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Port of Newcastle Operations Pty Ltd

Application for revocation of declaration

Further submission in response to letter from the NCC dated 4 September 2018

17 September 2018

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On 2 July 2018, PNO provided a submission to the NCC that the NCC should recommend under s 44J of the CCA that the designated Minister revoke the declaration of the Service. Capitalised terms in this submission have the same meaning as in PNO's 2 July 2018 submission, unless otherwise indicated.

On 4 September 2018, PNO received a request from the NCC for additional submissions, documents and information in relation to certain matters.

This submission and accompanying annexures set out PNO's response in relation to these matters.

1 Investment incentives in new coal mining projects in the Port's catchment area with and without declaration

PNO submits that declaration, and specifically increased access to the Service on reasonable terms and conditions as a result of declaration, will not have any material impact on investment incentives in new coal mining projects in the Port's catchment area.

PNO annexes expert reports on this issue from HoustonKemp, and Cecilie Næss of ResourcefulNæss Consulting.

In summary:

- As set out in the HoustonKemp report, there will be "*no discernible difference in the investment incentives in new coal mining projects, with and without declaration*" of the Service because the expected return from mining investments, and the risk of investing in coal mines, will not be discernibly different with and without declaration. In particular, Port charges are a very small part of the cost of supplying coal, so any reduction in charges is unlikely to have a discernible effect on expected investment returns and any increase in the level of certainty over such charges is similarly confined. Further, due to the risks to the returns from investing in coal mines being subject to vastly greater sources of uncertainty (such as coal prices), there being no basis to assume that access terms will be more favourable for users with declaration compared to without declaration, and as PNO is not able to set terms and conditions of access that discriminate between mines, the "hold up" problem described in the ACCC's submission to the NCC will not arise.
- As set out in the Næss report, Port charges are an immaterial cost of operating or developing a coal mine and are not a determinant of investment decisions to open or expand coal mines. Port charges are a very small proportion of the overall cost of coal exports, estimated at less than 1% of the total FOB cost for a typical tonne of coal produced in the Hunter Valley. Port charges are not part of the decision-making process for new coal mines or investment in new coal mining projects. Other market forces (such as coal price, exchange rate, labour rates, fuel prices, government regulations and polices) are much more significant and more likely to impact on investment incentives.

The conclusions in the HoustonKemp and Næss reports are supported by coal producers' own statements. For example, PNO notes the recent comments by the chief executive of

Yancoal quoted in the Australian Financial Review on 10 September 2018.[1] Those comments make clear that investment and market conditions in the Port catchment area are strong:

> "*the [increased] premium [paid for top quality coal] is fundamentally driven by two things: it is the hunger for good quality coal because of restrictions in the countries that burn them, and the lack of new mines being built in Australia because of the way this country has become from a mine approval point of view.*
>
> *…*
>
> *What we have done here in Yancoal, we have created a business that is now bulletproof. If you look at the current cost curve of our business, where 80 per cent of our production comes from three large open cut mines, no matter what happens we will always make a profit. We have created a tier one coal producer which will withstand whatever the market throws at it.*"

It is apparent from these statements that whether or not the Service is declared will have no impact on investment in mining projects, or the competitive position of miners operating in the Port's catchment area, which is demand-driven. These comments also show that the major limiting factor impacting on investment in new coal mining projects is the mine approval process. Port charges (and whether or not the Service is declared) are not material to these decisions.

2 The effect of declaration on competition in the acquisition and disposal of exploration and/or mining authorities

PNO submits that declaration, and specifically increased access to the Service on reasonable terms and conditions as a result of declaration, will not have any material impact on competition in the acquisition and disposal of exploration and/or mining authorities.

Competition in the acquisition and disposal of exploration and/or mining authorities is related to incentives to invest in coal mining projects (discussed above).

As set out in the annexed Næss report, declaration will have no discernible impact on competition in the acquisition and disposal of exploration and/or mining authorities because Port charges are not material to decisions to acquire and dispose of exploration and/or mining authorities.

A further report from HoustonKemp in relation to this issue is also annexed. In summary, declaration will not promote a material increase in competition for the acquisition and disposal of exploration and/or mining authorities because declaration is not likely to materially affect incentives to invest in and engage in coal mining and related activities in the Hunter Valley (as discussed above), and because the geographic dimension of the market is not limited to the Hunter Valley. This is also consistent with the NCC's view about the geographic dimension of the market when considering the declaration application. In these circumstances, declaration will not have any material effect on competition in the acquisition and disposal of exploration and/or mining authorities.

[1] Available here: https://www.afr.com/business/mining/record-premiums-for-quality-thermal-coal-lifts-yal-20180907-h152cn

3 Whether declaration of the Service would promote the public interest

PNO seeks revocation on the basis that the competition criterion set out in s 44CA(1)(a) and the public interest criterion contained in s 44CA(1)(d) are not satisfied. As submitted by PNO in its application for revocation, the criteria under which the Service was declared included the now repealed public interest test contained in s 44H(4)(f), namely: that access (or increased access) to the service would not be contrary to the public interest. This provision did not require the Minister to be positively satisfied that access (or increased) access would be in the public interest, only that it was not contrary to the public interest.

