavit.

[REDACTED]

22. [REDACTED]
[REDACTED]
[REDACTED]





23. [Redacted]
[Redacted]
[Redacted]

24. [Redacted]
[Redacted]

25. [Redacted]
[Redacted]

[Redacted]

26. [Redacted]
[Redacted]

[Redacted]
[Redacted]
[Redacted]

27. [Redacted]
[Redacted]

[Redacted]
[Redacted]

28. [Redacted]
[Redacted]
[Redacted]

29. [Redacted]
[Redacted]
[Redacted]

30. [Redacted]
[Redacted]

31. [Redacted]
[Redacted]

32. [Redacted]





Typographical corrections to my First Affidavit

33. In the course of reviewing my First Affidavit for the purpose of this affidavit, I have observed the following typographical errors in my First Affidavit which I correct below:

a. at paragraph 29:

In providing the below facts and information, I have had regard to an update on coal trade results and export trends at the Port for February 2021 prepared ~~for~~ by PNO ~~by~~ Kpler in the ordinary course of PNO's business (**February 2021 Kpler Update**), ~~extracts from which are~~ a copy of which is annexed and marked **Confidential Annexure SB-4**.

b. at paragraph 61:

[REDACTED]

c. at paragraph 67:

[REDACTED]

d. at paragraph 72:

[REDACTED]

34. The document reproduced at Confidential Annexure "SB-23" to my First Affidavit to which I refer at paragraph 67 was not the correct document. A correct copy of the revised Pro-forma Producer Deed described at paragraph 67 of my First Affidavit is annexed and marked **Confidential Annexure SB-4** to this affidavit.





35. A copy of the form of Pro-forma Producer Deed which was published on PNO's website on or about around 13 March 2020 and has remained published ever since, is annexed and marked **Annexure SB-5** to this affidavit.


AFFIRMED by the deponent
at Newcastle in New South Wales
on 25 June 2021

Before me:



SOLICITOR, NEW
SOUTH WALES

Signature of deponent



COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited (ACN 165 332 990)

ANNEXURE CERTIFICATE

SB-5

This is the Annexure marked "SB-5" referred to in the affidavit of Simon Byrnes affirmed at Newcastle in New South Wales on 25 June 2021.

Before me:



.....

Witness

[] 2020

PRODUCER PRO FORMA LONG TERM PRICING DEED

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

[Name]
[Address]
Email:[]

Long term pricing arrangements: NSC and Wharfage

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

- 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. This deed constitutes an agreement under s 67 of the PAMA Act.

For the avoidance of any doubt, nothing in this deed renders [Producer name] liable to pay any PAMA Act charges to PON where [Producer name] is not the party liable to pay that charge under the PAMA Act.

Please confirm [Producer 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 effective 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, Producer Coal or otherwise other than the navigation service charge and wharfage charge applicable to Producer Coal in accordance with its terms.

Yours sincerely

Simon Byrnes
Chief Commercial 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 **[insert name and ABN of Producer entity]** 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

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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 (Producer).
2.	Initial Term	The Producer 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 Producer 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 Producer 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.	Producer Specific Charges	Schedule 2 sets out the Producer Specific Charges agreed by PON and the Producer 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 Producer Coal loaded onto a Covered Vessel. For the avoidance of doubt, the Producer Specific Charges: (c) 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 PON's published standard terms and conditions and fees and charges for Port services; and (d) apply in substitution (only) for the Navigation Service Charge and the Wharfage Charge which would otherwise be payable in respect of the Covered Vessel and Producer Coal loaded onto the Covered Vessel under PON's published standard fees and charges for Port services.
5.	Non-discriminatory pricing	PON represents that: (a) the terms of Item 4 and Item 7 do not adversely discriminate against the Producer by comparison with Producer Specific Charges applicable to like circumstances to other Producers who have entered into materially similar deeds including as to the period of the Initial Term; (b) PON will not: (i) enter into bilateral arrangements with any other coal producer concerning Producer Specific Charges to apply over the Initial Term, or

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Item	Matter	Provision
		<p>(ii) give effect to any variations made to such charges under Item 7, which are materially dissimilar to the relevant provisions of, or different to any such variations under, this deed.</p>
<p>6.</p>	<p>Provision of vessel and cargo information to PON</p>	<p>The Producer 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 Producer Specific Charges.</p> <p>Without limitation, the Producer must ensure that the following information is provided to PON for each Covered Vessel within the timeframes specified below:</p> <p>(a) at least 14 days prior to the Covered Vessel entering the Port Channel, the vessel and cargo details prescribed by 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; (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; and (ix) 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 Vessel Owner fails to provide such information to PON within the time periods specified above, PON may, if it is not</p>

