

# **Other material information**

**relating to the initial public offering of  
ordinary shares  
in Napier Port Holdings Limited**

Dated 15 July 2019

# Contents

The information contained in this document should be read in conjunction with the Product Disclosure Statement dated 15 July 2019 (**PDS**) relating to the initial public offering of ordinary shares in Napier Port Holdings Limited (**Napier Port Holdings**) and the other information presented on the Offer Register.

Capitalised terms used but not defined in this document (*Other material information supplement*) have the meaning given to them in the PDS.

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# 1. Other terms of the Offer

## 1.1 Minimum investment

Applications under:

- the Priority Offer must be for a minimum of \$1,000, and in increments of \$100 thereafter; and
- the Broker Firm Offer must be for a minimum of 2,500 Shares.

For more information, see the PDS and the relevant Application Form.

## 1.2 Minimum total amount to be raised

A minimum amount of \$169.6 million must be raised before the Offer Shares are issued. This represents the total amount of new capital to be raised by Napier Port to repay its debt facilities and provide it with cash and undrawn debt facilities sufficient to meet its future capital requirements (\$110.2 million), the amounts required to fund Offer costs (\$13.7 million) and the loans to Eligible Employees to purchase Shares under the Employee Share Loan and to acquire Shares for the purposes of the Executive LTI Plan (\$1.7 million), and the special dividend (\$44.0 million) already declared and payable to HBRIC (each as shown in the table in Section 3.1 (*Purpose of the Offer*) of the PDS). HBRIC will receive the balance of the proceeds of the Offer after all of these amounts are deducted.

## 1.3 Selling restrictions

The Offer is only being made to:

- (a) eligible persons under the Priority Offer;
- (b) New Zealand resident clients of selected NZX Firms who have received a firm allocation of Shares from that NZX Firm under the Broker Firm Offer; and
- (c) selected NZX Firms and Institutional Investors under the Institutional Offer.

Unless otherwise agreed with Napier Port, any person or entity subscribing for Offer Shares in the Offer will, by virtue of such subscription, be deemed to represent that he, she or it is not in a jurisdiction that does not permit the making of an offer or invitation of the kind contained in the PDS and is not acting for the account or benefit of a person within such a jurisdiction.

None of Napier Port, the Joint Lead Managers, nor any of their respective directors, officers, employees, consultants, agents, partners or advisers accepts any liability or responsibility to determine whether a person is able to participate in the Offer.

Neither the PDS nor the Offer Register documents constitute an offer of Offer Shares in any jurisdiction in which it would be unlawful. In particular, neither the PDS nor the Offer Register documents may be distributed to any person, and the Offer Shares may not be offered or sold, in any country outside New Zealand except to the extent permitted below.

### Australia

The PDS and the Offer Register documents and the offer of Offer Shares are only made available in Australia to persons to whom an offer of securities can be made without disclosure in accordance with applicable exemptions in sections 708(8) (sophisticated investors) or 708(11) (professional investors) of the Australian Corporations Act 2001 (the "Corporations Act"). The PDS and the Offer Register documents are not a prospectus, product disclosure statement or any other formal "disclosure document" for the purposes of Australian law and is not required to, and

does not, contain all the information which would be required in a "disclosure document" under Australian law. The PDS and the Offer Register documents have not been and will not be lodged or registered with the Australian Securities & Investments Commission or the Australian Securities Exchange and Napier Port is not subject to the continuous disclosure requirements that apply in Australia.

Prospective investors should not construe anything in the PDS or the Offer Register documents as legal, business or tax advice nor as financial product advice for the purposes of Chapter 7 of the Corporations Act. Investors in Australia should be aware that the offer of Offer Shares for resale in Australia within 12 months of their issue may, under section 707(3) of the Corporations Act, require disclosure to investors under Part 6D.2 if none of the exemptions in section 708 of the Corporations Act apply to the re-sale.

### **European Economic Area - Belgium, Germany, Luxembourg and Netherlands**

The PDS and the Offer Register documents have been prepared on the basis that all offers of Offer Shares will be made pursuant to an exemption under the Directive 2003/71/EC ("Prospectus Directive"), as amended and implemented in Member States of the European Economic Area (each, a "Relevant Member State"), from the requirement to publish a prospectus for offers of securities.

An offer to the public of Offer Shares has not been made, and may not be made, in a Relevant Member State except pursuant to one of the following exemptions under the Prospectus Directive as implemented in the Relevant Member State:

- to any legal entity that is authorized or regulated to operate in the financial markets or whose main business is to invest in financial instruments unless such entity has requested to be treated as a non-professional client in accordance with the EU Markets in Financial Instruments Directive (Directive 2014/65/EC, "MiFID II") and the MiFID II Delegated Regulation (EU) 2017/565;
- to any legal entity that satisfies two of the following three criteria: (i) balance sheet total of at least €20,000,000; (ii) annual net turnover of at least €40,000,000 and (iii) own funds of at least €2,000,000 (as shown on its last annual unconsolidated or consolidated financial statements) unless such entity has requested to be treated as a non-professional client in accordance with MiFID II and the MiFID II Delegated Regulation (EU) 2017/565;
- to any person or entity who has requested to be treated as a professional client in accordance with MiFID II; or
- to any person or entity who is recognised as an eligible counterparty in accordance with Article 30 of the MiFID II unless such entity has requested to be treated as a non-professional client in accordance with the MiFID II Delegated Regulation (EU) 2017/565.

