

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



A handwritten signature in blue ink, consisting of a stylized 'R' followed by a 'U'.

REGISTRAR

Dated: 15/03/2021 7:35 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, Gabriella Sainsbury, of Level 4, 251 Wharf Road, Newcastle in the State of New South Wales, lawyer, affirm as follows:

1. I am Deputy General Counsel and Assistant Company Secretary for Port of Newcastle Operations Pty Limited (**PNO**). 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 of, 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.

Qualifications and experience

4. I have worked at PNO since April 2018, initially on a full-time secondment from an external law firm. I have held my current role as Deputy General Counsel and Assistant Company

Clayton Utz
Level 15, 1 Bligh Street
Sydney NSW 2000

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Ref: Bruce Lloyd

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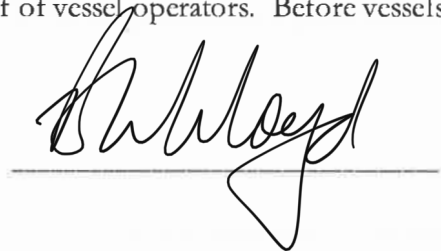
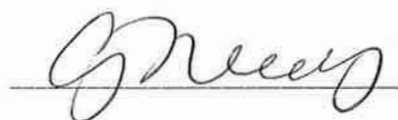
A handwritten signature in cursive script, appearing to read 'Bruce Lloyd', written over a horizontal line.

Secretary at PNO since 1 July 2019. As Deputy General Counsel, I report to the General Counsel, and lead PNO's legal services division comprised of employed solicitors, secondees and external legal engagements.

5. Together with the General Counsel, I have been responsible for leading PNO's pricing strategy from a legal perspective. My role in relation to PNO's pricing strategy has included:
 - a. working on the establishment and publication on PNO's website of the standard terms of use of the channel and berthing facilities of the Port of Newcastle (**Port**) by the owner, operator or charterer of a vessel; and
 - b. negotiations in late 2019 and early 2020 and more recently liaising with the agents of vessel operators using the Port in respect of proposed long term bilateral discounted pricing arrangements in respect of navigation service charges.

Relevant charges and open access arrangements at the Port

6. Pursuant to s 50 of the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**), PNO charges a navigation service charge for all vessels (including coal vessels) which enter the Port.
7. Up to 31 December 2019 this charge was imposed on vessel owners or charterers (vessel operators) of vessels which enter the Port. Approximately 2,300 vessels visited the Port in 2019, of which approximately 1,800 were coal vessels.
8. These coal vessels were operated by a number of different vessel operators, including Cosco Shipping (China), Hyundai Glovis (South Korea) and K-Line (Japan).
9. Each time a vessel enters the Port, the vessel operator enters into a contract by conduct with PNO for use of the shipping channels containing PNO's published standard terms and conditions, including the applicable navigation service charge. This contract is a single visit contract that covers the duration of the vessel's visit to the Port.
10. On or about 16 December 2019, PNO established open access arrangements for the terms of access to the Port's channel and berthing facilities by the owners, operators or charterers of vessels (**vessel operators**). PNO has published on its website standard terms governing use of the channels by vessel operators pursuant to these open access arrangements. A copy of the current relevant terms is annexed and marked **GS-1**.
11. On a day-to-day basis, PNO does not deal directly with vessel operators, but rather deals with agents, known as "ships' agents", that act on behalf of vessel operators. Before vessels



enter the Port, the relevant ships' agent submits details pertaining to the visit to the Port. After vessels leave the Port, PNO issues invoices to ships' agents, on behalf of vessel operators, for the payment of charges at the Port payable by those vessel operators. Those ships' agents pay the invoiced charges on behalf of the vessel operators.

12. The navigation service charge payable by vessel operators of coal vessels is fixed and payable according to the gross tonnage of a vessel that enters the Port and uses the channels, referred to in the Schedule of Service Charges in Annexure GS1 to this affidavit as "Vessel Gross Tonnage" (GT). GT refers to the capacity of the vessel using the channel, and not the volume of coal or other cargo which might be loaded onto the vessel during its visit at the Port.

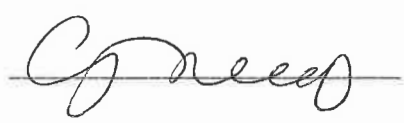
Bilateral Access Deeds

13. In recent years, ten different ships' agents have represented the vessel operators of all the coal vessels that have used the Port.

14. [CONFIDENTIAL TO PNO] [REDACTED]
[REDACTED]
[REDACTED] The effect of the Bilateral Access Deeds is to amend in part the standard terms governing use of the channels by vessel operators that PNO has published on its website.

15. [CONFIDENTIAL TO PNO] [REDACTED]
[REDACTED]
[REDACTED]
 - a. [REDACTED]
[REDACTED]
[REDACTED]
 - b. [REDACTED]
[REDACTED]
[REDACTED]
 - c. [REDACTED]
[REDACTED]

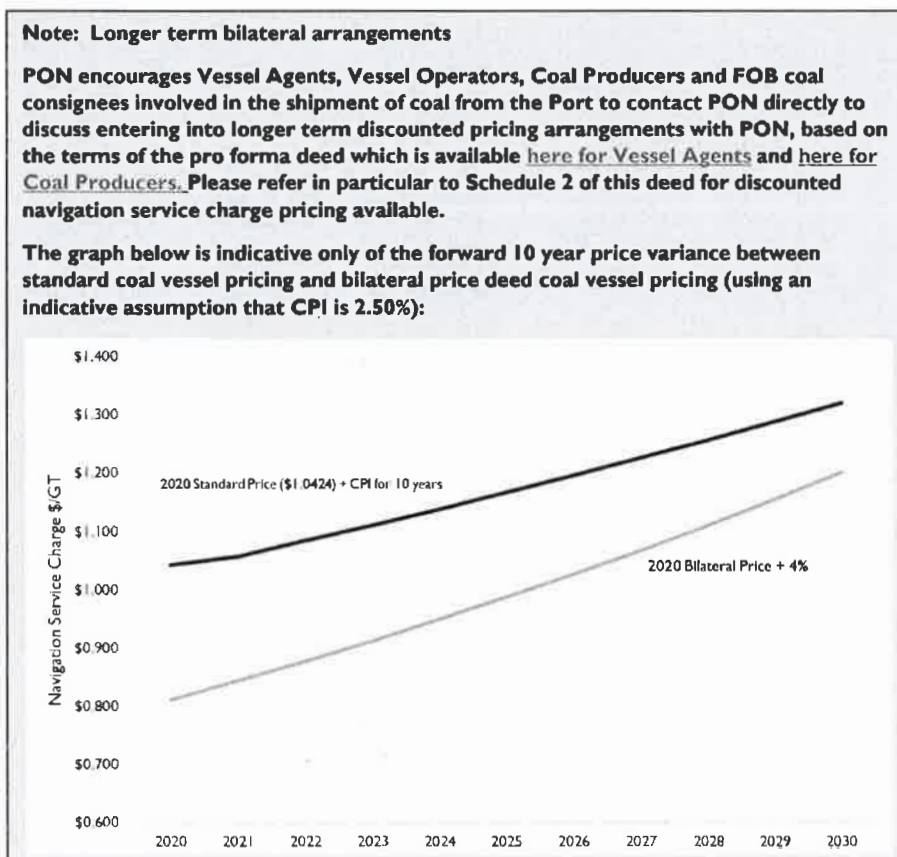
16. Approximately 2,200 vessels visited the Port in 2020, of which approximately 1,750 (approximately 80%) were coal vessels. These coal vessels were operated by a number of





different vessel operators, such as those listed in paragraph 8 above. Pursuant to those Bilateral Access Deeds, each ships' agent warranted they will be acting as agent for vessel operators covered under the Bilateral Access Deed for their visit to the Port, and that they have disclosed to those vessel operators, and will have the power and authority to bind those vessel operators to, the terms of the Bilateral Access Deed for their visit to the Port. These Bilateral Access Deeds took effect from 1 January 2020.

17. The Bilateral Access Deeds entered into with the ship's agents are all in identical terms (save as to party names) and are in the form of the template vessel agent deed which has been published on PNO's website. A copy of that deed is annexed and marked **GS2**.
18. PNO will enter into an agreement pursuant to s 67 of the PAMA Act with the operator of any other coal vessel through its agent not already covered by a Bilateral Access Deed that calls at the Port in the future on terms equivalent to the Bilateral Access Deed, and has made this clear by way of open offer in its Schedule of Service Charges published on PNO's website (available at <https://www.portofnewcastle.com.au/wp-content/uploads/2020/12/Schedule-of-Charges-2021-FINAL-.pdf>), an excerpt of which appears below:




Goree

[Signature]

19. Entry into the Bilateral Access Deeds is voluntary. For parties who do not wish to enter into the Bilateral Access Deed, PNO has publicly committed to ensuring transparent and open access to the land side and port side services and facilities provided by it at the Port, through its open access arrangements for users published on its website (and at annexure GS-1 to this affidavit).

AFFIRMED by the deponent
at Newcastle in New South Wales
on 15 March 2021

Before me:



Bruce Llewellyn Lloyd
NSW solicitor (21174)

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

GS-1

This is the Annexure marked "GS-1" referred to in the affidavit of Gabriella Sainsbury affirmed at Newcastle in New South Wales on 15 March 2021.

Before me:



.....

Witness

VESSEL BERTHING APPLICATION FORM

Vessels entering the port channel will be bound by PON's terms and conditions of access available on [PON's website here](#).

Vessel Details		
Name of Vessel		
IMO Number		
International Ship Security Certificate	Number	Expiry Date
Vessel Email Address		
Vessel Length Over All - LOA		
Bow to Bridge Measurement		
Bow to Gangway Measurement		
Helicopter Compliant		
Visit Details		
Vessel Inwards Agent		
Vessel Outwards Agent		
Visit Purpose (Loading/Discharging)		
Estimated Time of Arrival - ETA		
Cargo Type		
Through Cargo		
Towage Service Provider	Svitzer / Smit Lamnalco	
Last Port / Next Port after Newcastle	Last:	Next:
Arrival Details		
Berth		
Side to		
Bridge Mark if applicable		
Entry Draught	Fwd:	Aft:
Displacement		
In Ballast		
Departure Details		
Departure Draught	Fwd:	Aft:
Displacement		
In Ballast		

This vessel is accepted into this security regulated port under the provisions of the Maritime Transport and Offshores Facilities Security Act and Regulations 2003 (the Act) on the basis that the Designated Authority for Australia, the Aviation and Maritime Security (AMS) Division, has not provided advice to this port that this vessel cannot be accepted for security reasons. This port will not accept any liability resulting from any decisions either made or not made or advice given or not given by AMS on security matters under the Act 2003.

The Vessel Master shall fully complete this form and submit it for processing via the vessel agent at the earliest possible convenience. The vessel agent shall submit this form to Port of Newcastle operations by email (scheduling@portofnewcastle.com.au) for coal vessels or by data entry using the **C-PORTS** system on the Port Authority of NSW website for all other vessels no later than 48 hours prior to the vessels stated ETA.

Port of Newcastle will not accept any vessel movement booking without a completed application form.