As a result of the legislative amendments to Part IIIA, including the enactment of s 44CA(1)(d), it is clear that the Minister must now be positively satisfied that access (or increased access) to the Service, on reasonable terms and conditions, as a result of the declaration of the Service, would promote the public interest. It is now incumbent on the Minister to positively identify the respect or respects in which access (or increased access), on reasonable terms and conditions, as a result of the declaration of the Service, would promote the public interest and it is no longer sufficient to be satisfied only that declaration would not be contrary to the public interest. Similarly, to recommend declaration, the NCC must be so satisfied on the basis of the evidence available to it, and unless this test is satisfied the declaration must be revoked.

The interpretation that the NCC should give to the current public interest test as compared to the now repealed s 44(h)(4)(f) was the subject of submissions from PNO in its revocation application. PNO does not propose to repeat these submissions but addresses the matters raised by persons who have made submissions to the NCC in relation to the public interest criterion.

To date, nine parties (plus PNO) have made submissions to the NCC in relation to the revocation application. Of these, only Glencore Coal Pty Ltd (**Glencore**), Yancoal Australia Ltd (**Yancoal**) and Newcastle Coal Infrastructure Group (**NCIG**) made submissions that the NCC should not be satisfied of the public interest criterion. Glencore and Yancoal are joint venturers in relation to certain coal mining operations and Yancoal is one of NCIG's shareholders. NCIG's and Yancoal's submissions in relation to the public interest criterion are virtually identical. These submissions are not representative of the public but largely reflect the private business interests of a small group and category of stakeholders. PNO notes for completeness that Ports Australia has made submissions that the public interest criterion is not satisfied.

PNO submits that there is an insufficient basis for the NCC (and the Minister) to be satisfied that access (or increased access), on reasonable terms and conditions, as a result of the declaration of the Service, would promote the public interest and that the relatively low level of interest from the public to the revocation application supports this view.

The NCC can infer from the number of submissions received that the general level of public interest in the maintenance of the declaration is low. There are many users of the Service, and many participants in dependent markets, and only a small number of persons, most of whom have corporate or other commercial relationships to each other, made submissions to the NCC and no one other than Glencore has sought to utilise the declaration to date. This is unsurprising because the declaration of the Service has no measurable impact on the efficiency, competitiveness, or even the profitability of these users and market participants, nor on competition in any of the dependent markets.

Similarly, the State and other agencies that might ordinarily be regarded as having an interest in safeguarding and promoting the public interest have not elected to make any submissions to the NCC. PNO also notes the ACCC did not address the public interest criterion, confining itself to criterion (a). The fact that submissions were not made by persons other than PNO and Ports Australia arguing that the public interest would not be promoted by the declaration is not relevant because criterion (d) requires positive satisfaction of the public interest requirement.

3.1 Glencore's submissions on public interest

Glencore and its economic consultant, Synergies, have made submissions on the public interest test. The relevant heading in Glencore's submission states that "Revocation would be contrary to the public interest" and Glencore's opening statement in relation to the public interest test is that "*it is clearly contrary to the public interest, in this particular instance, that revocation would occur…*" (paragraph 145 of the Glencore submission).

This plainly misstates the test. The current test under s 44ZZCA(1)(d), is that access (or increased access) to the service, on reasonable terms and conditions, as a result of the declaration of the service would *promote* the public interest. This is a positive test that requires demonstration that the public interest would be promoted rather than declaration not being contrary to the public interest or revocation being contrary to the public interest. The NCC (and the designated Minister) must apply the current test which is qualitatively different, and PNO submits more stringent, than the old test. Glencore's final sentence of its submission is also nonsensical in that it states "*the NCC cannot be satisfied that criterion (d) is not satisfied*" and does not recognise that the NCC (and the designated Minister) is required to be positively satisfied of criterion (d).

Glencore's submissions that follow therefore proceed on an incorrect premise that the NCC should not revoke the declaration on the basis that to do so would be contrary to the public interest whereas as stated above, the NCC needs to be satisfied that access (or increased access) to the Service, on reasonable terms and conditions, as a result of the declaration of the Service would promote the public interest. Glencore also makes submissions about the absence of detriments. This is only relevant to the balancing exercise required to assess overall gain but does not obviate the need to demonstrate how the declaration of the Service would actually promote the public interest.

To the extent Glencore and Synergies actually make submissions as to why the declaration of the Service would promote the public interest, they fall in to two categories: first, those concerning asserted direct benefits that Glencore says would flow from the continuance of the declaration; and second, those concerning asserted consequential benefits resulting from the direct benefits, although the submissions conflate rather than separate these two categories.