### **France**

The PDS and the Offer Register documents are not being distributed in the context of a public offering of financial securities (*offre au public de titres financiers*) in France within the meaning of Article L.411-1 of the French Monetary and Financial Code (*Code monétaire et financier*) and Articles 211-1 *et seq.* of the General Regulation of the French *Autorité des marchés financiers* ("AMF"). The Offer Shares have not been offered or sold and will not be offered or sold, directly or indirectly, to the public in France.

The PDS and the Offer Register documents and any other offering material relating to the Offer Shares have not been, and will not be, submitted to the AMF for approval in France and, accordingly, may not be distributed (directly or indirectly) to the public in France. Such offers, sales and distributions have been and shall only be made in France to qualified investors (*investisseurs qualifiés*) acting for their own account, as defined in and in accordance with Articles L.411-2-II-2, D.411-1, L.533-16, L.533-20, D.533-11, D.533-13, D.744-1, D.754-1 and D.764-1 of the French Monetary and Financial Code and any implementing regulation.

Pursuant to Article 211-3 of the General Regulation of the AMF, investors in France are informed that the Offer Shares cannot be distributed (directly or indirectly) to the public by the investors otherwise than in accordance with Articles L.411-1, L.411-2, L.412-1 and L.621-8 to L.621-8-3 of the French Monetary and Financial Code.

### **Hong Kong**

WARNING: The PDS and the Offer Register documents have not been, and will not be, registered as a prospectus under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) of Hong Kong, nor has it been authorised by the Securities and Futures Commission in Hong Kong pursuant to the Securities and Futures Ordinance (Cap. 571) of the Laws of Hong Kong (the "SFO"). No action has been taken in Hong Kong to authorise or register the PDS or the Offer Register documents or to permit the distribution of the PDS, the Offer Register documents or any documents issued in connection with it. Accordingly, the Offer Shares have not been and will not be offered or sold in Hong Kong other than to "professional investors" (as defined in the SFO and any rules made under that ordinance).

No advertisement, invitation or document relating to the Offer Shares has been or will be issued, or has been or will be in the possession of any person for the purpose of issue, in Hong Kong or elsewhere that is directed at, or the contents of which are likely to be accessed or read by, the public of Hong Kong (except if permitted to do so under the securities laws of Hong Kong) other than with respect to Offer Shares that are or are intended to be disposed of only to persons outside Hong Kong or only to professional investors. No person allotted Offer Shares may sell, or offer to sell, such securities in circumstances that amount to an offer to the public in Hong Kong within six months following the date of issue of such securities.

The contents of the PDS and the Offer Register documents have not been reviewed by any Hong Kong regulatory authority. You are advised to exercise caution in relation to the offer. If you are in doubt about any contents of the PDS and the Offer Register documents, you should obtain independent professional advice.

### **Norway**

The PDS and the Offer Register documents have not been approved by, or registered with, any Norwegian securities regulator under the Norwegian Securities Trading Act of 29 June 2007. Accordingly, the PDS and the Offer Register documents shall not be deemed to constitute an offer to the public in Norway within the meaning of the Norwegian Securities Trading Act of 2007.

The Offer Shares may not be offered or sold, directly or indirectly, in Norway except to "professional clients" (as defined in Norwegian Securities Regulation of 29 June 2007 no. 876 and including non-professional clients having met the criteria for being deemed to be professional and for which an investment firm has waived the protection as non-professional in accordance with the procedures in this regulation).

### **Singapore**

The PDS, the Offer Register documents and any other materials relating to the Offer Shares have not been, and will not be, lodged or registered as a prospectus in Singapore with the Monetary Authority of Singapore. Accordingly, the PDS, the Offer Register documents and any other document or materials in connection with the offer or sale, or invitation for subscription or purchase, of Offer Shares, may not be issued, circulated or distributed, nor may the Offer Shares be offered or sold, or be made the subject of an invitation for subscription or purchase, whether directly or indirectly, to persons in Singapore except pursuant to and in accordance with exemptions in Subdivision (4) Division 1, Part XIII of the Securities and Futures Act, Chapter 289 of Singapore (the "SFA"), or as otherwise pursuant to, and in accordance with the conditions of any other applicable provisions of the SFA.

The PDS and the Offer Register documents have been given to you on the basis that you are (i) an existing holder of Shares, (ii) an "institutional investor" (as defined in the SFA) or (iii) an "accredited investor" (as defined in the SFA). In the event that you are not an investor falling

within any of the categories set out above, please return the PDS and the Offer Register documents immediately. You may not forward or circulate the PDS or the Offer Register documents to any other person in Singapore.

Any offer is not made to you with a view to the Offer Shares being subsequently offered for sale to any other party. There are on-sale restrictions in Singapore that may be applicable to investors who acquire Offer Shares. As such, investors are advised to acquaint themselves with the SFA provisions relating to resale restrictions in Singapore and comply accordingly.

### **Switzerland**

The Offer Shares may not be publicly offered in Switzerland and will not be listed on the SIX Swiss Exchange or any other stock exchange or regulated trading facility in Switzerland. None of the PDS, the Offer Register documents nor any other offering material relating to the Offer Shares (i) constitutes a prospectus or a similar notice as such terms are understood under art. 652a, art. 752 or art. 1156 of the Swiss Code of Obligations or a listing prospectus within the meaning of art. 27 *et seqq.* of the SIX Listing Rules or (ii) has been or will be filed with or approved by any Swiss regulatory authority. In particular, the PDS and the Offer Register documents will not be filed with, and the offer of Offer Shares will not be supervised by, the Swiss Financial Market Supervisory Authority (FINMA).