Version: 10 June 2020

Vessel Standard Terms and Conditions

Version 1

These Vessel Standard Terms and Conditions are the terms and conditions under which a Vessel may access and use the Port Channel, Facilities and Services. If the Vessel Operator does not agree to be bound by these Terms and Conditions, the Vessel must not enter the Port Channel.

PON may change these terms and conditions by publishing the varied terms and conditions on its website at <https://www.portofnewcastle.com.au/> not later than 10 Business Days before the variation is proposed to take effect. Each Vessel Operator is responsible for reviewing PON's website from time-to-time to ensure it is aware of the current version of these terms and conditions.

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PORT OF NEWCASTLE

VESSEL STANDARD TERMS AND CONDITIONS

1. SCOPE OF TERMS AND CONDITIONS

1.1 Application

These Terms and Conditions apply to the entry of Vessels to the Port Channel and to the use by Vessels of Facilities and Services provided by PON.

1.2 Vessel Berthing Application and other matters to be addressed prior to entering the Port Channel

- (a) As soon as practicable and in any event not later than 48 hours before entering the Port Channel, the Vessel Operator (or its Agent) must complete and submit to PON and PANSW via cPorts a Vessel Berthing Application and must not proceed to enter the Port Channel unless the Vessel Operator (or its Agent) has:
- (i) been notified via cPorts that the Vessel has been scheduled to enter the Port Channel and berth at the Port (and then only enter in accordance with such scheduling);
 - (ii) provided to PON any Security Deposit notified by PON for the purposes of clause 7; and
 - (iii) if requested by PON, provided evidence to PON that the insurances held in respect of the Vessel satisfy the requirements of clause 11.15.
- (b) A Vessel Berthing Application must be submitted by the Vessel Operator (or its Agent) for each proposed inward bound visit by a vessel to the Port Channel.

1.3 PAMA rights

PON's rights under these Terms and Conditions and the Contract are in addition to, and not in derogation of, PON's rights under the PAMA, the *Admiralty Act 1988* (Cth) or any other statutory right of PON.

1.4 Capitalised terms and interpretation

Capitalised terms in these Terms and Conditions have the meaning given in clause 24.1 and the rules for interpretation of these Terms and Conditions are set out in clause 24.2.

2. BINDING CONTRACT

2.1 Formation of Contract

- (a) A contract will automatically bind the Vessel Operator and PON with respect to the Vessel's entry to and use of the Port as soon as the Vessel enters the Port Channel. The Contract will comprise the documents listed in clause 4, in the order of precedence set out in clause 4 .
- (b) If the Vessel Operator does not agree to be bound by the terms of the Contract, the Vessel must not enter the Port Channel.

- (c) The Contract will commence when the Vessel enters the Port Channel and will, subject to clause 19, end at the conclusion of the Access Period.
- (d) The Vessel Operator must comply with, and ensure that its Personnel comply with, the obligations imposed on the Vessel Operator under the Contract.

2.2 Variation

The Contract cannot be varied unless a variation to the Contract is provided for in any Special Conditions or made by PON pursuant to clause 23.4.

3. SPECIAL CONDITIONS

- (a) Without limiting PON's rights under clause 23.4, PON and the Vessel Operator (or any person with authority to act on behalf of such entity) may agree to vary these Terms and Conditions, including any fees or charges specified in the Schedule of Service Charges, by written agreement between PON and any entity comprising the Vessel Operator (or any person with authority to act on behalf of such entity) (**Special Conditions**).
- (b) These Terms and Conditions and the Schedule of Service Charges will apply to the Vessel Operator subject to any variations provided for in any such Special Conditions.

4. PRECEDENCE

To the extent of any inconsistency between the provisions of any of the Contract documents such inconsistency must be resolved by applying the documents in the following order of precedence:

- (a) first, any Special Conditions;
- (b) second, these Terms and Conditions;
- (c) third, the Vessel Berthing Application;
- (d) fourth, the Passenger Ship Booking Request Form (if applicable); and
- (e) then the Port Rules.

5. FEES AND CHARGES

5.1 Fees and Charges

The Vessel Operator must pay to PON (or must ensure that its Agent pays to PON) all Fees and Charges invoiced by PON to the Vessel Operator arising out of the Vessel's visit to the Port.

5.2 Variation of Fees and Charges

PON may vary the Fees and Charges provided that it has published notice of the proposed change on its website at least 10 Business Days before the variation is proposed to take effect.

5.3 Forward price path

Without limiting clause 5.2, PON may, in its absolute discretion, publish on its website a forward price path setting out proposed future price variations for any Fees or Charges (**Published Future Price Path**). In varying any Fees and Charges pursuant to clause 5.2, PON will have due regard to any applicable Published Future Price Path.

5.4 GST

Unless expressly stated otherwise, all Fees and Charges and all consideration to be provided under the Contract are exclusive of GST. If GST is payable on any supply made by PON under the Contract, then unless the consideration for that supply is expressly stated to be inclusive of GST, the Vessel Operator will pay to PON (or must ensure that its Agent or other party required to provide consideration for that supply pays to PON) 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. PON will issue a tax invoice in respect of any taxable supply it makes under the Contract. Words and expressions used in this clause 5.4 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 clause as in the GST Act.

5.5 PAMA charges

To the extent that a Fee or Charge is expressed in the Schedule of Service Charges to be a fee or charge fixed by PON under Part 5 of the PAMA (**PAMA Charges**), for the avoidance of any doubt, those PAMA Charges are so fixed by PON under Part 5 of the PAMA and the Contract does not displace such determinations for the purposes of section 67 of the PAMA.

6. PAYMENT

6.1 Time for payment

All Fees and Charges payable to PON by the Vessel Operator arising out of the Vessel's visit to the Port must be paid to PON in full within 7 days of the date of PON's invoice.

6.2 No set-off or deduction

All such invoiced monies payable to PON must be paid by the Vessel Operator without any discount, deduction, counterclaim or set-off (whether legal or equitable) and regardless of any dispute (including any Contract Dispute) between PON and the Vessel Operator (or its Agent).

6.3 Late payment

If any amounts payable by the Vessel Operator to PON are not paid by the due date, the Vessel Operator must pay to PON, 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 Vessel Operator must indemnify PON for all amounts, including legal fees and costs, on an indemnity basis, incurred by PON associated with the recovery of any amounts owing by the Vessel Operator to PON under or in connection with the Vessel's visit to the Port. Such amounts are a debt due and payable to PON.

6.4 Manner of payment

The Vessel Operator must ensure that all payments required to be made under the Contract are made by:

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

6.5 Payment by Agent

Any payment to be made by the Vessel Operator to PON under the Contract may be satisfied by the Agent making the relevant payment to PON in full.

6.6 Approved credit agreements

If the Vessel Operator or its Agent has been granted credit pursuant to any approved credit agreement issued by PON from time to time, then payment by the Vessel Operator or its Agent may be made in accordance with the terms of credit established under that credit agreement.

7. SECURITY DEPOSIT

The Vessel Operator acknowledges and agrees that PON may require the Vessel Operator to lodge a Security Deposit with PON in accordance with, and on the terms of, Schedule 1.

8. ACCESS TO AND USE OF FACILITIES AND SERVICES

8.1 Access to Port Channel, Facilities and Services

(a) PON undertakes to:

- (i) grant the Vessel access to the Port Channel;
- (ii) allocate the Vessel a berth in the Port; and
- (iii) grant the Vessel access to and use of Facilities and Services,

for the Permitted Use and subject to the terms and conditions of this Contract (including subject to clause 10 and Schedule 3 if the Vessel is seeking to berth at a Common User Wharf).

(b) The Vessel Operator must not use the Port Channel or any Facilities or Services for any purposes during the Access Period other than for the Permitted Use.

(c) Without limiting PON's rights under section 72 of the PAMA to withhold or withdraw the provision of Services or Facilities, if the Vessel Operator has failed to pay any Fees or Charges payable to PON when due in respect of any prior access to or use of the Port Channel or any Facilities or Services and either:

- (i) any Security Deposit held by PON in respect of the Vessel Operator is insufficient to cover the amount unpaid; or
- (ii) PON does not hold a Security Deposit at the relevant time in respect of the Vessel Operator,

PON may withhold or withdraw access for the Vessel to the Port Channel and any Facilities or Services until such outstanding monies have been paid to PON in full.

(d) The Vessel Operator acknowledges and agrees that the rights conferred upon it by the Contract for the Vessel to access and use the Port Channel and relevant Facilities and Services may not be transferred or assigned by the Vessel Operator to any other party without the prior written consent of PON.

8.2 Comply with Port Rules, PON directions and best industry practice

The Vessel Operator must ensure that it and its Personnel comply with:

- (a) the Port Rules;
- (b) all directions given by PON in connection with the Vessel's visit to the Port;
- (c) all directions given by any relevant Authority or officer (including the Harbour Master and PANSW) in connection with the Vessel's visit to the Port;

- (d) all operational, work health and safety and environmental policies and procedures of PON (including without limitation the Port Rules) that are advised to the Vessel Operator or published on PON's website from time to time; and
- (e) best industry practice in the conduct of the Vessel's activities in the Port.

8.3 No interest in Facilities, Services, the Port Channel or waters

Nothing in these Terms and Conditions will create any licence, tenancy, estate or proprietary interest of any kind for the Vessel Operator in or over any Facilities or Services, the Port Channel or any other waters within the Port Boundaries.

8.4 Availability, suitability and withdrawal of Facilities and Services

- (a) Notwithstanding any other provision of the Contract, entry to the Port and allocation of Facilities or Services by PON as requested by the Vessel Operator or its Agent will always be subject to availability of those Facilities and Services (as determined by PON in its absolute discretion).
- (b) Without limiting PON's rights under section 72 of the PAMA to withhold or withdraw the provision of Facilities or Services, if:
 - (i) PON considers it necessary to do so to ensure safety, security, Port operational efficiency or compliance with any Regulatory Requirements or with relevant industry standards;
 - (ii) the Vessel Operator has failed to comply with the terms of the Contract; or
 - (iii) the Vessel is unable to be loaded or unloaded,then PON may at any time withdraw, suspend, reallocate, terminate or otherwise vary or modify any access or usage rights to the Port Channel or any Facilities or Services that have been granted in respect of the Vessel, including directing the Vessel to leave a berth or the Port Channel.
- (c) If PON exercises any of its rights under clause 8.1(c) or clause 8.4(b), nothing will relieve the Vessel Operator from liability to pay any Fees and Charges or any other amount payable by the Vessel Operator arising from the Vessel's visit to the Port already accrued or incurred and nothing will entitle the Vessel Operator to any compensation for any Claim, Liability, damage, demurrage, delay or inconvenience suffered.
- (d) The Vessel Operator acknowledges and agrees that PON has made no representation and gives no warranty concerning the adequacy or suitability of the Port, the Port Channel or any Facility or Service for the Vessel or the use intended by the Vessel Operator. Any details, information or guidance provided by PON or its Personnel regarding the capability, capacity or specifications of any Facilities or Services are provided for general guidance only and PON does not assume any duty of care to the Vessel Operator to consider or review such details, information or guidance for accuracy or suitability for the specific requirements of the Vessel or the Vessel Operator.