The direct benefits Glencore claims would flow from the continued declaration of the Service are:

- that declaration would enhance efficiency of Australian-based coal producers and improve competition in dependent markets; and
- that declaration would provide incentives and price certainty allowing coal producers to invest in dependent markets.

The consequential benefits Glencore claims would flow from these benefits are:

- the economic benefits of increased investment in mining, including growth in the NSW and Australian economies; and

- an increase in tax and royalties paid to government resulting from increased activity in dependent markets.

Any alleged public benefits flowing from improved competition properly fall for consideration in criterion (a), not criterion (d) (as set out in PNO's previous submission), and have been addressed in substantive detail by PNO in its submissions concerning criterion (a). Incentives to invest in coal mining projects is also discussed above and in the annexed expert reports. PNO's position is that the declaration of the Service would not satisfy the competition test in criterion (a) and PNO submits that nothing that has been submitted by any of the parties in response to the revocation application casts any doubt on PNO's analysis of criterion (a). Accordingly, any claimed public benefits said to arise from improved competition in dependent markets cannot satisfy criterion (d).

As the broader public benefits asserted to arise from increased efficiency and competition, such as increased investment in mining and growth in the economy, necessarily rely upon satisfaction of the competition criterion, PNO submits that there is no basis to conclude the public interest would be promoted by declaration of the Service.

3.1.1 Responses to specific matters raised by Synergies

Synergies contends (at p 71) that the declaration provides "*an effective restraint on PNO increasing its prices to capture monopoly rents and promotes the efficient use of infrastructure and improved conditions for investment in exploration and development of coal reserves*".

Synergies has provided no evidence in support of this claim. Furthermore, Synergies has not answered or even traversed the fact that Port charges represent a *de minimis* cost input for those of the relevant market participants who may possibly bear these costs. Nor has Synergies demonstrated any relationship between coal export volumes and Port charges, nor explained why in the absence of declaration PNO would have any incentive to act in a way which would hamper the volume of coal shipments.

Synergies also argues that revocation will lead to a loss of investor confidence and poorer prospects for investment in coal exploration. There is no evidential basis for this assertion. As PNO has demonstrated and as has been accepted by previous Tribunals and Courts (and as set out in the annexed Næss report), Port charges play no discernible role in investment decisions in dependent markets.

Synergies also asserts there are public detriments associated with revocation and that these are additional to the public benefits associated with declaration. However, certain of these claimed detriments (for example, loss of price constraint and loss of efficiency independent markets) are merely negatively stated benefits. PNO's responses to these claimed detriments are covered above.

Synergies' submissions relating to other examples of revocations are not to the point. None of those matters are analogous to the situation here, where the declaration criteria itself has been amended in a way that makes it clear the Service would never have been declared under the new criteria (as recognised by the High Court, the new criteria "*effectively reverses the result of the Full Court in* Sydney Airport*"*[2]). Synergies' submission that revocation is not common is also misleading in that it does not acknowledge that declaration under Part IIIA is also not common, and there is no precedent for the current situation where the declaration criteria have been substantively amended while a declaration is in force. PNO also does not

[2] *Port of Newcastle Operations Pty Ltd v The Australian Competition Tribunal & Ors* [2018] HCATrans 55 (23 March 2018).

agree with Synergies' assertion that there are no other constraints on PNO's pricing absent declaration, as discussed in detail in PNO's previous submission.

The other claimed detriments are alleged losses incurred by businesses who have invested on the basis of the declaration being in place and alleged losses associated with negative precedent effects.

As to the asserted loss of value in investments, PNO notes that not a scintilla of evidence has been provided to support this claim. PNO notes that export coal prices have experienced very significant growth since June 2016 (when the Service was declared) and it is likely that this and other more relevant factors have influenced investment decisions in the coal sector rather than the declaration. PNO submits that there is simply no evidence to support this bald assertion. In any case, the public benefit in not chilling investment in infrastructure services outweighs any detriment associated with investment made on the basis of declaration, which any sophisticated investor would have understood was liable to be revoked (and until March 2018, may have been overturned by the courts).

As to Synergies' argument concerning negative precedent implications, PNO notes that this argument is premised on the claim that inefficient pricing behaviour will go unaddressed and that the mere act of revoking the declaration will provide PNO with the incentive and opportunity to set unreasonable terms and conditions. This premise is without foundation for the reasons set out in detail in PNO's revocation application, and as set out in the annexed HoustonKemp report.

Furthermore, this argument is without any legal merit or logic. The revocation is prompted by a clear change in the law which materially alters the declaration test in such a way which renders the current declaration legally unsustainable, a matter noted by the High Court (see above). There is no conceivable "negative precedent" that can arise is such circumstances. The "negative precedent" argument advanced by Synergies effectively asks the NCC to put a gloss on the clear statutory criteria that is not consistent with Parliament's intention in enacting and amending the declaration criteria under the guise of "public interest". This is not a permissible approach as a matter of statutory construction.