None of the PDS, the Offer Register documents nor any other offering material relating to the Offer Shares may be publicly distributed or otherwise made publicly available in Switzerland. The Offer Shares will only be offered to regulated financial intermediaries such as banks, securities dealers, insurance institutions and fund management companies as well as institutional investors with professional treasury operations. The PDS and the Offer Register documents are personal to the recipient and not for general circulation in Switzerland.

### **United Arab Emirates**

None of the PDS, the Offer Register documents nor the Offer Shares have been approved, disapproved or passed on in any way by the Central Bank of the United Arab Emirates, the Emirates Securities and Commodities Authority or any other governmental authority in the United Arab Emirates, nor has Napier Port received authorisation or licensing from the Central Bank of the United Arab Emirates, the Emirates Securities and Commodities Authority or any other governmental authority in the United Arab Emirates to market or sell the Offer Shares within the United Arab Emirates. No marketing of any financial products or services may be made from within the United Arab Emirates and no subscription to any financial products or services may be consummated within the United Arab Emirates. The PDS and the Offer Register documents do not constitute and may not be used for the purpose of an offer or invitation. No services relating to the Offer Shares, including the receipt of applications and/or the allotment or redemption of Offer Shares, may be rendered within the United Arab Emirates by Napier Port.

No offer or invitation to subscribe for Offer Shares is valid in, or permitted from any person in, the Dubai International Financial Centre.

### **United Kingdom**

None of the PDS, the Offer Register documents nor any other document relating to the offer has been delivered for approval to the Financial Conduct Authority in the United Kingdom and no prospectus (within the meaning of section 85 of the Financial Services and Markets Act 2000, as amended ("FSMA")) has been published or is intended to be published in respect of the Offer Shares.

The PDS and the Offer Register documents are issued on a confidential basis to "qualified investors" (within the meaning of section 86(7) of the FSMA) in the United Kingdom, and the Offer Shares may not be offered or sold in the United Kingdom by means of the PDS or the Offer Register documents, any accompanying letter or any other document, except in circumstances which do not require the publication of a prospectus pursuant to section 86(1) of the FSMA. The PDS and the Offer Register documents should not be distributed, published or reproduced, in

whole or in part, nor may its contents be disclosed by recipients to any other person in the United Kingdom.

Any invitation or inducement to engage in investment activity (within the meaning of section 21 of the FSMA) received in connection with the issue or sale of the Offer Shares has only been communicated or caused to be communicated and will only be communicated or caused to be communicated in the United Kingdom in circumstances in which section 21(1) of the FSMA does not apply to Napier Port.

In the United Kingdom, the PDS and the Offer Register documents are being distributed only to, and is directed at, persons (i) who have professional experience in matters relating to investments falling within Article 19(5) (investment professionals) of the Financial Services and Markets Act 2000 (Financial Promotions) Order 2005 ("FPO"), (ii) who fall within the categories of persons referred to in Article 49(2)(a) to (d) (high net worth companies, unincorporated associations, etc.) of the FPO or (iii) to whom it may otherwise be lawfully communicated (together "relevant persons"). The investments to which the PDS and the Offer Register documents relates are available only to, and any offer or agreement to purchase will be engaged in only with, relevant persons. Any person who is not a relevant person should not act or rely on the PDS and the Offer Register documents or any of their contents.

## 1.4 Key ownership restrictions

### ***Takeovers Code***

Once the Shares are quoted on the NZX Main Board (expected to occur on 20 August 2019), Napier Port Holdings will be a "Code Company" under the takeovers code set out as the schedule to the Takeovers Code Approval Order 2000 (New Zealand) (the **Takeovers Code**). The Takeovers Code prohibits, amongst other things, any person (together with their "associates" (as defined in the Takeovers Code)) from becoming the holder or controller of 20% or more of the voting rights in Napier Port Holdings, or becoming the holder or controller of an increased percentage of the voting rights in Napier Port Holdings if the person or that person's "associates" already holds or controls more than 20% of the voting rights in Napier Port Holdings, other than in compliance with the requirements of the Takeovers Code (for example, pursuant to a full or partial takeover or with shareholder approval by Ordinary Resolution).

The Takeovers Code defines "associates" broadly to include:

- persons acting jointly or in concert; or
- persons accustomed to act in accordance with another person's instructions; or
- related companies; or
- persons with a business relationship, personal relationship or an ownership relationship such that they should, in the circumstances be regarded as associates; or
- the first person is an associate of a third person who is an associate of the other person and the nature of the relationships between the first person, the third person and the other person (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the other person.

You should seek legal advice in relation to any act, omission or circumstance that may result in you breaching any provision of the Takeovers Code.

## **Overseas Investment Act 2005**

Any person who is (together with its "associates" (as defined in the Overseas Investment Act 2005) (the **Overseas Investment Act**)) an "overseas person" for the purposes of the Overseas Investment Act 2005 and who intends to acquire 25% or more of the Shares (or make any other acquisition regulated by that Act) will be required to obtain any necessary consent(s) under the Overseas Investment Act.