8.5 Additional Facilities or Services

In addition to those Facilities or Services for which Fees or Charges are levied under the Schedule of Charges, other or additional Facilities and Services must be utilised in respect of the Vessel at the direction of PON (and may be charged by PON to the Vessel Operator) in circumstances where PON considers the use of additional or alternative Facilities or Services

is necessary to ensure safety, security, Port operational efficiency or compliance with any Regulatory Requirements or with relevant industry standards.

9. CHANNEL ENTRY AND BERTHING ORDER

9.1 Order of entry and departure

- (a) The Vessel Operator acknowledges and agrees that PON will allocate (and may change) in its absolute discretion the order of Port Channel access (entry and departure) for the Vessel and/or berthing of the Vessel or access to the Facilities and Services.
- (b) In general (but subject always to PON's absolute discretion, clause 10 and Schedule 3 in respect of Common User Wharves and the other provisions of this clause), Port Channel access (entry and departure) and/or berthing priority will be based on:
 - (i) Port safety and security;
 - (ii) Port operational efficiency;
 - (iii) the order of arrival at the pilot boarding ground or designated anchorage providing:
 - A. the order of arrival is not inconsistent with the details provided to PON in the Vessel Berthing Application;
 - B. the Vessel is ready to commence loading or unloading its nominated cargo immediately upon arrival at berth; and
 - C. the Vessel is able to work its nominated cargo at a loading or unloading rate commensurate with the design capacity of the Facilities or Services; and
 - (iv) subject always to the Port Rules.

9.2 PON's discretion

Without limiting PON's absolute discretion under clause 9.1, the general priority order may not, at PON's absolute discretion, apply where:

- (a) agreement is reached between PON and any vessel operator to change the berthing order or give a vessel priority berthing rights;
- (b) the Vessel's cargo cannot be worked at a loading or unloading rate equal to the design capacity of the Facility or Services;
- (c) a condition survey of the Vessel (where required) has not been passed or where the Vessel is deemed non-working by PON or an Authority; or
- (d) any Special Conditions provide otherwise.

9.3 PANSW guidelines

Port Channel access (entry and departure) and berthing must also be undertaken in accordance with applicable ship handling safety and other guidelines published by PANSW from time to time.

9.4 Condition survey

If the Vessel requires a condition survey prior to the commencement of cargo operations, the Vessel Operator must ensure that the survey is completed prior to the Vessel's arrival at the anchorage or at a berth. If the Vessel fails to pass a condition survey it will lose its berthing priority and, if alongside, must be moved at the Vessel Operator's own cost as soon as possible after being directed to move by PON or the Harbour Master. All costs and expenses incurred by PON in relation to this clause 9.4 (including the Vessel Operator's failure to comply with clause 9.4 or the Vessel not passing a condition survey) must be paid for by the Vessel Operator on demand by PON as a debt due and payable to PON within 7 days of the date of PON's invoice.

9.5 Completion of cargo operations

Without limiting clause 8.2, if the Vessel has completed cargo operations and requires further work, or is waiting for a tide to sail, the Vessel will have no right to the berth and must be moved at the Vessel Operator's cost if so directed by PON or the Harbour Master.

10. USE OF COMMON USER WHARF

If the Vessel is scheduled by PON to access and use a Common User Wharf, the provisions in Schedule 3 will, in addition to the other terms of the Contract, apply to the Vessel's access to and use of the Common User Wharf and applicable Facilities and Services.

11. OTHER OBLIGATIONS

11.1 No damage or alterations

The Vessel Operator must ensure that it and its Personnel do not:

- (a) cause any damage, loss or destruction to any Facilities or Services or anything else within the Port; or
- (b) make any alterations or additions (including installation of any fixed plant or equipment) to any Facilities or Services.

11.2 Notification of damage or injury

- (a) As soon as practicable after the Vessel Operator, its Agent or any of its Personnel becomes aware of any:
 - (i) damage, loss or destruction to any Facilities or Services;
 - (ii) injury to or death of any person at, or in the vicinity of, any Facilities or during the course of the provision of any Services; or
 - (iii) circumstances likely to cause any such damage, loss, destruction, injury or death,

the Vessel Operator (or its Agent) must, without limiting its obligations under clause 13.2(c), notify PON and PANSW of such damage, loss, destruction, injury, death or circumstances.

- (b) Within 72 hours after the Vessel Operator gives notice in accordance with clause 11.2(a) the Vessel Operator must lodge a detailed written report with PON and PANSW in respect of the event or other circumstance referred to in clause 11.1.

11.3 Maintenance and repair

The Vessel Operator must ensure that any Facilities or Services used by the Vessel are used in such a manner as to maintain their good condition and state of repair (having regard to their

age and general condition) and the Vessel Operator must ensure that any Facilities or Services used are left in a good, clean and operational condition after use.

11.4 Rectification of damage

Without limiting the indemnity provided by the Vessel Operator under clause 16.2, if any Facilities or Services are not left in the condition and state of repair required by clause 11.3, PON may:

- (a) direct the Vessel Operator, at the cost of the Vessel Operator, to return the Facility or Service to the condition required under clause 11.3 and to provide evidence (via an independent report or other means) that it has returned the Facility or Service to the condition required under clause 11.3; and/or
- (b) carry out any work necessary to restore the Facilities or Services to the condition required under clause 11.3, and all costs and expenses incurred by PON in respect of such work (including PON internal costs) must be paid for by the Vessel Operator on demand by PON as a debt due and payable to PON within 7 days of the date of PON's invoice.

11.5 Professional standards

- (a) The Vessel Operator must ensure that all shipping activities and work carried out on the Vessel in or around the Port in connection with the Vessel's visit are carried out:
 - (i) by Personnel who are fit for work and possess the appropriate training, experience and qualifications to do the work; and
 - (ii) with a high degree of skill, competence and professionalism at all times.
- (b) The Vessel Operator acknowledges and agrees that it is responsible for the acts and omissions of its Personnel in respect of the Vessel's visit to the Port.

11.6 Third party service providers

- (a) The Vessel Operator must not:
 - (i) engage a third party to provide stevedoring services in respect of the Vessel unless that third party has been licensed by PON to provide stevedoring services; or
 - (ii) engage a third party to provide any other services in respect of the Vessel or its cargo when the Vessel is in the Port unless:
 - A. the third party holds all permits, licences or approvals that may be required from time to time under any Law to provide those services; and
 - B. PON has, subject to clause 11.6(b), given its prior written consent to that third party providing those services, provided that PON consent will not be required for tradespersons performing minor works on board the Vessel.
- (b) If requested by PON, the Vessel Operator must provide to PON evidence that any third party service provider referred to in clause 11.6(a) holds any permit, licence or approval as may be required by Law to provide the relevant services, prior to PON giving its consent under clause 11.6(a).

11.7 No interference with other users

The Vessel Operator must ensure that it and its Personnel do not obstruct or cause any interference to PON, PANSW or anyone else lawfully using the Port.

11.8 Not to cause Pollution Incidents, Environmental Hazards or Contamination

- (a) The Vessel Operator must ensure that it and its Personnel do not cause any Pollution Incident, Environmental Hazard or Contamination of any kind arising from the Vessel Activities (**Environmental Incident**).
- (b) Without limiting the Vessel Operator's obligations under clause 11.8(a), the Vessel Operator must as soon as possible after the Vessel Operator or its Personnel becomes aware of any Environmental Incident, give PON and PANSW notice of the occurrence of such Environmental Incident (followed by written notice given to PON not later than 24 hours after the initial notification to PON).
- (c) Promptly and in any event not later than 48 hours after the Vessel Operator or any of its Personnel receives any notices or legal proceedings in respect of any Environmental Incident, including notices or proceedings issued by any Authority, the Vessel Operator must give written notice to PON and PANSW of the issue of that notice or legal proceedings, together with a copy of such notice or proceedings. The Vessel Operator and its Personnel must comply with any and all statutory notices referred to in this clause 11.8(c) and the Vessel Operator is liable for any costs of compliance with such statutory notices.

11.9 Obligation to clean-up

- (a) Without limiting the Vessel Operator's obligations under clause 16.2, the Vessel Operator must, at its expense, clean-up and otherwise address or rectify any Environmental Incident and the cause of the Environmental Incident, including in accordance with any direction issued by PON, PANSW or any Authority and within the timeframe specified in the direction.
- (b) PON may, at its absolute discretion and at the Vessel Operator's cost, engage an environmental auditor in respect of an Environmental Incident.
- (c) Without limiting the Vessel Operator's obligations under clause 16.2, if the Vessel Operator fails to clean-up and otherwise address or rectify any Environmental Incident or the cause of the Environmental Incident, including in accordance with any direction or notice issued by PON, PANSW or any Authority within the timeframe specified in the direction or notice, PON may at its absolute discretion take such actions or steps as it considers necessary to clean-up or address or rectify the Environmental Incident or the cause of the Environmental Incident. All costs and expenses incurred by PON under this clause 11.9(c) must be paid for by the Vessel Operator on demand by PON as a debt due and payable to PON within 7 days of the date of PON's invoice.

11.10 Induction

The Vessel Operator must:

- (a) ensure that it and its Personnel undertake any PON induction briefings or courses as and when required by PON in relation to anything connected with the Vessel's visit to the Port or as set out in the Port Rules; and
- (b) pay such fees as PON may prescribe from time to time for attendances of the Vessel Operator and its Personnel at such induction briefings or courses.

11.11 Compliance with Regulatory Requirements

- (a) The Vessel Operator must ensure that it and its Personnel comply with all Regulatory Requirements relating to the Vessel, its Personnel, its access to the Port and its use of the Facilities and Services, including paying any charges or other amounts payable pursuant to any such Regulatory Requirements from time to time.
- (b) Without limiting the Vessel Operator's obligations under clause 16.2, if PON incurs costs or expenses as a result of complying with any Regulatory Requirement in relation to the Vessel, including costs or expenses incurred in connection with the provision of security for the protection of people and property or other services related to the protection of people and property, then all such costs and expenses incurred by PON must be paid for by the Vessel Operator on demand by PON as a debt due and payable to PON within 7 days of the date of PON's invoice.
- (c) The Vessel Operator must ensure that the acts or omissions of the Vessel Operator or any Personnel of the Vessel Operator in respect of the Vessel's visit to the Port do not cause or contribute to PON contravening any Regulatory Requirement. If any act or omission of the Vessel Operator or any Personnel of the Vessel Operator in respect of the Vessel's visit to the Port causes or contributes to PON contravening any Regulatory Requirement, PON may notify the Vessel Operator of the relevant act or omission and breach and the Vessel Operator must (without limiting PON's rights or the Vessel Operator's obligations under clause 16) promptly take such steps and actions as PON may direct in its notice to cease the relevant act or omission and/or rectify the contravention at the Vessel Operator's cost and expense.