3.1.2 Responses to specific matters raised by Glencore

Glencore makes a number of unsubstantiated assertions to the effect that revocation would be contrary to the public interest and that declaration provides certain public benefits. As stated above, the relevant test is that access (or increased access), on reasonable terms and conditions, as a result of declaration would promote the public interest, not that revocation would be contrary to the public interest. These are not one and the same.

The principal public benefit that Glencore asserts is that users of the Service will face the prospect of substantially higher access prices and that this would impact on competition in the market for tenements and exploration and development incentives. As stated, this is a detriment rather than a benefit, but even if it is assumed that the absence of the detriment might be regarded as a benefit, no evidence to support this argument is provided and no answer to PNO's submissions on this topic and evidence led in support of them has been provided. Again, Glencore makes mere assertions.

Additionally, the public benefit is not to be equated with *private* benefits to be enjoyed by Glencore or even other coal miners resulting from better terms of access (to the extent this would actually result from declaration). Glencore's private benefits do not equate to public benefits and there is no basis for the NCC to conclude that better or more reasonable terms of access that might be enjoyed by Glencore as a result of the declaration would flow through to any other person, let alone to the public.

3.2 Responses to specific matters raised by Yancoal and NCIG

Yancoal and NCIG have made virtually identical submissions on the public interest criterion.

Their submissions in relation to the interpretation of criterion (d) are legally incoherent. The absence of the word "material"in criterion (d) is claimed to reflect a parliamentary intention to set a low threshold for establishing that access (or increased access) to the Service, on reasonable terms and conditions, as a result of the declaration of the Service, would promote the public interest. There is no basis for this submission. The word "promote" itself implies a level of improvement or enhancement and the NCC must be positively satified that that access (or increased access) to the Service, on reasonable terms and conditions, as a result of the declaration of the Service, would promote the public interest.

Even if the bar for this test is low, which PNO does not accept, it does not permit unsupported speculation or a mere hypothetical possibility with no evidential basis that the public interest would be promoted by the declaration. It is also clear, for example from the Harper Report (at p 32), that the onus under the new criterion (d) of demonstrating that access would promote the public interest is on those seeking access, rather than there being an onus on infrastructure owners and operators to demonstrate that access would be contrary to the public interest.

Yancoal and NCIG also criticise PNO's submission that the declaration may have a chilling effect on investment in infrastructure services. In support of this they rely upon statements made by one of PNO's shareholders, CMPort. On their face it is clear that these statements do not conflict with or even relate to PNO's argument concerning the chilling effect on investment. A chilling effect on investments would clearly arise where a service was declared in circumstances where the competition test was not satisfied, as in the present case, and where there is no evidence, but only an assertion from a subset of commercially interested stakeholders, that the public interest would be promoted. Any rational infrastructure owner, or potential investor in or developer of new infrastructure, would be extremely cautious in committing resources if there was a risk that heavy handed regulation arising from declaration could result in such circumstances. A chilling effect on investment does not require an absence of *any* investment, but rather is a reduction in the investment that would otherwise occur.

Yancoal and NCIG are not in any position to comment on whether declaration has in fact dampened investment, and their submissions on this issue are without foundation and should not be accepted. Moreover, the chilling effect on investment in infrastructure is broader than specific investments in the Port and relates to investment in infrastructure services generally, which Yancoal and NCIG have not addressed.

PNO notes that Yancoal and NCIG have made submissions about "uncertainty" and the alleged effect on investment in dependent markets in the context of criterion (d). PNO does not agree with these submissions but notes in any case they are relevant only to criterion (a) and not criterion (d). Yancoal's submission is also not consistent with its recent public statements cited in section 1 above. As set out in PNO's previous submission, matters addressed in criteria (a)-(c) cannot also be considered under criterion (d).

PNO does not agree with Yancoal and NCIG's submissions about administrative and compliance costs. Yancoal and NCIG's submission that PNO's compliance costs have been excessively incurred and that PNO's arguments about compliance costs create an incentive to maximise costs incurred are speculative and without foundation. It is well accepted that regulation necessarily results in increased administrative and compliance costs for the infrastructure operator that would not be incurred absent regulation. PNO notes Yancoal and NCIG appear to have focused on PNO's costs incurred at the declaration stage,

notwithstanding that PNO's previous submission focused on the ongoing compliance and administrative costs if declaration continues, not the costs of the declaration process itself. Yancoal and NCIG's submissions also fail to appreciate that the public interest criterion now requires that the public interest be demonstrably promoted, not merely that access (or increased access) not be contrary to the public interest.