For the purposes of this 25% threshold, the rights or interests of the overseas person must be aggregated with the rights and interests of all "associates" of that overseas person. The Overseas Investment Act defines "associates" broadly to include a person that acts jointly or in concert with the overseas person in relation to an investment or other matter or who acts subject to or as a consequence of any arrangement or understanding with the overseas person.

The Group holds an interest in "sensitive land" for the purposes of the Overseas Investment Act as at the date of the PDS. Therefore, Napier Port Holdings intends to allocate Shares under the Offer to such number of investors who are not "overseas persons" that ensures it does not become an "overseas person" as a result of the Offer, which would otherwise require consent under the Overseas Investment Act.

Following Listing, any "overseas person" that acquires rights or interests in Shares may need to obtain consent under the Overseas Investment Act if such acquisition would result in 25% or more of the Shares becoming held or controlled by "overseas persons".

You should seek legal advice in relation to any act, omission or circumstance that may result in you breaching any provision of the Overseas Investment Act.

## **1.5 Summary of the Exemption granted by the FMA**

### ***Financial Markets Conduct (Napier Port Holdings Limited) Exemption Notice 2019***

Two exemptions are provided for under the Exemption. Those exemptions relate to:

- the presentation of financial information in the PDS; and
- an exemption from section 80(1) of the FMC Act in the event of certain new circumstances occurring.

#### **Financial information exemption**

This exemption permits Napier Port to include, in the selected financial information table in Section 7 of the PDS, historical financial information relating to Port of Napier for the required historical periods, without needing to disclose information only about Napier Port Holdings (which will acquire the Napier Port business pursuant to the Acquisition Agreement before settlement of the Offer) for the short period between the date of its incorporation and the date of the PDS. Such information for that short period is incorporated within the pro-forma financial information for FY2019F. The Board believes the presentation of historical financial information for Port of Napier provides more useful information for investors, making it more easily comparable with the prospective financial information for the Group for FY2019F and FY2020F.

This exemption is granted subject to various conditions which prescribe certain disclosures required in the PDS. Details of these conditions, along with a "statement of reasons" for the issue of the exemptions, are set out as part of the Exemption, a copy of which is on the Offer Register.

#### **Significant event exemption**

This exemption exempts Napier Port from section 80(1) of the FMC Act in certain specified circumstances. This exemption enables Napier Port to lodge a supplementary disclosure document



or replacement product disclosure statement, or to amend the Offer Register, if Napier Port becomes aware prior to commencement of the Bookbuild of a circumstance that:

- has arisen since the PDS or Offer Register was lodged that otherwise would have been required by the FMC Act or FMC Regulations to be disclosed in the PDS or Offer Register;
- is materially adverse from the point of view of an investor.

The conditions of this exemption require, amongst other things, that:

- Napier Port alerts the relevant Applicants to the publication of the supplementary disclosure document, replacement product disclosure statement or amendment to the Offer Register by publishing advertisements in newspapers, with additional information on the Offer website and in a notice to be released via NZX and provided to Applicants by their broker (in the case of Applicants applying through a broker), by Napier Port (in the case of Eligible Employees) and by email (in the case of Applicants who have applied online); and
- any Applicant whose Application is dated on or before the publication of the newspaper advertisements is given the right to withdraw their Application within seven working days after the newspaper advertisements and have their Application monies (excluding interest) refunded.

Due to the timing of the Bookbuild, the only Applicants that may be affected, and therefore would be required to be contacted by Napier Port, are Applicants under the Priority Offer.

A copy of the Exemption is included on the Offer Register in the document entitled "*Financial Markets Conduct (Napier Port Holdings Limited) Exemption Notice 2019*".

## 2. EY Consent

In accordance with section 60(1)(b) of the FMC Act, it is stated that Ernst & Young Transaction Advisory Services Limited has provided Napier Port Holdings with its written consent to the inclusion on the Offer Register of its Investigating Accountant's Independent Limited Assurance Report on Prospective Financial Information dated 15 July 2019 in the form and context in which such report appears on the Offer Register.

## 3. Material contracts

### 3.1. Summary of Acquisition Agreement

Under the terms of the Acquisition Agreement, Napier Port Holdings will acquire all of the shares in Port of Napier from HBRIC on the Business Day immediately preceding the date on which completion of the Offer occurs. Port of Napier will become wholly-owned by Napier Port Holdings pursuant to the Acquisition.

#### **Consideration – Shares and net proceeds**

The consideration for the Acquisition will be satisfied by:

- Napier Port Holdings issuing the Consideration Shares to HBRIC, which shall be 110,000,000 Shares, being that number of Shares (including the one Share in Napier Port Holdings issued to HBRIC on incorporation of Napier Port Holdings) required to ensure that HBRIC holds 55% of the total number of Shares on issue immediately following completion of the Offer; and
- Napier Port Holdings paying the net proceeds of the Offer to HBRIC (the **Net Proceeds**).

The Consideration Shares will be issued as fully paid Shares which rank equally in all respects with each existing Share and with a subscription price per share equal to the Final Price.

The Net Proceeds will be an amount equal to the net proceeds of the Offer after deducting Offer costs, the repayment of certain debt obligations and other specified uses.

HBRIC has agreed that the Net Proceeds will be reduced by an amount equal to the Offer costs, meaning that Napier Port can fund the payment of the Offer costs from the proceeds of the Offer.