11.12 Biosecurity, ballast water management and cargo residues

Without limiting its obligations under clause 11.11, the Vessel Operator must ensure that it and its Personnel comply with:

- (a) the requirements of the *Biosecurity Act 2015* (Cth) in regard to ballast water management and discharge, anti-fouling and in-water cleaning and other biosecurity requirements in respect of the Vessel's visit to the Port, including the reporting of biosecurity incidents;
- (b) the requirements of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) and applicable MARPOL requirements regarding the prevention of pollution from the Vessel in its visit to the Port; and
- (c) any directions provided by PON, AMSA or any other Authority regarding the management or discharge of ballast water, waste, garbage or pollution from the Vessel, in-water cleaning or any biosecurity or biofouling incident.

11.13 Dangerous cargo

The Vessel Operator undertakes to ensure that the Vessel does not enter the Port Channel with any Known Dangerous Cargo without prior to arrival in the Port Boundaries:

- (a) giving written notice to PANSW and PON of the details and nature of the Known Dangerous Cargo as required by PANSW or pursuant to any applicable Laws; and
- (b) ensuring that the Known Dangerous Cargo and its container or other outside covering is appropriately marked as required by any applicable Laws and indicating that it requires special care by any person or stevedore who moves or handles it.

11.14 Access to Vessel

- (a) The Vessel Operator must, upon request from PON at any time during the Access Period, give:

- (i) authorised Personnel of PON; and
- (ii) other persons authorised by PON under the *Marine Safety Act 1998* (NSW),

access to the Vessel to check and monitor the Vessel Operator's compliance with its obligations under these Terms and Conditions or any Regulatory Requirement, subject to:

- (iii) those persons carrying appropriate photo ID at all times; and
 - (iv) compliance by PON with the reasonable requirements of the master of the Vessel.
- (b) The Vessel Operator must ensure that PON is given prompt access to any information that is requested by PON to calculate and issue any invoice for Fees and Charges arising from the Vessel's visit to the Port and to check and monitor the Vessel Operator's compliance with its obligations under these Terms and Conditions or any Regulatory Requirement.
 - (c) The Vessel Operator must in the event of any emergency, accident or security situation, provide authorised Personnel of PON and any relevant Authority, including NSW Police, the Australian Federal Police and medical and emergency services, with reasonable and prompt access to the Vessel and any Facilities or Services being used by the Vessel.

11.15 Insurance

- (a) The Vessel Operator must:
 - (i) ensure that the Vessel is entered with a P&I Club for:
 - A. P&I Cover;
 - B. hull and machinery liabilities; and
 - C. pollution and oil spill liabilities;

on the terms commonly provided by the 'International Group of Protection and Indemnity Clubs' for a vessel of a type which is the same or substantially similar to the Vessel type and for amounts not less than the minimum amount calculated in accordance with the *Convention on Limitation of liability for Maritime Claims 1976* and that the Vessel continues to be covered on those terms for at least the duration of the Access Period; and

 - (ii) effect and maintain such other insurances as the Vessel Operator is required to hold under any Law.
- (b) As a pre-condition to being scheduled to enter the Port Channel, and at any time before the end of the Access Period, PON may require the Vessel Operator or its Agent to produce evidence to PON (including certificate of entry issued by a P&I Club or certificates of currency) that the insurances required under clause 11.15(a) are in place in respect of the Vessel. The Vessel Operator, or its Agent, must produce promptly to PON any such evidence, if requested by PON.
- (c) PON may, at its absolute discretion, approve in writing the Vessel accessing or remaining in the Port Channel with alternative insurance and indemnity coverage to the coverage specified in clause 11.15(a) above provided that the Vessel Operator seeks such approval not later than 96 hours before proposing to enter the Port

Channel and promptly provides such information as PON may reasonably require to assess the request.

- (d) PON may, at its absolute discretion, refuse the Vessel access to the Port Channel, or direct the Vessel to leave the Port Channel if it is not satisfied with the adequacy of the policies of insurance held by the Vessel Operator.
- (e) The Vessel Operator:
 - (i) represents and warrants that all obligations under all insurances and indemnities referred to in clause 11.15(a) have been complied with; and
 - (ii) must ensure that it complies (and, where relevant, must procure that any third party complies) with all obligations under all insurances or indemnities referred to in clause 11.15(a),

and has not done and will not do anything which may prejudice or adversely affect the right and entitlement of any insured or third party to recover or bring a claim under any such insurances or indemnities, including by complying with any duty of disclosure and notification requirements.

12. CARGO MANIFESTS AND ADDITIONAL INFORMATION

12.1 Inward manifest

If the Vessel Operator proposes to discharge cargo at the Port, the Vessel Operator must or must ensure that its Personnel, by the end of the first working day after the Vessel leaves the Port Channel, submit electronically to PON (using manifests@portofnewcastle.com.au) an accurate, complete and correctly formatted manifest in the form of an Approved Manifest for all cargo discharged or intended to be discharged (as applicable) at the Port which must include:

- (a) the details required under any Regulatory Requirements, including under section 16(5) of the PAMA Regulations;
- (b) without limiting clause 12.1(a), accurate and complete particulars of the cargo (including empty containers) which are intended to be discharged or which have been discharged (as applicable) at the Port;
- (c) the full name, address and contact details of any entity or entities which chartered the Vessel to visit the Port; and
- (d) all other information prescribed by PON from time to time.

12.2 Outward manifest

If cargo is loaded onto the Vessel at the Port, the Vessel Operator must, or must ensure that its Personnel, by the end of the first working day after the Vessel leaves the Port Channel submit electronically to PON (using manifests@portofnewcastle.com.au) an accurate, complete and correctly formatted manifest in the form of an Approved Manifest for all cargo loaded onto the Vessel which must include:

- (a) the details required under any Regulatory Requirements, including under section 17(5) of the PAMA Regulations;
- (b) without limiting clause 12.2(a), accurate and complete particulars of the cargo loaded onto the Vessel;
- (c) the full name, address and contact details of any entity or entities which chartered the Vessel to visit the Port; and

- (d) all other information prescribed by PON from time to time.

12.3 Additional information

Without limiting PON's rights under section 40E of PAMA, the Vessel Operator or its Agent must submit electronically to PON (using manifests@portofnewcastle.com.au):

- (a) by the end of the first working day after the Vessel leaves the Port Channel a copy of the 'Draft Survey', 'Mate's Receipts' and 'Bills of Lading' in respect of the cargo loaded onto or unloaded from the Vessel; and
- (b) any additional information or documentation requested by PON concerning any cargo or the Vessel referred to in an inward manifest or an outward manifest within 3 days of a written request from PON to do so.

12.4 No cargo discharged or loaded

If the Vessel does not discharge or load any cargo whilst at the Port, the Vessel Operator must, within 48 hours after the Vessel departs the Port Channel, give PON written notice that no cargo was discharged or loaded (as applicable).

12.5 New Electronic Data Interchanges (EDIs)

- (a) The Vessel Operator must, and must ensure that its Personnel, comply with PON's requirements in relation to the development, configuration and application of any new EDI between any entity comprised in the Vessel Operator and PON.
- (b) The Vessel Operator acknowledges that all new EDIs between any entity comprised in the Vessel Operator or its Personnel and PON must be tested by PON before being used.

13. WORK HEALTH AND SAFETY

13.1 Vessel Operator's responsibility

The Vessel Operator acknowledges and agrees that work health and safety on the Vessel is the Vessel Operator's responsibility and the Vessel Operator must ensure that it and its Personnel comply with all applicable WHS Laws.

13.2 Vessel Operator's obligations

The Vessel Operator must:

- (a) ensure that its Personnel are not exposed to conditions or practices that have the likely potential to cause personal injury or property damage;
- (b) ensure that its Personnel are made aware of and comply with all work health and safety requirements, including the work health and safety management plan and induction training (if any) for the Port; and
- (c) immediately notify PON of any incident or dangerous occurrence on the Port Channel or in respect of Facilities or Services which is notifiable to SafeWork NSW, AMSA or any other Authority pursuant to the provisions of, as applicable, any WHS Law or any Maritime Safety Law.

13.3 Provision of notices

Promptly and in any event within 48 hours after the Vessel Operator or its Personnel receives any notices or legal proceedings in respect of the impact of the activities of the Vessel on human health and safety related to a visit by the Vessel to the Port, including notices or

proceedings issued by any Authority, the Vessel Operator must give written notice to PON and PANSW of the issue of that notice or legal proceedings, together with a copy of such notice or proceedings.

14. PORT SECURITY

14.1 Compliance with security procedures

The Vessel Operator must ensure that it and its Personnel comply with PON's security procedures and requirements in relation to cargo, vessels, Facilities, Services and access to and from the Port communicated to it or its Personnel. Communication of such procedures and requirements is deemed to have been communicated when they are placed on PON's website.

14.2 MTOFSA and Customs Act

Without limiting clause 14.1:

- (a) the Vessel Operator must comply with, and must ensure that its Personnel are aware of and comply with the security requirements of the Port, including the MTOFSA and the Customs Act;
- (b) the Vessel Operator must prepare and maintain a security plan for the Vessel in accordance with the International Ship and Port Facility Security Code (ISPS Code);
- (c) the Vessel Operator acknowledges that the Port is a 'security regulated port' within the meaning of the MTOFSA and that security measures required by the MTOFSA may be audited by PON and various Authorities, including the Department of Home Affairs and their appointees;
- (d) the Vessel Operator acknowledges that financial penalties apply for breaches of the MTOFSA and the Customs Act;
- (e) the Vessel Operator acknowledges that it is an offence under the MTOFSA for an unauthorised person, vessel or vehicle to enter or remain in a Maritime Security Zone;
- (f) the Vessel Operator acknowledges that the Port is an appointed port within the meaning of section 15 of the Customs Act and that compliance with the requirements of the Customs Act may be audited by PON and its Personnel and the Department of Home Affairs and its Personnel;
- (g) the Vessel Operator must comply with, and ensure that its Personnel understand and comply with, PON's security requirements; and
- (h) the Vessel Operator acknowledges that it is an offence under the Customs Act for a person to be in a 'waterfront area' of a port (as defined in section 20 of the Customs Act) and to fail to produce identification to an officer of Customs in accordance with the requirements of that Act.

15. SUPPLY OF WATER AND ELECTRICITY

15.1 Water for personal consumption

Any fresh water supplied by PON to the Vessel will be for the purpose of personal consumption by the Vessel crew, Vessel passengers and visitors to the Vessel (e.g. drinking, washing and cooking) and the Vessel Operator must ensure that the water supplied is not used for industrial or commercial purposes, including washing down decks or for ballast purposes, unless otherwise approved by PON.

15.2 Equipment

- (a) The Vessel Operator must ensure that PON's fresh water hoses and equipment are properly attached to the existing fresh water supply fixtures located at the wharf apron.
- (b) The Vessel Operator must ensure that any person engaged by or on behalf of the Vessel to collect water from PON's fresh water supply takes good care of PON's water supply equipment and returns such equipment promptly after use in the same condition as supplied. Without limiting any rights of PON under clause 16, the Vessel Operator is responsible for any damage to fresh water supply equipment and will bear the cost of any repair or replacement of such equipment.

15.3 Water and electricity charges

The Vessel Operator must pay PON for the use of fresh water or electricity supplied by PON in accordance with clause 5.