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Item	Matter	Provision
		<p>reasonably satisfied that the vessel is a Covered Vessel, decline to apply the Producer Specific Charges to that vessel and PON's published standard charges will apply to that vessel and such amount is a debt due and payable by the Vessel Owner in accordance with PON's published standard terms and conditions for vessels using the Port.</p>
<p>7.</p>	<p>Variations to Producer Specific Charges</p>	<p>The Producer Specific Charges will not be varied by PON during the Initial Term, except for the following variations which will occur at the beginning of each Contract Year (other than the beginning of the first Contract Year) (each an Adjustment Date):</p> <p>(a) Annual Adjustment</p> <p>Each Producer 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 Producer 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) Other variations</p> <p>PON may increase the Producer Specific Charges in addition to the basis set out in Item 7(a) where each of the following requirements is met:</p> <ul style="list-style-type: none"> (i) where any such increase is Material; and (ii) the increased Producer Specific Charges are consistent with the Pricing Principles. <p>(c) Capex transparency</p> <ul style="list-style-type: none"> (i) Without affecting PON's rights under paragraph 7(b), in order to provide the Producer with visibility of and the opportunity to comment on any prospective increases in the Producer Specific Charges on account of capital expenditure proposed to be incurred by PON, not later than 31

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Item	Matter	Provision
		<p>March 2020 PON will prepare and provide to the Producer a forward looking 5 year forecast (covering the period 1 January 2020 to 31 December 2024) of its projected capital expenditure that may impact the Producer Specific Charges and meet with the Producer to discuss those forecasts and any potential associated variations to the Producer Specific Charges. PON will update this 5 Year CAPEX Forecast annually on a rolling 5 year basis by no later than 31 March each following Contract Year and will meet with the Producer to discuss each such updated 5 Year CAPEX Forecast. For the avoidance of doubt, PON may, but is not obliged to, implement any comments made by the Producer on its 5 Year CAPEX Forecasts or any proposed increase to the Producer Specific Charges.</p> <p>(ii) The operation of Item 8 and Item 9 of this Deed with respect to resolving a Dispute following a Price Variation Objection Notice concerning a Notified Price Change are unaffected by the terms of, and any communications which may occur between the parties pursuant to, this Item 7(c).</p>
8.	<p>Notice of proposed variations to Producer Specific Charges</p>	<p>PON must provide the Producer with written notice of any proposed variations to the Producer Specific Charges pursuant to Item 7 not later than 45 days before the proposed date for commencement of the proposed variation (Notified Price Change).</p> <p>If a Notified Price Change includes any proposed variations to the Producer Specific Charges on account of PON applying paragraph (b) of Item 7, PON will issue with the Notified Price Change a copy of a report prepared by an independent appropriately qualified professional which sets out the opinion of that person, and the material facts (including all relevant cost, capital expenditure and revenue data) on which that opinion was based, as to whether those proposed variations to the Producer Specific Charges meet the requirements of Item 7 and are consistent with the Pricing Principles.</p> <p>If the Producer objects to any Notified Price Change, the Producer must issue a price objection notice to PON within 14 days of receipt of the Notified Price Change (Price Variation Objection Notice) in which event Item 9 will apply to resolve the Dispute.</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 Producer in any Price Variation Objection Notice).</p>
9.	<p>Disputes in regard to Price Variation Objection Notice and other Disputes</p>	<p>Where PON receives a Price Variation Objection Notice in accordance with Item 8, 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>

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Item	Matter	Provision
10.	Consultation in relation to efficiency improvements and other matters	<p>PON and the Producer will meet at least twice in each Contract Year (or at such other frequency as PON and the Producer may agree from time to time) to consult on the following matters:</p> <ul style="list-style-type: none"> (a) measures that can be introduced to improve the efficiency of delivery of any Vessel Services to Covered Vessels; (b) PON's delivery of Vessel Services, including (as they relate to the delivery of the Vessel Services): <ul style="list-style-type: none"> (i) PON's capital expenditure; (ii) any proposed variation to PON's fees and charges; (iii) PON's costs of operations; (iv) the Producer's future needs, including the Producer's estimates of Producer Coal to be shipped from the Port in the next 6 month period; (v) the application of these special pricing arrangements; and (vi) any other matters agreed between PON and the Producer (each acting reasonably); and (c) respective market insights of the parties, including volume forecasts and shipment destinations.
11.	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 11 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>
12.	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>
13.	Termination	<p>Termination by PON</p> <p>If the Producer is in default of this deed and the default is not remedied within a period of 21 days from the date PON provides notice of the breach to the Producer, PON may terminate this deed by written notice to the Producer.</p> <p>For the avoidance of any doubt, PON acknowledges and agrees that the Producer is not liable to PON for any failure by the relevant Vessel Owner of a Covered Vessel to pay the Navigation Service Charge component of the Producer Specific Charges to PON in respect of the Covered Vessel or for any other liability of the Vessel Owner to PON (except where the Producer is the Vessel Owner for the Covered Vessel), provided always that PON will not be required to continue to afford that Vessel Owner the benefit of the Producer Specific Charges in respect of Covered Vessels if the Vessel Owner fails to pay an amount to PON as and when due and the default is not remedied within a period of 14 days of PON issuing the Vessel Owner with notice of the default.</p> <p>Termination by the Producer</p>