### **Conditions**

Completion under the Acquisition Agreement is conditional on:

- the Final Price and the number of Consideration Shares having been approved in a manner consistent with certain resolutions passed at the meetings of the Council on 29 May 2019 and 26 June 2019; and
- Napier Port Holdings being satisfied, that immediately prior to completion under the Acquisition Agreement, it is able to issue the Offer Shares pursuant to the Offer and that Listing will occur.

### **Termination right**

The parties may not cancel or rescind the Acquisition Agreement other than where the conditions have not been satisfied by 9.00am on the business day prior to the date on which completion of the Offer (including by allotment of Shares under the Offer) occurs.

### **Warranties and liability**

Each of Napier Port Holdings and HBRIC give warranties to the other in respect of their capacity and authority to enter into the Acquisition Agreement. HBRIC gives a warranty regarding its title to the shares in Port of Napier.

The liability of each of Napier Port Holdings and HBRIC under the Acquisition Agreement is capped at the Purchase Price (as defined in the Acquisition Agreement) and each party is only liable for a breach of warranty if a claim is brought within 12 months after completion under the Acquisition Agreement. All warranties are given on the date of the Acquisition Agreement and are repeated at completion under the Acquisition Agreement.

## **3.2. Summary of Deed of Arrangement**

Napier Port Holdings has entered into a Deed of Arrangement with HBRIC (the **Deed of Arrangement**). Under the Deed of Arrangement HBRIC acknowledges that it has no present intention to sell or otherwise dispose of any of the 55% shareholding in Napier Port that it will hold upon completion of the Offer. Notwithstanding this, the Deed of Arrangement provides that, in the event that HBRIC, or any of its related parties, does wish to offer for sale (other than in the ordinary course of trading or pursuant to a full or partial takeover made under the Takeovers Code) some or all of the Shares held by HBRIC or its relevant related parties, HBRIC is able to request reasonable co-operation and assistance from Napier Port Holdings in connection with that offer.

HBRIC can request this assistance for so long as it holds not less than 20% of the Shares or otherwise controls Napier Port Holdings, provided that the Shares are quoted on the NZX Main Board and the exclusion set out in Schedule 1 to the FMC Act relating to offers of financial products of the same class as quoted financial products being available, and certain requirements in respect thereof being satisfied.

The assistance which can be requested includes Napier Port Holdings:

- issuing "cleansing notices" under the FMC Act and FMC Regulations (which Napier Port Holdings must notify HBRIC if it is not in a position to do so within the requested time period);
- providing information reasonably required by HBRIC and its advisers in connection with a sale of Shares;
- using reasonable endeavours to provide the reasonable support of, and access to, senior executives of the Group to facilitate, market and promote a sale of Shares;
- taking any other steps required under the FMC Act or FMC Regulations in connection with a sale of Shares; and
- doing all things reasonably requested by HBRIC, its advisers or a government agency to facilitate a sale of Shares.

A majority of the independent Directors have the right to defer any request by HBRIC for co-operation or assistance in accordance with the Deed of Arrangement if, at any time, the Group is involved in, or is in negotiations in relation to, a pending or proposed acquisition, merger, capital markets transaction or other transaction and an exception to Napier Port Holdings' continuous disclosure regime under the NZX Listing Rules applies in respect of that transaction so that, in accordance with applicable law, Napier Port Holdings is not required to disclose that transaction to NZX for public release.

A majority of independent Directors can exercise this deferral right, within a seven business day period after a request for co-operation and assistance by HBRIC if, acting in good faith and after taking financial and legal advice from external advisers, they resolve that not deferring would be materially prejudicial for the pending or proposed transaction or the negotiations relating thereto. The period of any deferral may not be for more than 60 business days after the date of the independent Directors' resolution (or, if shorter, the period ending when Napier Port Holdings ceases to hold material information) and may be exercised on one or more occasions provided that Napier Port Holdings is acting reasonably and in good faith, having regard to the interests of Napier Port Holdings and its shareholders as a whole.

HBRIC indemnifies Napier Port Holdings, each member of the Group and certain other persons against all liabilities they may incur as a result of their participation in a sale of Shares (other than in the case of negligence, fraud or wilful misconduct of or by any indemnified person).

### **3.3. Summary of Confidentiality Deed and Information Access Protocol**

Napier Port Holdings, HBRIC and the Council have entered into arrangements which provide that HBRIC and Council have the right to receive information relating to the Group:

- from or on behalf of the Group; or
- through Directors affiliated with HBRIC and/or the Council, provided that the information is not "material information" (as defined in the NZX Listing Rules),

subject to certain confidentiality, content and use restrictions, and in the case of the disclosure by the Directors affiliated with HBRIC and/or the Council, information access protocols. This will not impact Napier Port Holdings' continuous disclosure obligations.

There are also express restrictions on each of HBRIC and the Council trading if any information held by it pursuant to the Confidentiality Deed is "inside information" (as defined in section 234 of the FMC Act). HBRIC and the Council are responsible for procuring that their respective representatives also comply with the relevant restrictions.

Under the Confidentiality Deed, HBRIC and the Council agree to be responsible for compliance with the terms of the information access protocol and the Confidentiality Deed by their respective representatives (which includes directors, officers, employees or professional advisers of HBRIC, Council (including members of Council) and their related parties and who receive information in accordance with the Confidentiality Deed).