16. LIMITATION OF LIABILITY

16.1 Release of PON

- (a) Subject to clause 16.1(b) and 16.3, but without limiting clause 16.4, the Vessel Operator (and its Personnel) will use the Port, the Port Channel, the Facilities and Services at its own risk and the Released Parties will not be liable to the Vessel Operator (or its Personnel), and the Vessel Operator releases (and will procure that its Personnel release) each Released Party to the fullest extent permitted by Law from and against any Claim of any kind arising out of, or in connection with, directly or indirectly, the Vessel's visit to the Port or the use of the Port Channel and any Facilities or Services, including:
 - (i) the loss of, or any destruction or damage to, or Claim in respect of, any vessel, plant, equipment, cargo or other property;
 - (ii) any Claim or Liability arising from injury or damage done or suffered to any person, including death; or
 - (iii) any Claim or Liability arising from any Pollution Incident, Environmental Hazard or Contamination caused by the Vessel, the Vessel Operator or any of the Vessel Operator's Personnel, or arising from the Vessel's use of any Facilities or Services or the Port.
- (b) Subject to clause 16.4, the releases in clause 16.1(a) will not apply for the benefit of a Released Party to the extent that the relevant Claim is directly caused by the gross negligence or wilful misconduct of PON in providing the Services.

16.2 Indemnity by Vessel Operator

- (a) Subject to clause 16.2(b) below, the Vessel Operator indemnifies and will keep each Released Party indemnified from and against all Claims that may be brought by any person (including any of the Vessel Operator's Personnel or the end cargo customer) against, and all Liabilities that may be suffered or incurred by, the Released Party, directly or indirectly, in relation to or arising from:
 - (i) the Vessel Activities including:
 - A. any loss or damage to, or claim in respect of, any vessel, plant, equipment, cargo or other property;
 - B. any Claim or Liability arising from injury or damage done or suffered to any person, including death;

- C. breach of any Law; or
 - D. any negligence or wilful misconduct;
- (ii) any Pollution Incident, Environmental Hazard or Contamination caused by the Vessel, the Vessel Operator or any of the Vessel Operator's Personnel, or arising from the Vessel's use of any Facilities or Services or the Port;
 - (iii) any breach of, or default under, the Contract by the Vessel Operator; or
- (b) Subject to clause 16.4, the indemnities in clause 16.2(a) will not apply for the benefit of a Released Party to the extent the relevant Claim or Liability is directly caused by the gross negligence or wilful misconduct of PON in carrying out the Services.

16.3 Re-supply of Facilities or Services

Without limiting the remainder of this clause 16, to the extent that any rights or warranties cannot be excluded or limited as a matter of Law, the Liability of PON (or any other Released Party) to the Vessel Operator or its Personnel for any failure to provide, or default in providing any Facility or Service in accordance with this Contract must be strictly limited to either of the following remedies as elected by the applicable Released Party:

- (a) the re-supply of equivalent Facilities or Services; or
- (b) the payment by that Released Party of the costs necessary to have the Facilities or Services supplied again.

16.4 Further limitations

- (a) Notwithstanding any other provision of the Contract, under no circumstances will a Released Party be liable for, or responsible to the Vessel Operator, its Personnel or any other person for, any Claim or Liability arising from or in connection with:
 - (i) the availability of, or inability of, the Vessel to enter or use the Port Channel or a berth;
 - (ii) the availability of, or inability of the Vessel to use, any Facilities or Services;
 - (iii) the failure to perform or delay in providing any Facilities or Services;
 - (iv) for any demurrage, delay or other costs of transportation of any kind; or
 - (v) any Consequential Loss,howsoever caused or contributed to including, without limitation, the gross negligence of a Released Party.

17. PROPORTIONATE LIABILITY

17.1 Exclusion of Civil Liability Act 2002 (NSW)

To the extent permitted by Law, part 4 of the *Civil Liability Act 2002* (NSW) (and any equivalent statutory provision in any other state or territory) are excluded in relation to all and any rights, obligations or liabilities of any party under this Contract or any claim, demand or cause of action under this Contract whether those rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

17.2 Contract prevails

Without limiting clause 17.1, the rights, obligations and liabilities of the parties under this Contract or in relation to any Claim under this Contract with respect to proportionate liability are as specified in this Contract and not otherwise, whether those rights, obligations or liabilities are sought to be enforced by a Claim in contract, in tort or otherwise.

18. DISPUTE RESOLUTION

If a Contract Dispute arises between PON and the Vessel Operator, the Contract Dispute must be notified in accordance with, and determined pursuant to, the Dispute Resolution Procedures.

19. EXPIRY OR TERMINATION

On termination of the Contract or expiry of the Contract under clause 2.1(c):

- (a) nothing will release or discharge the Vessel Operator from liability to PON in relation to anything occurring prior to the termination or expiry (including any breach of the Contract);
- (b) nothing will release or discharge the Vessel Operator from liability for any Fees and Charges or other amount payable to PON by the Vessel Operator in relation to anything occurring prior to the termination or expiry;
- (c) none of the warranties, indemnities nor any other provision of the Contract merges on completion of the Contract;
- (d) the indemnities and releases in the Terms and Conditions, including in clause 16, are continuing obligations and remain in full force and effect following the expiry or termination of the Contract; and
- (e) without limiting clauses 19(a) to 19(d), the following clauses of the Terms and Conditions will also survive expiry or termination of the Contract: clauses 5, 6, 7, 11.4, 11.8, 11.9, 11.11, 11.15, 12, 13.3, 17, 18, 19 and 21 .

20. FORCE MAJEURE

Despite anything to the contrary contained elsewhere in these Terms and Conditions, PON will not be in breach of any obligations it may have in circumstances where PON's ability to comply was interfered with, obstructed, delayed or prevented by a Force Majeure Event.

21. TRUSTEE LIMITATION

21.1 Trustee capacity

PON is the trustee for the Port of Newcastle Unit Trust (in this clause 21, the **Trustee**) and is a party to the Contract only in its capacity as trustee for the Port of Newcastle Unit Trust (in this clause 21, the **Trust**).

21.2 Trustee limitations

- (a) A Liability arising under the Contract 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.
- (b) No person will be entitled to:

- (i) Claim from or commence proceedings against the Trustee in respect of any Liability under the Contract in any capacity other than as trustee for the Trust;
 - (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
 - (iii) enforce or seek to enforce any judgment in respect of a Liability under the Contract against the Trustee in any capacity other than as trustee of the Trust.
- (c) The limitations of Liability and restrictions in this clause 21 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.
- (d) The limitation of liability in this clause 21 applies despite any other provision of the Contract.

22. NOTICES

22.1 Notices to PON

Subject to the specific requirements in clauses 12.1, 12.2 and 12.3 regarding electronic submission of manifests and other information using manifests@portofnewcastle.com.au, any notice or other communication in relation to the Contract may only be given by the Vessel Operator to PON if the notice or communication is in writing and addressed to PON and delivered in person to the delivery address or sent by email to the email address specified in Schedule 4.

22.2 Notices to Vessel Operator

PON may give a notice or communication in relation to this Contract to the Vessel Operator by giving the relevant notice or communication to the Agent or to any entity comprised in the Vessel Operator, by such method and to such address (including an email address) as PON, acting reasonably, may determine.

23. MISCELLANEOUS

23.1 No assignment

The rights and entitlements of the Vessel Operator under the Contract must not be assigned, novated or transferred by the Vessel Operator without the prior written consent of PON.

23.2 Severance

If any term or clause contained in these Terms and Conditions or elsewhere in the Contract is declared or becomes unenforceable, invalid or illegal for any reason then that term or clause will be severed and the other terms and clauses will remain in full force and effect.

23.3 Governing law and jurisdiction

The Contract is governed by and will be construed in accordance with the laws of New South Wales and the Vessel Operator and PON each irrevocably and unconditionally submit to the non-exclusive jurisdiction of the courts of New South Wales.

23.4 Variation

- (a) PON may vary these Terms and Conditions provided it provides notice of any variation in accordance with clause 23.4(b).
- (b) PON will notify any variation to these Terms and Conditions by placing the varied terms on its website not later than 10 Business Days before the variation is proposed to take effect.

23.5 Released Parties

PON holds the benefit of the releases, indemnities and limitations in clause 16 for its benefit and as trustee for the benefit of each other Released Party and PON may enforce the provisions of clause 16 on its behalf and for and on behalf of any other Released Party.

24. DEFINITIONS AND INTERPRETATION

24.1 Definitions

In these Terms and Conditions:

Access Period means, with respect to the Vessel, the period commencing from the earliest time at which the Vessel enters the Port Boundaries and expires when the Vessel departs the Port Boundaries.

Agent means the Vessel Operator's agent (if any) specified in the Vessel Berthing Application.

AMSA means the Australian Maritime Safety Authority.

Approved Manifest means the form and content of manifest prescribed by PON from time to time.

Authority means any governmental or semi-governmental or local government authority, administrative or judicial body or tribunal, department or commission, public authority, Minister, statutory corporation or instrumentality.

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.

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 the Contract.

Cleared Zone means an area of land or water within the Port which is established as a 'cleared zone' under the MTOFSA and MTOFSR.

Common User Wharf means the wharf structures adjacent to the following Port berths:

- (a) Dyke 1 and 2;
- (b) Kooragang 2, 2.5 and 3;
- (c) Mayfield 4;
- (d) Channel Berth; and
- (e) Western Basin 3 and 4.

Consequential Loss includes any:

- (a) indirect or consequential loss or damage;
- (b) loss of revenue or loss of profits;
- (c) loss of use of the Vessel; or
- (d) loss of opportunity, loss of access to markets, loss of goodwill, loss of business reputation, adverse publicity or damage to credit rating.

Contamination means the presence in the Environment at a level above background levels of any substance which is potentially harmful to human health and comfort, detrimental to the well-being of flora or fauna and/or detrimental to the beneficial uses of the Environment, irrespective of whether the quantity of the substance does or does not exceed statutory or industry criteria applicable to commercial or industrial land or waterways use.

Contract means the contract between PON and the Vessel Operator that is formed under clause 2.

Contract Dispute means any dispute, controversy or claim arising out of, relating to or in connection with the Contract, including any question regarding its existence, validity or termination.

cPorts means the vessel scheduling and communications system currently known as "cPorts" hosted by PANSW (or any future vessel scheduling/communications system which may replace cPorts).

Customs Act means the *Customs Act 1901* (Cth).

Dangerous Cargo means good or cargo defined as dangerous in the International Maritime Dangerous Goods Code as promulgated by the International Maritime Organization (IMO).

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.

Dispute Resolution Procedures means the Port of Newcastle Dispute Resolution Process as published on PON's website at <https://www.portofnewcastle.com.au/> (as varied by any Special Conditions).

Environment means the physical factors of the surroundings of human and non-human life forms, including land, soil, plants, habitat, waters, atmosphere, climate, sound, odours, tastes, biodiversity and the social and aesthetic values of landscape.

Environmental Hazard means a state of danger to human health or the Environment, whether imminent or otherwise, resulting from the location, storage, handling or release of any substance having toxic, corrosive, flammable, explosive, infectious, irritant or otherwise dangerous or damaging characteristics.

Environmental Incident has the meaning given in clause 11.8(a).