PNO also does not agree with Yancoal's submission that the following factors indicate the costs of complying with the declaration are not as significant as asserted by PNO (at p 21):

> *(a) the nature of the channel service being a single common service for all users (like coal handling services) results in synergies and simplicity of price regulation which would be anticipated to reduce the costs incurred; and*
> *(b) once pricing structures are set by arbitration, PNO is able to realise efficiency savings in subsequent negotiations and arbitrations by adopting the previous determination and minimising the management time and legal and expert costs incurred throughout that process.*

NCIG also makes a similar submission at p 17. In relation to (a), PNO does not agree that price regulation at the Port is "simple". In any case, PNO does not understand the relevance of this point or on what basis Yancoal or NCIG consider the nature of the channel service has not been taken into account by PNO in its submissions about administrative and compliance costs.

In relation to (b), the submission is plainly incorrect because there is no basis to conclude that PNO can simply "adopt" a previous determination in a subsequent dispute with another user. Part IIIA arbitration is a bilateral dispute resolution mechanism not a general price setting regime. There is no reason to think that any two users are likely to have the same dispute with PNO, or that a user would necessarily wish to adopt the same terms as another user (e.g. a user may wish to negotiate a different payment structure). To conclude otherwise (as Yancoal have done) is to misunderstand the nature of Part IIIA arbitration.

The same arguments apply in relation to NCIG's submission, which is identical save that it refers to having "close regard" to a previous determination rather than "adopting" a previous determination. Synergies' submission that "*there is a high likelihood that PNO would be able to avoid future arbitrations*" by offering terms of access determined in one arbitration to other users is similarly without foundation and should not be accepted. Yancoal and NCIG's submission that users will incur additional costs in the absence of declaration which would be significantly greater than the efficient costs of administering and complying with the current declaration should also not be accepted. First, for the reasons set out in PNO's previous submissions, PNO does not accept that declaration will result in higher prices for users. Secondly, the comparison urged by Yancoal and NCIG is incoherent in that it confuses unrelated concepts and misunderstands the meaning of "public interest" and the test required to be applied under criterion (d).

Further, none of NCIG and Yancoal's submissions at section 7.4 should be accepted. The alleged "public benefits" identified do not arise from declaration. In relation to (a) and (b), there is no basis to suggest that it would somehow be necessary to duplicate the channel absent declaration or that declaration is otherwise necessary to ensure efficient use of infrastructure or ecologically sustainable development. In relation to (c), these are matters properly dealt with under criterion (a), not criterion (d), and in any case PNO submits that there is no evidence to suggest that declaration will in fact promote the investment identified by Yancoal and NCIG. Similarly, the matters asserted by Yancoal and NCIG in (d) are not supported by the facts. In any case, any increase in royalties for the State will be dwarfed by the benefits to the State of the declaration being revoked, including in

investment in infrastructure services not being chillled by the threat (and actuality) of heavy handed regulation and the State's ongoing interest in the value of the assets used to provide the Service and revenue generated through use of the Service.

4 The effect of a proposed new container terminal at the Port on PNO's incentives to provide access to the declared service with and without declaration, including the terms and conditions on which access is provided

PNO has developed a concept proposal for a container terminal development at its Mayfield site. However, the development of a container terminal is contingent on the removal of the existing restraint on competition for container trade between the ports in NSW (which is currently under investigation by the ACCC). PNO does not currently know if or when this restraint will be removed.

The 80Ha Mayfield site has the capacity for a potential 2 million twenty-foot equivalent units (**TEU**) per annum container terminal subject to further planning and development approvals. A terminal of that scale could be delivered over a number of stages. PNO has an existing development approval for a 350,000 twenty-foot equivalent units per annum container terminal. Port of Newcastle has the available channel capacity for a 2 million TEU container terminal and the Mayfield site is well connected to existing heavy rail network and heavy vehicle road network that provides ready access to the Port for cargoes coming to or from the north of the NSW, the inland and north west regions and areas to the south including Sydney and the Central Coast.

Any development of a container terminal in the Port (which at this time is hypothetical) will have no impact on access (or PNO's incentives to provide access) by current or other future users (including expanded use by existing users) of the shipping channel, including the terms and conditions on which access is provided.

With or without declaration, any operation of a container terminal in the Port will have no impact on PNO's incentives to provide access to the Service to all users and prospective users. The channel used to provide the Service has abundant available capacity for significant growth in vessels visits (including container vessels) and PNO will continue to have an incentive to maximise throughput and provide access to all users and respective users.

PNO's response to the specific matters at 4(a)-(i) of the NCC's letter are set out below.

General information about the container terminal proposal is also available on PNO's website[3], including PNO's submission in relation to the draft NSW Freight and Ports Plan, and Deloitte Access Economics' report "NSW Container and Port Policy – Port of Newcastle".

(a) An estimate of the date on which a container terminal might commence operation at the Port

It is not currently possible for PNO to estimate if and when a container terminal might commence operation at the Port because this is contingent on the removal of the existing restraint on competition for container trade between ports in NSW. PNO does not currently know if or when this will occur.