### 3.4. Summary of Letter Agreement and Construction Contract

Port of Napier has engaged HEB in connection with the 6 Wharf expansion project pursuant to the Letter Agreement, which is binding and specifically enforceable and entitles Port of Napier to require HEB to execute the Construction Contract within certain specified timeframes. The Letter Agreement and Construction Contract are summarised below.

#### Letter Agreement

The Letter Agreement provides for the initial engagement of HEB by Port of Napier. In addition, the Letter Agreement sets a baseline contract price that will apply under the Construction Contract. However the contract price is subject to change as the Letter Agreement:

- provides for the potential repricing of certain items required in connection with the construction works, being steel piles, fenders and bollards;
- requires HEB to obtain revised fuel pricing for the dredging works (and, if Port of Napier is dissatisfied with the revised pricing, entitles Port of Napier to elect to provide all fuel for the dredging works directly to HEB at a pre-agreed price set by the Letter Agreement);
- requires HEB and Port of Napier to jointly seek to obtain more favourable insurance terms than those currently provided for under the Construction Contract, including lower deductibles;
- requires HEB, in conjunction with lead design consultants Beca Group, to perform value engineering services with a view to identifying potential cost savings in relation to the carrying out and completion of the contract works. HEB and Port of Napier have agreed certain cost savings through this value engineering process. Those cost savings are reflected in the total estimated project cost of \$173 -190 million. Port of Napier will continue to consider opportunities for value engineering as the overall design details are finalised; and
- contemplates that the terms of, and costs associated with, the HEB parent company guarantee will be agreed between HEB and Port of Napier.

Under the Letter Agreement, Port of Napier is entitled to award the Construction Contract to HEB and to require HEB to execute the Construction Contract. Specifically:

- *prior to 30 September 2019:* Port of Napier has a specifically enforceable right to require HEB to enter into the Construction Contract, which will be based on HEB's baseline pricing proposal as set out in the Letter Agreement and on the terms of the agreed Construction Contract included in the Letter Agreement subject to such other terms as are agreed between Port of Napier and HEB, including any changes to the contract price, as a result of the matters described above having been completed and agreed;
- *from 30 September 2019 until 31 March 2020:* HEB must notify Port of Napier if HEB, or the key subcontractor responsible for the dredging works, wishes to tender for other works which may impact the 6 Wharf expansion project. Following receipt of any such notification, Port of Napier has 10 working days to award HEB the Construction Contract (and Port of Napier has a specifically enforceable right to require HEB to enter into the Construction Contract during that period), on the same basis as outlined above. If Port of Napier does not exercise this right, then:

- the contract price increases by approximately \$207,000 (plus Goods and Services Tax) per month;
  - the key subcontractor responsible for the dredging works may be removed by HEB, meaning that HEB would need to arrange for a new dredging subcontractor to undertake this work; and
  - Port of Napier otherwise retains its entitlement to award HEB, and has a specifically enforceable right to require HEB to enter into, the Construction Contract on the same basis as outlined immediately above; and
- *from 31 March 2020:* If the Construction Contract has not been entered into by 31 March 2020, HEB will be entitled to renegotiate the commercial terms of the Construction Contract and Port of Napier will no longer have a specifically enforceable right to require HEB to enter into the Construction Contract.

### **Construction Contract**

The Construction Contract is based on the New Zealand Standard Conditions of Contract for Building and Civil Engineering Construction NZS 3910:2003 amended and supplemented by agreed special conditions. Once the Construction Contract is executed, the contract price is fixed other than in respect of certain measure and value items and also subject to cost fluctuation for fuel pricing (unless Port of Napier elects to supply the fuel, as described above).

The Construction Contract is a "build only" construction contract meaning the design of 6 Wharf is principally undertaken by Port of Napier's design consultants, led by Beca Group, and HEB is required to carry out and complete the construction of 6 Wharf in accordance with that design. However, HEB does warrant under the Construction Contract that it is satisfied as to the buildability of the design.

The Construction Contract requires HEB to complete 6 Wharf in accordance with the design and "Good Industry Practice", so as to be free of defects and fit for the purpose intended, and so that practical completion is achieved by the due date for completion provided for under the Construction Contract.

The Construction Contract further records the importance of the Port operations remaining fully operational, and provides that a system is to be developed to minimise the impact that the construction will have on on-going shipping operations, as well as minimising any delays on the construction programme. If required, Port of Napier can prioritise shipping operations by temporarily suspending the construction works to mitigate interruption to the Business. In such circumstances, HEB is entitled to recover stand-down costs but must use best endeavours to mitigate such costs.

HEB's right to claim variations and extensions of time are subject to complying with limitations on timing which apply from when HEB becomes aware of the basis for the claim or event arising.

Following completion of the 6 Wharf construction, HEB will be subject to a 12 month defects liability period in respect of 6 Wharf, which may be extended to 18 months where any work elements requires replacement during the initial 12 month period. However, this defects liability period will not apply to the dredging works. HEB will also remain liable for any breach of warranty or other term of the Construction Contract in the usual course and subject to the ordinary limitations at law. In addition, certain subcontractors involved with the 6 Wharf construction are subject to separate warranties for materials and workmanship.