Facilities means the land, buildings, berths, wharves, jetties, buoys, dolphins, lay-down areas and any associated plant and equipment and other infrastructure or equipment of any kind that is owned, vested in, managed, leased, controlled or operated by PON to which the Vessel is given access or use of in connection with the Vessel's visit to the Port, and includes the Mayfield 7 facilities.

Fees and Charges (or Fees or Charges) means:

- (a) those PAMA Act charges and other fees, rates, levies and charges set out in the Schedule of Service Charges, which are expressed in that Schedule to be payable by the owner of the Vessel; and
- (b) any additional amounts required to be paid by the Vessel Operator to PON under the Contract.

Force Majeure Event means any event or situation that arises due to something beyond the reasonable control of PON.

Harbour Master means the Port's harbour master and includes any assistant harbour master or other person authorised to carry out any harbour master's functions or duties in the Port.

Known Dangerous Cargo means cargo that:

- (a) has been declared by a consigner or consignee of the cargo or their agents as Dangerous Cargo; or
- (b) the Vessel Operator knew or ought reasonably to have known is Dangerous Cargo.

Landside Restricted Zone means an area of land or a structure within the boundaries of the Port which is established as a 'land-side restricted zone' under the MTOFSA and MTOFSR.

Law means the common law and any legislation of the Commonwealth of Australia, any Australian State or Territory or any local government or Authority, including without limitation delegated legislation, regulations, statutory instruments, notices and directions.

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.

Maritime Safety Law means, as applicable to the Vessel or its Personnel, the *Navigation Act 2012* (Cth), the *Marine Safety Act 1998* (NSW) and any other Law in respect of maritime safety.

Maritime Security Zone includes Landside Restricted Zones and Waterside Restricted Zones, Cleared Zones.

MARPOL means the International Convention for the Prevention of Pollution from Ships.

MTOFSA means the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth).

MTOFSR means the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Cth).

NBT Terminal Rules means the Newcastle Bulk Terminal: Terminal Rules and Information posted from time to time on PON's website at <https://www.portofnewcastle.com.au/newcastle-bulk-terminal/>

Newcastle Bulk Terminal means the common user cargo handling facilities located at Kooragang 2 and Kooragang 3.

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

PAMA Regulations means the Ports and Maritime Administration Regulation 2012 (NSW).

PANSW means the Port Authority of New South Wales.

Passenger Ship Booking Request Form means the "Passenger Ship Booking Request Form" on the Port of Newcastle website as amended from time to time, and which is required to be completed and submitted by every cruise ship or similar passenger vessel desiring to enter and use the Port on each proposed visit to the Port by the vessel.

Permitted Use means (as applicable to the Vessel):

- (a) the embarking and disembarking of passengers (where applicable);
- (b) the transit, receipt, delivery, loading and unloading of cargo;
- (c) provisioning and bunkering;
- (d) ship repair and maintenance; and
- (e) crew change.

Personnel means any employee, officer, agent, consultant, contractor, representative, invitee or licensee of the relevant party (or an entity comprised in the relevant party) and, with respect to the Vessel Operator includes:

- (a) any shipping agent engaged by the Vessel Operator; and
- (b) crew and other personnel engaged by or performing duties for the Vessel Operator.

P&I Club means a mutual insurance association which provides P&I Cover and is a member of the 'International Group of Protection & Indemnity Clubs'.

P&I Cover means protection and indemnity insurance that covers loss, damage or liabilities concerning or arising from at least the following risks:

- (a) death and personal injury to seamen, passengers and third parties;
- (b) in respect of stowaways or persons rescued at sea;
- (c) collisions;
- (d) groundings;
- (e) damage to fixed and floating objects;
- (f) pollution;
- (g) wreck removal;
- (h) towage operations; and
- (i) cargo damage.

Pollution Incident has the meaning given to it in the *Protection of the Environment Operations Act 1997* (NSW).

PON means 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.

Port means the Port of Newcastle, including all waters in the Port Boundaries.

Port Boundaries means the boundaries of the land and waters comprising the Port as delineated in the PAMA Regulations.

Port Channel means the area of navigable waters and subjacent land in the Port Boundaries as shown in the channel plan in Schedule 2 as amended by PON from time to time.

Port Rules means the rules (including the NBT Terminal Rules) established by PON or PANSW from time to time governing access to and use of the Port and, in the case of rules established by PON, as posted on PON's website at <https://www.portofnewcastle.com.au/> from time to time.

Regulatory Requirement means:

- (a) any Law;
- (b) certificates, licences, consents, permits, approvals and requirements of or issued by any Authority;
- (c) directions of the Harbour Master or PANSW;
- (d) the Port Rules; and
- (e) directions of any Authority.

Released Party means each of:

- (a) PON, Port of Newcastle Investments (Property) Pty Limited (ACN 169 286 024) as trustee of the Port of Newcastle Investments (Property) Trust (**PNIP**) and any related body corporate of PON or PNIP; and
- (b) any employee, officer, agent or contractor of PON, PNIP or any related body corporate of PON or PNIP.

Schedule of Service Charges means the schedule of PON's rates, levies, charges or other fees from time to time and which are posted on PON's website at <https://www.portofnewcastle.com.au/shipping-and-operations/#port-charges> (as varied by any Special Conditions).

Security Deposit means:

- (a) a cash deposit; and/or
- (b) an irrevocable and unconditional bank guarantee with an expiry date of not less than 6 months from the date the bank guarantee is provided to PON and otherwise in a form reasonably acceptable to PON, given by a bank acceptable to PON and capable of being drawn on demand at any branch of that bank in Sydney or Newcastle, New South Wales.

Services means any services that are provided by or arranged by PON pursuant to the Contract.

Special Conditions has the meaning given in clause 3(a).

Terms and Conditions means these Terms and Conditions (as amended by any Special Conditions).

Vessel means the vessel particularised in the Vessel Berthing Application (or if the relevant vessel enters the Port and has not been particularised in a Vessel Berthing Application, that vessel).

Vessel Activities means all acts, conduct and omissions of the Vessel Operator or its Personnel arising from or in connection with the Contract, the Vessel's visit to the Port or the use of any Facilities or Services by the Vessel Operator or its Personnel.

Vessel Berthing Application means the "Vessel Berthing Application" on cPorts website as amended from time to time, and which is required to be completed and submitted by every vessel desiring to enter and use the Port on each proposed visit to the Port by the vessel.

Vessel Operator means each of the owner of the Vessel, the charterer of the Vessel and the operator of the Vessel (and also includes any mortgagee in possession of the Vessel).

Waterside Restricted Zone means an area of water within the Port which is established as a 'water-side restricted zone' under the MTOFSA and MTOFSR.

WHS Laws means all legislation, regulations, by-laws, orders and legal requirements concerning the health, safety and welfare of people at work, including the *Work Health and Safety Act 2011* (NSW).

24.2 Interpretation

In these Terms and Conditions:

- (a) words importing the singular will include the plural and vice versa and any word or expression defined in the singular has the corresponding meaning if used in the plural and vice versa;
- (b) a reference to any act or statute (including subordinate legislation) will include a reference to any amendment, re-enactment or extension thereof or any statutory or regulatory provision that may be substituted from time to time and includes any subordinate legislation issued or made under it;
- (c) where any party to the Contract is comprised of more than one person or entity then those people or entities will be bound jointly and each of them will be bound severally by the terms of the Contract;
- (d) a reference to the Vessel Operator includes a reference to each of the entities referred to in the definition of Vessel Operator jointly and severally (so that for example an undertaking in this Contract given by the Vessel Operator is given by each such entity jointly and severally);
- (e) headings are for ease of reference and do not affect the interpretation of the Contract;
- (f) a reference to a party includes a reference to that party's heirs, executors, administrators, successors and permitted assigns;
- (g) words importing natural persons include partnerships, bodies corporate, associations, governments and governmental and local authorities and agencies;
- (h) a reference to \$ is a reference to the currency of Australia;
- (i) a provision of the Contract must not be construed to the disadvantage of PON merely because PON was responsible for the preparation of it or for its inclusion in the Contract; and
- (j) the word "including" or any other form of that word is not a word of limitation.

Schedule 1 - Security Deposit

1.1 Requirement to provide Security Deposit

- (a) The Vessel Operator acknowledges PON's right to require the Vessel or any entity comprised in the Vessel to provide a Security Deposit to PON (including as a pre-condition to the Vessel entering the Port Channel).
- (b) The Vessel Operator acknowledges and agrees that PON may, at any time, issue a notice to the Vessel Operator requesting the Vessel Operator to provide:
 - (i) a Security Deposit;
 - (ii) a replacement Security Deposit in a greater amount than the amount of the Security Deposit held by PON at the relevant time, having regard to the matters contemplated in paragraph 1.2(b); or
 - (iii) a replacement Security Deposit,(a **Security Deposit Notice**).
- (c) Following the delivery of a Security Deposit Notice, the Vessel Operator must provide the Security Deposit referred to in the Security Deposit Notice to PON on or before the date that is the Vessel enters the Channel (or such later time as PON may direct).
- (d) If the Vessel Operator does not provide a replacement Security Deposit within the time specified by PON, PON may draw down on the existing Security Deposit in full and PON will hold the proceeds as a Security Deposit for the Vessel Operator and pay the amount remaining at the relevant time to the Vessel Operator:
 - (i) when the Vessel Operator provides a replacement Security Deposit to PON for the amount stated in the Security Deposit Notice referred to in paragraph 1.1(b); or
 - (ii) otherwise in accordance with paragraph 1.4(a).
- (e) For the avoidance of doubt, if PON holds an amount under paragraph 1.1(d), that amount will be deemed to be the Security Deposit and PON will be entitled to draw on it in accordance with paragraph 1.3.

1.2 Security Deposit

- (a) The amount of the Security Deposit will be determined by PON, in its absolute discretion.
- (b) In determining the amount of the Security Deposit, PON may have regard to such matters as it deems relevant in its absolute discretion, including:
 - (i) the creditworthiness of the entities comprised in the Vessel Operator and their related bodies corporate;
 - (ii) any incident that PON considers may give rise to a Liability on the part of the Vessel, the Vessel Operator, an entity comprised in the Vessel Operator or the Vessel Operator's Personnel to PON; and
 - (iii) the potential Liabilities of the Vessel Operator or any entity comprised in the Vessel Operator to PON under this Contract or Part 5 of the PAMA.

- (c) PON may review the amount of the Security Deposit at any time, in its absolute discretion.

1.3 Entitlement to Security Deposit

- (a) PON will be entitled, without prior notice to the Vessel Operator, to draw down on the Security Deposit and retain the proceeds to:
 - (i) pay any Fees or Charges, GST amounts or any other sums actually or contingently owing under this Contract (or any prior or future Contracts made in respect of Vessels where the Vessel Operator is the owner, operator or charterer of the Vessel) which have not been paid when due; and
 - (ii) pay any interest calculated in accordance with clause 6.3 owing on overdue amounts.

Any such draw down is without prejudice to any other rights PON may have against the Vessel Operator.