[3] https://www.portofnewcastle.com.au/Projects-and-Development/Newcastle-Container-Terminal.aspx

PNO estimates that Stage 1 operations at a container terminal on the Mayfield site could commence within 12-18 months of the removal of the existing restraint on competition.

(b) The nature and timing of projected investment in the container terminal

A summary of the nature and timing of projected investment in the first ten years of a container terminal development is set out in the following table:

Container Terminal - Capex Requirement ($m) Year 1 to 10

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Total
Berths	0.4	-	24.2	24.8	-	-	-	-	-	-	49.4
Quayline	1.1	-	72.0	73.8	-	-	-	-	-	-	146.9
Hardstand	25.4	-	-	-	-	-	-	51.9	54.1	-	131.4
Cranes and Operating Equipment	11.8	7.8	1.3	1.3	-	3.1	14.3	0.3	37.7	4.8	82.4
Total Capex	38.6	7.8	97.5	99.9	-	3.1	14.3	52.2	91.8	4.8	410.1

(c) Projected throughput (in terms of twenty-foot equivalent units [TEU] and vessels) at the terminal when it commences operation

PNO's current projected throughput in Year 1 of container terminal operation is 76,638 TEUs and 77 container vessel visits.

(d) Projected throughput (in terms of TEU and vessels) at the terminal by July 2031

It is not possible for PNO to project with any certainty likely throughput by July 2031 because, as set out above, development of a container terminal is contingent on removal of the existing restraint on competition for container trade between ports in NSW as well as a number of other variables relating to the development and operation of such a terminal.

If the container terminal was able to commence operations on 1 July 2020 (which is likely to be the earliest operations could commence should the restraint be removed) then PNO forecasts that projected throughput in the year ending 30 June 2031 (Year 11 of operations) would be 408,057 TEU, and 422 container vessel visits.

(e) Estimates of the projected throughput and revenue at the terminal as a percentage of total port throughput and revenue

Expressing container volumes as a proportion of throughput at a predominantly bulk port such as the Port of Newcastle is difficult as bulk ports measure throughput in tonnes of cargo and container ports measure in number of TEU. If, for the purpose of this exercise, we assume each container holds approximately 12.22 tonnes of cargo, which PNO

understands is a reasonable assumption, then in Year 1 of terminal operations (assuming operations commence on 1 July 2020) PNO estimates that containers would account for:

- approximately 0.5% of total trade throughput by mass;
- approximately 0.3% of vessel visits; and
- approximately 5.3% of PNO revenue.

Estimating proportion of container trade against total trade in 2031 involves forecasting both container volumes as well as non-containerised volumes. Both of these forecasts are highly speculative. Nevertheless, PNO's current estimate is that in Year 11 of terminal operations (being the year ending 30 June 2031 if terminal operations commence on 1 July 2020) containers would account for:

- approximately 2% of total trade throughput by mass;
- approximately 11.9% of vessel visits; and
- approximately 21.1% of PNO revenue.

(f) Information on the likely significance of charges for the declared service, including an estimate of the proportion of container prices and container service costs that port charges would comprise

Charges for the Service are expected to be an insignificant component of the cost of transporting containers.

Charges for the Service include the Navigation Service Charge levied on the vessel and a component of the Wharfage Charge (the smaller component of the Wharfage Charge relating to the berthing box adjacent to the wharf which is currently charged at the $0.0746 per tonne of cargo).

Charges for the Service would be $18.16 per TEU based on the following assumptions:

- the berthing box component of the Wharfage Charge of $0.0746 per tonne of cargo;
- the current Navigation Service Charge of $0.4881 per GT on a standard 30,000 GT container vessel;
- 12.22 tonnes of cargo in each TEU; and
- 856 TEU's are exchanged at the terminal on a standard 30,000 GT container vessel.

The total cost of importing or exporting one TEU container at the Port will be highly variable and will be impacted by a range of factors:

- landside origin or destination for the cargo, its mass, method of delivery and any specialised requirements for handling of the container; and

- seaside origin or destination, length of sea journey, shipping rates, number of containers in consignment, whether it is a direct service or requires transhipment, whether it is handled on a scheduled service or requires a specific service, its type of cargo and mass, what other cargoes are being collected or discharged on the port call and any specialised container requirements.

