

## 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 granted by Port of Newcastle Lessor Ministerial Holding Corporation 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.