- (b) For the avoidance of doubt, the amount PON is entitled to draw down includes such amount as is required to satisfy any GST gross-up required to be paid to PON under clause 5.4 in respect of the draw down of the Security Deposit.
- (c) The parties acknowledge that the amount of the Security Deposit is a genuine pre-estimate of the costs and losses PON will suffer if an event contemplated by paragraph 1.3(a) occurs.
- (d) If PON draws down on a Security Deposit, PON must promptly notify the entity comprised in the Vessel Operator that provided the Security Deposit that it has drawn down on the Security Deposit.

1.4 Return of Security Deposit

PON must on written request of the entity comprised in the Vessel Operator that provided the Security Deposit return the Security Deposit to that entity if:

- (a) this Contract has expired or otherwise been terminated and:
 - (i) the Vessel Operator has performed all of the obligations required to be performed or procured by it under this Contract (and any prior contract between PON and the Vessel Operator in respect of prior Vessel visits to the Port) or such obligations have been waived by PON; and
 - (ii) any and all disputes between PON and the Vessel Operator arising out of or in connection with this Contract (or any prior contract between PON and the Vessel Operator in respect of prior visits to the Port) have been fully and finally resolved; and
 - (iii) the Vessel Operator has advised PON in writing that any entity comprising the Vessel Operator will not be seeking access to the Port in the next 6 months; or
- (b) the Vessel Operator has provided a replacement Security Deposit or a Security Deposit in a greater amount in accordance with paragraph 1.1(b).

Schedule 2 - Port Channel Plan



Schedule 3 - Common User Wharf

1. Access to and use of Common User Wharves

1.1 No right of exclusive occupation

- (a) The Vessel Operator acknowledges and agrees that it has no right of exclusive occupation or use of any Common User Wharfs.
- (b) Without limiting the generality of this paragraph 1.1, PON may at any time exercise its rights to enter, use, possess and enjoy the whole or any part of a Common User Wharf, including granting access and usage rights to the Common User Wharfs to other vessels and vessel operators.

1.2 Berthing order

Clause 9 will apply in respect of PON determining the berthing order and time for any Vessel proposing to berth at a Common User Berth.

1.3 Access to be exercised in accordance with directions

The Vessel's right to occupy, access or use a Common User Wharf for the Permitted Uses is subject to the directions of PON, the Harbour Master and PANSW, which directions may specify the Common User Wharf to which access is permitted, the method of access and the dates and time of access.

1.4 Newcastle Bulk Terminal Rules

The Vessel's access to and use of the Newcastle Bulk Terminal and associated Facilities and Services will be subject to, and the Vessel Operator and its Personnel must comply with, the NBT Terminal Rules.

1.5 Common User Wharves may change

The Vessel Operator acknowledges and agrees that the Common User Wharves available for access by the Vessel may change from time to time in PON's absolute discretion. If there is a change to access arrangements or the status of the Common User Wharves, PON will give notice of such change to the Vessel Operator.

1.6 Rights to access, occupy and use a Common User Wharf are personal

The Vessel Operator acknowledges and agrees that the rights conferred upon it by this Contract to access, occupy and use a Common User Wharf may not be transferred or assigned by the Vessel Operator to any other party without PON's prior written consent.

1.7 Condition

- (a) The Vessel Operator must ensure that any Common User Wharves used by the Vessel are used in such a manner as to maintain their good condition and state of repair (having regard to their age and general condition) and the Vessel Operator must ensure those Common User Wharves are left in good, clean and operational condition after use.
- (b) Clause 16.2 of the Terms and Conditions will apply if the Vessel Operator fails to comply with paragraph 1.7(a).

1.8 Plant and equipment

- (a) The Vessel Operator and its Personnel must not use any PON plant or equipment situated on a Common User Wharf, including PON's grabs and hoppers, unless PON has expressly authorised such use.
- (b) The Vessel Operator must ensure that PON's plant and equipment, if used by the Vessel, the Vessel Operator or its Personnel during the Access Period, is left in the same condition and state of repair as at the commencement of the Access Period.
- (c) Clause 16.2 of the Terms and Conditions will apply if the Vessel Operator fails to comply with paragraph 1.8(b).

1.9 No alterations

The Vessel Operator must not make any alterations or additions to the Common User Wharves.

1.10 No installation

The Vessel Operator must not install fixed plant or equipment including any fuel storage tanks on, over or under the Common User Wharves.

Schedule 4 - PON notice details

Item	Description	Detail
1.	PON address	Delivery address: Level 4, 251 Wharf Road NEWCASTLE NSW 2300 Email address: manifests@portofnewcastle.com.au



SCHEDULE OF SERVICE CHARGES
EFFECTIVE FROM 1 JANUARY 2021

VERSION: 2 DECEMBER 2020



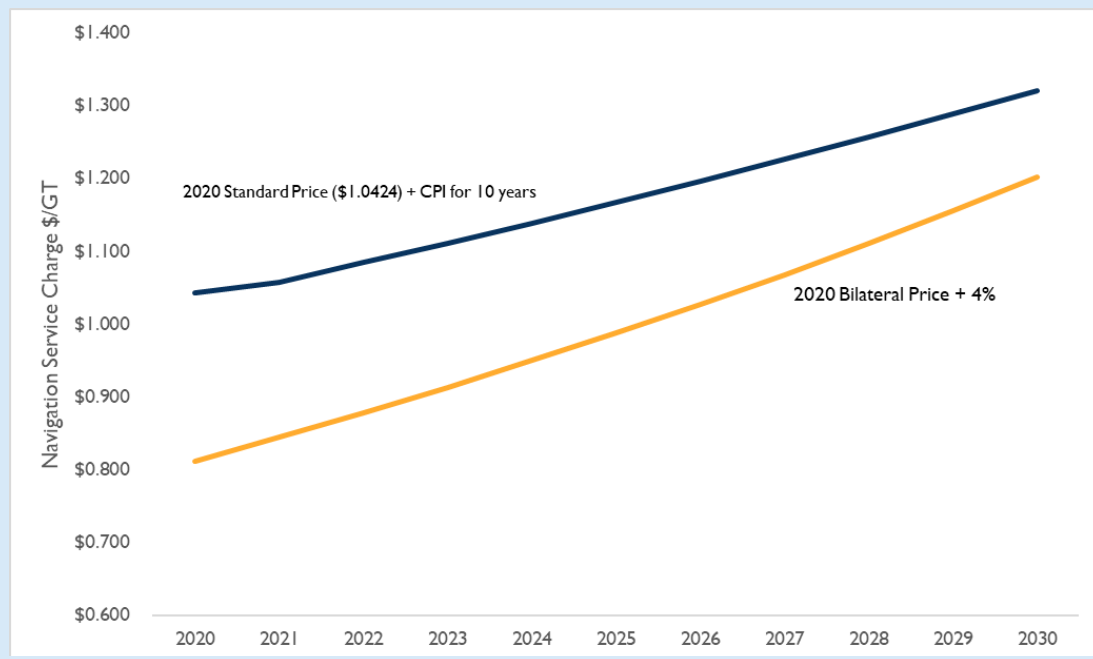
ABOUT THIS SCHEDULE OF SERVICE CHARGES

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 2021, 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 for Vessel Agents](#) and [here for Coal Producers](#). 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 (using an indicative assumption that CPI is 2.5%):



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 2021

Navigation Service Charge (NSC)

Vessel Gross Tonnage (GT)	Rate (ex GST)
Non-coal vessels (over 600GT)	\$0.5325 per GT for the first 50,000 GT plus \$1.1987 per GT thereafter. (Subject to a maximum NSC for passenger cruise ships of \$56,654.07 per visit)
Standard price for coal vessel (over 600GT) where bilateral long term price deed does not apply to the vessel	\$1.0580 per GT
If bilateral long-term price deed applies for the coal vessel (over 600GT)	See schedule 2 of the deeds found here for Vessel Agents and here for Coal Producers , which indicates a 2021 NSC Covered Vessel charge of \$0.8445.

Port Security Charge

Per visit all vessels	Rate (ex GST)
	\$617.22

Site Occupation Charge

Berth name	Rate per hour (ex GST)
Channel Berth (cruise vessels)	\$261.87
Dyke 1 and 2 Channel Berth (non passenger cruise vessels)	\$78.55
Kooragang 2,2.5 and 3, Mayfield 4, West Basin 3 and 4	\$297.59

Wharfage Charge

Non-containerised cargo by berth	Rate per Revenue Tonne (ex GST)
Dyke 1	\$1.93
Dyke 2	\$1.03
Mayfield 4, West Basin 3 and 4, Kooragang 2 and 3	\$2.10
East Basin 1 and 2, Dyke 4 and 5, Kooragang 4 - 10, BHP 6 and Mayfield 7	\$0.0814

Containerised cargo and cargo on platforms	Rate per Twenty Foot Equivalent Unit (TEUs) (ex GST)
Full	\$64.93
Empty	\$11.89

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)
	\$222.91

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 each year, published charges 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.

PORT OF NEWCASTLE DISPUTE RESOLUTION PROCESS

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

1. OBJECTIVE

- 1.1 PON is 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) a User wishes to raise a Dispute with PON; or
- (b) PON wishes to raise a Dispute with a User,

that party must do so within 3 months 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, including, where the Dispute relates to a service provided by PON to the User, the precise details of the service in question;
- (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 User accepts that no Dispute may be raised by a 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;

- (d) the parties designate the laws applicable in the State of New South Wales as applicable to the substance of the Dispute.

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) 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;
- (b) 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;
- (c) the economic value to PON of any additional investment that the User or PON has agreed to undertake;
- (d) the interests of all persons holding contracts for use of any relevant port facility;
- (e) firm and binding contractual obligations of PON or other persons (or both) already using any relevant port facility;
- (f) the operational and technical requirements necessary for the safe and reliable provision of the service;
- (g) the economically efficient operation of any relevant port facility;
- (h) the benefit to the public from having competitive markets;
- (i) that prices should allow multi-part pricing and price discrimination when it aids efficiency;
- (j) 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

- (k) 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 a 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 any entity comprising the 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 User is seeking to enforce unpaid debts;
- (c) PON or the User is seeking urgent interlocutory relief; or
- (d) the relevant Dispute relates to a material failure by PON or the 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 User.

6. DEFINITIONS

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

ACICA means the Australian Centre for International Commercial Arbitration.

Coal vessel has the meaning given in the Schedule of Service Charges.

Contract means the agreement defined at the webpage entitled "Vessel Open Access Terms" which binds the User and PON with respect to the relevant Vessel's entry to and use of the Port.

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

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

Dispute means any dispute, controversy or claim arising out of, relating to or in connection with the Contract, including any question regarding its existence, validity or termination.

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 Coal vessels, where the amount of the Navigation Service Charge per gross tonne published in the Schedule of Service Charges for Coal vessels does not exceed \$1.04 (exclusive of GST) per vessel gross tonne in 2020, and each subsequent annual CPI increase in the



amount of the Navigation Service Charge for Coal vessels each calendar year for a 10 year period from 1 January 2020; and

- (b) the amount of the Wharfage Charge, where the amount of the Wharfage Charge for each of East Basin 1 and 2, Dyke 4 and 5, Kooragang 4-10, BHP 6 and Mayfield 7 published in the Schedule of Service Charges does not exceed \$0.0.0802 (exclusive of GST) per revenue tonne in 2020, and each subsequent annual CPI increase in the amount of that Wharfage Charge each calendar year for a 10 year period from 1 January 2020.