A simplified analysis of PNO's understanding of the cost of importing or exporting one TEU container is set out below. The reference to Port charges in this analysis is all Port charges (being the charges for the Service as well as the Site Occupation Charge and the larger proportion of the Wharfage Charge, which are not charges for the Service). Based on this analysis, total Port Charges are a small percentage of the total cost of importing or exporting one TEU container, and therefore Port charges referable only to the Service will be even less significant:

	Cost of importing one TEU at the Port	**Cost of exporting one TEU at the Port**
Container repositioning	100	100
Packing	500	500
Origin transport	250	500
Origin storage	100	100
Origin Terminal Handling Charges	150	150
Origin Port Charges	100	100
Seafreight	1,500	1,500
Bunker Adjustment Factor	150	150
Currency Adjustment Factors	50	50
Destination Port Charges	100	100
Destination Terminal Handling Charges	150	150
Destination storage	100	100
Destination transport	500	250
Unpacking	500	500
Container repositioning	100	100
Total cost or importing / exporting	**4,350**	**4,350**
Destination Port Charges as a %	***2.3%***	
Origin Port Charges as a %		***2.3%***

(g) The effect of the proposed new container terminal on the Port's capacity utilisation up to July 2031 and the effect that any consequent change in capacity utilisation will have on the terms and conditions of access to the declared service with and without declaration.

PNO assumes that the reference to "July 2013" in the NCC's letter at 4(g) was intended to be to "July 2031".

PNO (as well as its predecessor the State-owned Newcastle Port Corporation) has over many years worked with the Hunter Valley Coal Chain Co-Ordinator to model the capacity of the shipping channel at the Port. This modelling work has investigated a range of development options in the Port to understand what, if any, impacts such developments would have on the current and existing forecast use of the shipping channel. The Port currently has estimated channel capacity for approximately 328 million tonnes of cargo, 10,000 vessel movements or 5,000 vessel visits per annum.

In 2017, the Port handled 2,326 vessel visits.

Based on forecast growth of existing trade, which includes relatively aggressive forecast growth in coal trade, the Port is forecast to handle 3,228 vessel visit in 2031 excluding container ships.

If a container terminal is developed and commences operation on 1 July 2020, then PNO currently estimates that the Port would handle 438 container vessel visits in 2031.

Based on these forecasts, the Port will have ample channel capacity to handle vessels generated by the successful operation of a container terminal in the Port.

As these figures indicate, any change in capacity utilisation as a result of the successful development of a container terminal will be incremental. PNO submits that any such incremental increase in capacity utilisation at the Port, with or without declaration, will have no impact on other users' access to the Service, nor the terms and conditions of that access.

(h) The effect of the proposed new container terminal on prices and terms and conditions of access for non-containerised throughput

As identified in (g) above, the development and operation of a container terminal would have no effect on other users access to the Service, nor the terms and conditions of that access.

(i) Whether PNO (or any of its owners) is/are relevantly vertically integrated into any container market or expects to become relevantly vertically integrated by July 2031

PNO is not relevantly vertically integrated into any container market and does not expect to become relevantly vertically integrated by July 2031.

As set out in PNO's submission dated 2 July 2018:

1. PNO is an equally owned joint entity of China Merchants Port Holdings Company Limited (**CM Port**) and The Infrastructure Fund (**TIF**);
2. CM Port and TIF have equal governance rights in relation to PNO. Therefore, CM Port does not control PNO; and

3. CM Port is listed on the Hong Kong Stock Exchange with a 62% interest controlled by China Merchants Group Limited (**CMG**).

CMG is a large consolidated group with a number of discrete business units, one of which, Sinotrans & CSC Holdings Limited, has a controlling interest in Sinotrans Container Lines Co Ltd (**Sinotrans**). Sinotrans operates 56 container vessel routes from China to a number of international destinations predominantly in east and south-east Asia including three weekly routes calling at each of Port Melbourne, Port Botany and Port of Brisbane. PNO submits that this relationship is similar in nature to the relationship between CMG and CMS/Ming Wah Shipping Company (discussed in PNO's submission dated 2 July 2018) and that no vertical integration issues arise for the same reasons as set out in that submission and as accepted by all relevant decision makers during the declaration process.

TIF has no related entities involved in the container trade.

5 Containers imported and exported at the Port in 2017 and 2018

(a) The total number of containers imported and exported at the Port (itemised by container capacity)

Based on data provided by the Port Authority of NSW, the total number of containers imported and exported at the Port (itemised by container capacity) in 2017 and in the six months to June 2018 were:

	12 months to Dec 2017	6 months to Jun 2018
Import	5,538	3,021
Export	3,958	2,387

This includes both twenty and forty foot containers. The data provided by the Port Authority of NSW does not include a breakdown by container capacity for imported and exported containers.

(b) The total number of container ships that imported or exported containers at the Port, including the class of those ships and the average number of containers (in TEU) that they were laden with

There are no container vessels currently calling at the Port.

All containers that are currently handled in the Port are handled by multi-cargo vessels that handle cargo in a range of forms including dry bulk, break bulk and as general cargo. These vessels unload containers using their own on-board cranes. These vessels often load or discharge containers in addition to loading or discharging cargoes in other forms in the Port.