In the event that HEB defaults on its obligations under the Construction Contract, Port of Napier will have recourse to:

- a bond in lieu of retentions;

- a performance bond;
- liquidated damages, calculated on a daily basis for each calendar day past the due date for completion, up to a maximum amount of 10% of the contract price;
- a parent company guarantee (described below); and
- deeds of continuity with specified key subcontractors which enable Port of Napier to require those subcontractors to continue with their works where the Construction Contract is terminated or HEB suspends performance as a result of the relevant default.

HEB's liability under the Construction Contract is limited to 100% of the contract price (subject to certain, relatively typical, exceptions).

Port of Napier may also terminate the Construction Contract in a variety of default scenarios, including HEB's insolvency and on certification from the engineer that HEB has committed a material breach of the Construction Contract.

### **Parent Company Guarantee**

Vinci Construction International Network (**Vinci**) has agreed a form of parent company guarantee with Port of Napier, which is to be entered into within 10 days of entry into of the Construction Contract. This parent company guarantee is summarised below.

Once issued, Vinci guarantees to Port of Napier the payment of all indebtedness and the performance of all obligations of HEB to Port of Napier under the Construction Contract. Vinci will also indemnify Port of Napier for any losses incurred, directly or indirectly, by Port of Napier due to the failure of HEB to perform any of its obligations under the Construction Contract.

Port of Napier's rights against Vinci under the parent company guarantee and against HEB under the Construction Contract are separately enforceable. Port of Napier can require Vinci to perform any obligation for which HEB is responsible under the Construction Contract without first having taken any steps to require HEB to perform the relevant obligation.

Vinci is only discharged from its liability under the parent company guarantee when HEB has satisfied and performed in full all of its obligations, including warranties, under the Contract. Vinci's liability under the parent company guarantee can never be greater than HEB's liability under the Construction Contract.

## **3.5. Summary of Offer Management Agreement**

Napier Port Holdings and the Joint Lead Managers have entered into an offer management agreement (**Offer Management Agreement**) which sets out the terms and conditions under which the Joint Lead Managers will operate the bookbuild process for the Offer and also in relation to the provision of settlement support relating to the participation of Institutional Investors (including Brokers) in the Offer in certain circumstances as described below.

Under the Offer Management Agreement:

- the Joint Lead Managers accept the appointment to arrange and manage the Offer and provide settlement support in respect of the participation of Institutional Investors (including Brokers) in the Offer; and
- if an Institutional Investor (including any Broker) is allocated Shares and fails to settle on those Shares (**Shortfall Shares**), the Joint Lead Managers are required, in return for receipt of the Shortfall Shares, to pay for those Shares, except to the extent that the Joint Lead

Managers have provided written notice to the Company that they are not prepared to take credit risk on the relevant participant.

The Offer is not underwritten other than in respect of this settlement support. Settlement support is not provided in respect of the Priority Offer.

The Joint Lead Managers' obligations under the Offer Management Agreement are subject to certain conditions given for their benefit. If the conditions of the Offer Management Agreement are not satisfied (or waived, if capable of waiver), the Joint Lead Managers will not be required to perform their obligations under the Offer Management Agreement, including their settlement support obligations described above. That may not necessarily mean that Napier Port Holdings would withdraw the Offer or that the Offer would not proceed.

Either Joint Lead Manager may terminate its obligations under the Offer Management Agreement (including its settlement support obligations) in certain circumstances, including where on or before settlement of the Offer (which is expected to take place on 19 August 2019):

- the Priority Offer, Broker Firm Offer or Institutional Offer is withdrawn by Napier Port Holdings; or
- Napier Port Holdings is prevented from allotting Shares pursuant to the Offer by any applicable laws or as a result of an order or judgment of a Court or regulatory authority; or
- a statement in the PDS or the information included on the Offer Register is or becomes false or misleading or likely to mislead (including by omission) in any material respect, or any material information that is required to be contained in the PDS or the information registered on the Offer Register is omitted, or the PDS or the information included on the Offer Register otherwise fails to comply with laws applicable to the Offer; or
- the S&P/NZX 50 Index declines by a specified percentage over a prescribed time period; or
- an insolvency event occurs in relation to Napier Port Holdings or Port of Napier; or
- a material adverse change, or any event or development which is likely to give rise to a material adverse change, in Napier Port Holdings, Port of Napier or the Group occurs following the date of the Offer Management Agreement; or
- a representation or warranty contained in the Offer Management Agreement on the part of Napier Port Holdings is not, or has ceased to be, true or correct or there is a breach of the Offer Management Agreement by Napier Port Holdings, in either case which is, in the reasonable opinion of a Joint Lead Manager, likely to have a material adverse effect on the Offer or other certain specified matters; or
- there are particular disruptions in certain major financial markets which, in the reasonable opinion of a Joint Lead Manager, is likely to have a material adverse effect on the Offer or other certain specified matters.

Pursuant to the Offer Management Agreement, Napier Port Holdings has granted an indemnity to the Joint Lead Managers and their respective affiliates in relation to all claims and losses suffered or incurred by the Joint Lead Managers in relation to the Offer or the Offer Management Agreement, provided that Napier Port Holdings will have no liability if such claim or loss is judicially determined to have resulted from the fraud, gross negligence, wilful default or wilful misconduct of the relevant Joint Lead Manager or its affiliates.