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 situated will revert to the lessor for nil consideration.

Navigation Service Charge has the meaning given in the Schedule of Service Charges.

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

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

- (c) the amount of the Navigation Service Charge published in the Schedule of Service Charges; and
- (d) the amount of the Wharfage Charge published in the Schedule of Service Charges.

PON means the Port of Newcastle Operations Pty Limited (ACN 165 332 990) as trustee for the Port of Newcastle Unit Trust, being the operator of the Port of Newcastle.

Port has the meaning given to the term "Port of Newcastle" under the PAMA.



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.

Schedule of Service Charges means the schedule of charges published by PON on its website for services supplied at the Port to Users from time to time.

User means a Vessel Operator. Where a person asserts that they act on behalf of the Vessel Operator for the purposes of the DR Process, such person must furnish to PON written authority from the Vessel Operator to do so in a form satisfactory to PON in its absolute discretion.

Wharfage Charge has the meaning given in the Schedule of Service Charges.

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

GS-2

This is the Annexure marked "GS-2" referred to in the affidavit of Gabriella Sainsbury affirmed at Newcastle in New South Wales on 15 March 2021.

Before me:



.....

Witness

VESSEL AGENT PRO FORMA LONG TERM PRICING DEED

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

[date]

[Name]

[Position]

[Vessel Agent name]

[Address]

Dear [name]

Long term pricing arrangements: navigation service charge for Covered Vessels

This document (executed as a deed) sets out the navigation service charge agreed between PON and [Vessel Agent name] which will apply during the Initial Term with respect to coal loaded onto Covered Vessels at the Port.

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

Please confirm [Vessel Agent name]'s 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, coal loaded onto Covered Vessels or otherwise, other than the navigation service 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

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

Full name of witness

Full name of attorney

Signature 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 witness

Full name of attorney

Executed by [name and ABN of Vessel Agent] 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

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Annexure

Item	Matter	Provision
1.	Parties	<p>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).</p> <p>The entity named in Paragraph 1 of Schedule 1 (Vessel Agent).</p>
2.	Initial Term	<p>The Covered Vessel NSC will commence with effect from the Commencement Date and continue for 10 years (unless terminated earlier under Item 16) (Initial Term).</p>
3.	Extension of Initial Term	<p>Not later than 36 months prior to the expiry of the Initial Term, PON or the Vessel Agent 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).</p> <p>Following the issue of an Extension Notice, PON and the Vessel Agent 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).</p>
4.	Covered Vessel NSC	<p>Schedule 2 sets out the Covered Vessel NSC agreed by PON and the Vessel Agent to apply during the Initial Term for Covered Vessels.</p> <p>For the avoidance of doubt, the Covered Vessel NSC is 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 are in substitution (only) for the PAMA NSC which would otherwise be payable in respect of the Covered Vessel and coal loaded onto the Covered Vessel under PON's published standard fees and charges for Port services.</p>
5.	Non-discriminatory pricing	<p>PON represents that:</p> <p>(a) the terms of Item 4 and Item 7 do not adversely discriminate against the Vessel Agent by comparison with the Covered Vessel NSC applicable to like circumstances to other Vessel Agents who have entered into materially similar deeds including as to the period of the Initial Term;</p> <p>(b) PON will not:</p> <p>(i) enter into bilateral arrangements with any other vessel aAgents concerning the Covered Vessel NSC to apply over the Initial Term, or</p> <p>(ii) give effect to any variations made to such charges under Item 7,</p> <p>which are materially dissimilar to the relevant provisions of, or different to any such variations under, this deed.</p>

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Item	Matter	Provision
6.	Provision of information to PON	<p>The Vessel Agent must promptly provide to PON such information as PON may reasonably require from time to time to:</p> <p>(a) verify that a vessel is a Covered Vessel for the purposes of receiving the benefit of the Covered Vessel NSC; and</p> <p>(b) properly administer this deed.</p> <p>If the Vessel Agent fails to provide such information to PON within 24 hours of the request by PON, PON may, if it is not reasonably satisfied that the vessel is a Covered Vessel, decline to apply the Covered Vessel NSC 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 Agent in accordance with the Published Vessel Standard Terms and Conditions.</p>
7.	Variations to Covered Vessel NSC	<p>The Covered Vessel NSC for Covered Vessels 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>The Covered Vessel NSC 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 NSC (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 Covered Vessel NSC in addition to the basis set out in Item 7(a) where each of the following requirements is met:</p> <p>(i) where any such increase is Material; and</p>

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Item	Matter	Provision
		<p>(ii) the increased Covered Vessel NSC is consistent with the Pricing Principles.</p> <p>(c) Capex transparency</p> <p>(i) Without affecting PON's rights under Item 7(b), in order to provide the Vessel Agent with visibility of and the opportunity to comment on any prospective increases in the Covered Vessel NSC on account of capital expenditure proposed to be incurred by PON, not later than 31 March 2020 PON will prepare and provide to the Vessel Agent 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 Covered Vessel NSC and meet with the Vessel Agent to discuss those forecasts and any potential associated variations to the Covered Vessel NSC. 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 Vessel Agent 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 Vessel Agent on its 5 Year CAPEX Forecasts or any proposed increase to the Covered Vessel NSC.</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.	Notice of proposed variations to Covered Vessel NSC	<p>PON must provide the Vessel Agent with written notice of any proposed variations to the Covered Vessel NSC 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 Covered Vessel NSC 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 Covered Vessel NSC meet the requirements of Item 7 and are consistent with the Pricing Principles.</p> <p>If the Vessel Agent objects to any Notified Price Change, the Vessel Agent 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</p>

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Item	Matter	Provision
		necessary to take account of the resolution of any dispute notified by the Vessel Agent in any Price Variation Objection Notice).
9.	Disputes in regard to Price Variation Objection Notice and other Disputes	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. The Dispute Resolution Process will also apply in respect of all other Disputes.
10.	Consultation in relation to efficiency improvements and other matters	PON and the Vessel Agent will meet at least twice in each Contract Year (or at such other frequency as PON and the Vessel Agent may agree from time to time) to consult on the following matters: (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): (i) PON's capital expenditure; (ii) any proposed variation to PON's fees and charges; (iii) PON's costs of operations; (iv) the Vessel Agent's future needs, including the Vessel Agent's estimates of coal to be shipped from the Port on Covered Vessels in the next 6 month period; (v) the application of these special pricing arrangements; and (vi) any other matters agreed between PON and the Vessel Agent (each acting reasonably); and (c) respective market insights of the parties, including volume forecasts and shipment destinations.
11.	GST	Unless expressly stated otherwise, all amounts specified in this deed are exclusive of GST and any GST payable must be paid in accordance with the Published Vessel Standard Terms and Conditions. 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.
12.	Assignment	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.
13.	Vessel Agent acting as agent	The Vessel Agent represents and warrants to PON that it will be acting as the agent for the Vessel Operator of the relevant Covered Vessel in respect of that Covered Vessel's visit to the Port (Principal) and, has disclosed to, and will have the power and authority to bind, the Principal to the terms of this deed in respect of that Covered Vessel's visit to the Port.

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Item	Matter	Provision
14.	Published Vessel Standard Terms and Conditions	For the avoidance of any doubt, the Published Vessel Standard Terms and Conditions apply to Covered Vessels and the Vessel Agent, 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.
15.	Section 67 PAMA agreement	This deed is an agreement for the purposes of section 67(1) of the PAMA.
16.	Termination	<p>Termination by PON</p> <p>If the Vessel Agent 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 Vessel Agent, PON may terminate this deed by written notice to the Vessel Agent.</p> <p>If any Covered Vessel NSC charged by PON in respect of a Covered Vessel is due and payable and is not paid to PON in full within 7 days of PON issuing written notice to pay the overdue amount, PON will not be required to continue to afford that Covered Vessel the benefit of the Covered Vessel NSC unless and until such time as the outstanding amounts have been paid.</p> <p>Termination by the Vessel Agent</p> <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 Vessel Agent provides notice of the breach to PON, the Vessel Agent may terminate this deed by written notice to PON.</p>
17.	Trustee limitations	<p>PON is the trustee for the Port of Newcastle Unit Trust (in this Item 17, 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 17, 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> <ul style="list-style-type: none"> (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; (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 (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.

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Item	Matter	Provision
		<p>(c) The limitations of Liability and restrictions in this Item 17 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 17 applies despite any other provision of this deed.</p> <p>(e) In this Item 17:</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>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>
18.	Variation	This deed may only be varied by a document signed by or on behalf of PON and the Vessel Agent.
19.	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 19(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> <p>(i) to a professional adviser, financial adviser, banker, financier or auditor if that other person is obliged to keep the information confidential;</p> <p>(ii) to comply with any applicable law, or any requirement of any regulatory body (including any relevant stock exchange);</p> <p>(iii) to any of its employees on a confidential basis to whom it is necessary to disclose the information;</p> <p>(iv) to obtain the consent of any third party to any term of, or to any act pursuant to, this deed;</p> <p>(v) to enforce its rights or to defend any claim or action under this deed;</p> <p>(vi) to a related body corporate on a confidential basis;</p>

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Item	Matter	Provision
		(vii) to a Principal or any person the Vessel Agent is seeking to act for as a vessel agent in respect of a coal vessel's visit to the Port; or (viii) if the information has come into the public domain through no fault of that party.
20.	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.	Vessel Agent	[insert name and ABN of Vessel Agent]
2.	Commencement Date	1 January 2020

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Schedule 2 - Covered Vessel NSC

\$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.

Illustrative example

By way of illustration only, and without limiting Item 7 of this deed, the following is an example of the adjusted navigation service charge (exclusive of GST) 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

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

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 Vessel Agent accepts that no Dispute may be raised by the Vessel Agent 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 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 the Covered Vessel NSC 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, 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 Vessel Agent (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 Vessel Agent, 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 Vessel Agent, 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 Vessel Agent is seeking to enforce unpaid debts;
- (c) PON or the Vessel Agent is seeking urgent interlocutory relief; or
- (d) the relevant Dispute relates to a material failure by PON or the Vessel Agent 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 Vessel Agent.

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 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

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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.

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 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; or
- (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 situated will revert to the lessor for nil consideration.

Permitted Price Dispute means a Dispute which is not an Excluded Dispute and relates to the amount of the navigation service charge for 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 situated.

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Schedule 4 - Defined Terms

Annual Adjustment	each annual price adjustment of the Covered Vessel NSC 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 coal at the Port in respect of which the Vessel Agent is named as the vessel's inward agent in the vessel berthing application lodged with PON in respect of that vessel's visit to the Port.
Covered Vessel NSC	The navigation service charge set out in Schedule 2, as varied pursuant to Item 7.
Dispute	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 Covered Vessel NSC of more than 5%.
PAMA Act	<i>Ports and Maritime Administration Act 1995</i> (NSW).
PAMA NSC	a navigation service charge imposed by PON for standard vessel movements under Division 2 of Part 5 of the PAMA Act.
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.
Principal	has the meaning given in Item 13.
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.
Vessel Operator	the owner or charterer of the relevant Covered Vessel.

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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.