In 2017 and the six months to June 2018, the number of vessel visits involving containers were:

Year	Vessel type	Vessel group average TEU capacity	No of vessel visits (where TEU's exchanged)	Average number of TEU's exchanged
2017	General Cargo Vessel (0-700 TEU)	259	24	117
	General Cargo Geared Vessel 1300-2000 TEU Capacity	1,013	37	129
	General Cargo Geared Vessel 700-1300 TEU Capacity	1,657	10	192
	General Cargo Geared Vessel +2000 TEU Capacity	2,041	10	37
6 months to June 2018	General Cargo Geared Vessel (0-700 TEU)	308	10	206
	General Cargo Geared Vessel 1300-2000 TEU Capacity	998	22	114
	General Cargo Geared Vessel 700-1300 TEU Capacity	1,622	11	217
	General Cargo Geared Vessel +2000 TEU Capacity	2,047	4	76

(c) A breakdown of charges (itemised by charge type) imposed by PNO on container ships and the owners of container cargo

Containers currently handled in the Port are handled at berths that are either PNO-owned common user berths such as Mayfield 4 berth or West Basin 4 berth, or at PNO owned and leased berths at East Basin 1 and 2.

At PNO-owned common user berths the cargo is subject to a Wharfage Charge as well as the vessel paying a Site Occupation Charge and the Navigation Service Charge.

The following charges are imposed by PNO on vessels that enter the Port to load or discharge containers at a PNO common user berth:[4]

Charge	2018 rate (ex GST)	2017 rate (ex GST)
Navigation Service Charge (for non-coal vessels over 600 GT)	$0.4881 per GT for the first 50,000 GT plus $1.0983 per GT thereafter	$0.4721 per GT for the first 50,000 GT plus $1.0622 per GT thereafter

[4] See Schedule of Service Charges (Effective from 1 January 2018) available here: https://www.portofnewcastle.com.au/Resources/Documents/Port-of-Newcastle-Schedule-of-Port-Pricing-2018.pdf, and Schedule of Port Pricing (Effective from 1 January 2017) available here: https://www.portofnewcastle.com.au/Resources/Documents/Port-of-Newcastle-Schedule-of-Port-Pricing-2017.pdf

Port Security Charge (per visit for all vessels)	$527.48	$510.14
Site Occupation Charge (per hour)	$272.65	$263.69
Wharfage Charge (for containerised cargo in conventional containers or full-size frames)	Full Import - $59.50 per TEU Full Export - $59.50 per TEU Empty - $10.90 per TEU	Full - $57.55 per 20' container, $115.11 per 40' container Empty - $10.55 per 20' container, $21.09 per 40' container
Ship Utility Charge (per visit)	$204.23	$197.51

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

Of these charges, only the Navigation Service Charge and the berthing box component of the Wharfage Charge ($0.0746 per tonne of cargo) is attributable to the Service.

At the leased berths there is no Site Occupation Charge paid to PNO and other charges are levied by the operator of that berth (which are not charges for the declared service). The Navigation Service Charge (including the Port Security Charge), the Wharfage Charge and the Ship Utility Charge are as set out above.

(d) An estimate of the percentage that PNO's charges comprise of the total cost of importing or exporting one TEU container at the Port

In response to question 4(f) above, PNO provides its assessment of the percentage that PNO's charges will comprise of transporting one TEU container in the (currently hypothetical) situation of a dedicated container terminal in the Port.

As identified in the response to 4(f) above, the total cost of importing or exporting one TEU container at the Port is highly variable and will be impacted by a range of factors.

PNO expects that the container-specific charge, being the Wharfage Charge, would be a small proportion of the total supply chain charges for the handling of the container.

The vessel-specific charges (Navigation Service Charge, Site Occupation Charge and Ship Utility Charge) are charged to the vessel and therefore any purported assessment of any allocation of these charges to a single container is dependent upon the number of cargoes being loaded or

discharged on the port call, whether any other cargoes are being loaded or discharged on the call and other commercial considerations which PNO does not have visibility of including the commercial arrangements between the cargo owner, the shipping line and other participants in the supply chain.

(e) An estimate of the percentage that PNO's charges comprise of the total price paid by end consumers who have paid to import or export one TEU container at the Port

PNO submits that the total price paid by end consumers who have paid to import or export one TEU container at the Port should be the same as the total cost of importing or exporting one TEU container at the Port (discussed in 5(d) above) unless some of those costs are paid by the vendor of the product in the container. End consumers would also likely incur additional costs for landside logistics and related services. These are commercial arrangements over which PNO has no visibility.

PNO submits (as set out above) that Port charges are likely to be a small proportion of the total price paid by the end consumer to import or export one TEU container at the Port.

Annexures

- Annexure A: ResourcefulNæss Consulting, “Effect of Port Charges on Incentives to Invest in Coal” (September 2018)
- Annexure B: HoustonKemp Economists, “Effect of declaration on incentives to invest in coal mines” (14 September 2018)
- Annexure C: HoustonKemp Economists, “Effect of declaration on competition for coal authorities” (14 September 2018)