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Item	Matter	Provision
		<p>If PON is in default of this deed and the default is not remedied within a period of 21 days from the date the Producer provides notice of the breach to PON, the Producer may terminate this deed by written notice 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> <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>

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Item	Matter	Provision
		(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.
15.	Variation	This deed may only be varied by a document signed by or on behalf of PON and the Producer.
16.	Confidentiality	<p>(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).</p> <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; or (vii) 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.

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Schedule 1 - Reference Schedule

Paragraph	Reference	Details
1.	Producer	[insert name and ABN of Producer entity]
2.	Commencement Date	1 January 2020.

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Schedule 2 - Producer 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 7 of this deed.

2. *Wharfage Charge*

\$0.0802 (exclusive of GST) from the Commencement Date per Revenue Tonne of Producer Coal loaded onto the relevant Covered Vessel, adjusted over the Initial Term pursuant to Item 7 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 7 of this deed, an example of the adjusted Navigation Service Charge (exclusive of GST) and adjusted Wharfage Charge each Contract Year during the Initial Term applying the Annual Adjustment under Item 7 if the increase in CPI for the relevant Contract Year is less than 4%, assuming no other adjustments apply under Item 7:

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

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

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 Producer accepts that no Dispute may be raised by the Producer 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;
- (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 7 of this deed (but only in relation to whether the requirements of Item 7(a) or 7(b)(i) are met (not in relation to the requirement in Item 7(b)(ii) that any proposed increase in Producer Specific Charges is consistent with the Pricing Principles, which will be measured solely by reference to the remaining principles below);
- (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, including efficient additional capital investments;
 - (ii) a reasonable rate of return, commensurate with the commercial risks involved, on the value of all assets comprising its Initial Capital Base and any updates thereof, including efficient additional capital investments; and
 - (iii) the return over the Leasehold Period of the total value of the assets comprising its Initial Capital Base and any updates thereof, including efficient additional capital investments;
- (c) the revenue expected to be derived from all users of the service;
- (d) 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;
- (e) the economic value to PON of any additional investment that the Producer (or any other user of the service) or PON has agreed to undertake;
- (f) the interests of all persons holding contracts for use of any relevant port facility or otherwise having rights to use the service;
- (g) firm and binding contractual obligations of PON or other persons (or both) already using any relevant port facility;
- (h) the operational and technical requirements necessary for the safe and reliable provision of the service;

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- (i) the economically efficient operation of any relevant port facility;
- (j) the benefit to the public from having competitive markets;
- (k) that prices should allow multi-part pricing and price discrimination when it aids efficiency;
- (l) that prices should not allow a vertically integrated service provider to set terms and conditions that would discriminate in favour of either its upstream or downstream operations, except to the extent that the cost of providing services to others would be higher; and
- (m) 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 Producer, 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 Producer, 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 Producer is seeking to enforce unpaid debts;
- (c) PON or the Producer is seeking urgent interlocutory relief; or
- (d) the relevant Dispute relates to a material failure by PON or the Producer 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 Producer.

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

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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 Producer Coal 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 subsequent Annual Adjustment in the amount of that Wharfage Charge for Producer Coal 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 Producer Coal 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.

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Schedule 4 Defined Terms

Annual Adjustment	each annual price adjustment of the Producer Specific Charges provided for in paragraph (a) of Item 7.
Commencement Date	the date specified in Paragraph 2 of Schedule 1.
Contract Year	each year in the Initial Term comprising 1 January to 31 December
Covered Vessel	a vessel that is loaded with and carries out of the Port: <ul style="list-style-type: none">(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 Producer Specific Charges, and no other coal.
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.
Material	means an increase in the Producer Specific Charges of more than 5%.
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	any coal to be loaded at the Port which has been mined from a Producer Mine.

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Producer Mine

the following operating coal mines owned and operated by the Producer as at the Commencement Date:

[insert mine details]

and any further mines owned and operated by the Producer that become operational after the Commencement Date (as may be approved by PON from time to time acting reasonably in writing for the purposes of this definition).

Producer Specific Charges

the charges set out in Schedule 2, as varied pursuant to Item 7.

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.

Vessel Owner

an owner of the vessel concerned within the meaning of sections 48(1) to (5) of the PAMA Act.

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.