The Offer Management Agreement also sets out a number of representations, warranties and undertakings by Napier Port Holdings to the Joint Lead Managers, and by the Joint Lead Managers

to Napier Port Holdings, which are customary for an offer of this nature. Napier Port Holdings undertakes not to make any allotments of Shares or other equity securities for a period of 180 days following the date of completion of the Offer, other than pursuant to the Offer, the Offer Management Agreement, any employee share or option plan, as disclosed in the PDS, the information included on the Offer Register or any supplementary PDS or with the Joint Lead Managers' consent.

### **3.6. Encumbrance over main Port site**

An encumbrance is being registered in favour of Council, restricting the use of land at the Port site (located at Ahuriri, Napier) to activities associated with operating a port. In addition, the encumbrance will restrict sales and certain other disposals of the Port site by Napier Port to sales or disposals which have been approved by Council. This approval by Council may not be unreasonably withheld or delayed provided that the encumbrancer (currently Napier Port) and the proposed transferee can demonstrate to the reasonable satisfaction of Council that the land will continue to be used for "Port Activities" (as defined in the encumbrance), the proposed transferee has the financial resources and skills to undertake the Port Activities and, in the case of disposal of part of the land only, there will be no material impact on the Port Activities on the remaining part of the land. There is an exception to the need for consent for disposal of part of the land for a term of less than 50 years where the use of the land by the party in possession will contribute to, is incidental or related to, or will not materially adversely affect, the Port Activities.

## **4. Executive LTI Plan**

Concurrent with the Offer, Napier Port has adopted the Executive LTI Plan.

Under the Executive LTI Plan, the Board may invite certain employees of Napier Port to participate in an award of share rights. Share rights provide each participant with the right to receive Shares for no cash cost subject to the satisfaction of certain conditions. The Board may set the terms and conditions of the share rights at the time they are granted, including the number of share rights to be offered and the vesting conditions that relate to them. It is intended that offers of participation under the Executive LTI Plan will be made on an annual basis subject to the Board's discretion, including as to eligibility.

The first grant of share rights under the Executive LTI Plan will be made to certain senior managers of Napier Port contemporaneously with the issue of Shares under the Offer. These share rights, if taken up in full, will equate to a total number of Shares that will be calculated based on an aggregate remuneration pool of \$423,000 divided by the Final Price (which would be 173,716 Shares based on the Final Price being set at mid-point of the Indicative Price Range).

In order to qualify to receive Shares under these share rights, participants must remain employed by Napier Port for a three year vesting period (unless otherwise specified) and the vesting conditions must be met. The vesting conditions require achievement of FY2019F and FY2020F Pro forma EBITDA (as set out in Section 7.2 (*Selected Financial Information*) by Napier Port Holdings and total shareholder return of the Shares to be positive and exceed the percentage change in total shareholder return of the 50th percentile/median member of the NZX 50.

It is intended that any Shares provided to participants upon vesting of share rights under the Executive LTI Plan will be obtained from the market after the Offer or from Shares held by Napier Port Holdings as treasury stock. The costs of operating the Executive LTI Plan, including obtaining Shares from the market, will be met by Napier Port.

## **5. Employee Share Loan**

Concurrent with the Offer, Napier Port Holdings has established an Employee Share Loan (known as "Fair Share"), the purpose of which is to facilitate participation by Napier Port employees as Shareholders, improving the alignment of interests between employees and Shareholders. Under



the Employee Share Loan, Napier Port Holdings will fund the acquisition of up to \$5,000 of Shares by each Eligible Employee under the Priority Offer at the Final Price.

This funding will take the form of a limited recourse, interest free loan made by Napier Port Holdings to Eligible Employees. Any Shares acquired by an Eligible Employee (which may include senior managers of Napier Port) with funding under the Employee Share Loan will be held on trust for the relevant Eligible Employee until the loan has been repaid in full. Pacific Custodians (New Zealand) Limited has been appointed as the trustee.

Any Eligible Employee using funding under the Employee Share Loan to acquire Shares will be required to acquire at least \$1,000 of Shares using that funding. The Employee Share Loan does not limit any Eligible Employee from applying for additional Shares above the maximum \$5,000 loan amount, although the purchase of any such additional Shares would need to be funded by the Eligible Employee themselves (and not through the Employee Share Loan). Any Shares acquired by an Eligible Employee with their own funds would not be required to be held on trust. At any time after the issue of Shares, an employee who is participating in the Employee Share Loan is entitled to repay the loan in full and have their Shares released from trust. Participating employees who cease employment with Napier Port before their loan is repaid will be required to either repay the loan in full (and receive their Shares) or surrender their entitlement to Shares (and be released from their loan in full).

The maximum aggregate amount of the loans to be made by Napier Port Holdings under the Employee Share Loan is \$1,320,000 (based upon 264 Eligible Employees as at the date of the PDS). This amount may change depending upon the final number of Eligible Employees.

The costs of operating the Employee Share Loan, including the trustee's fees and expenses, will be met by Napier Port.

## 6. Regulation

### *Regulatory environment*

In the late 1980s, the New Zealand government abolished the Ports Authority (which controlled capital expenditure) and passed the Port Companies Act and the Waterfront Industry Reform Act 1989 to make ports more competitive and commercially focused. The Port Companies Act transferred harbour boards' commercial activities to new port companies and ownership. It also vested the ports' social and environmental responsibilities to territorial authorities. The majority of New Zealand ports continue to be owned by local government, with Port of Tauranga, South Port and Northport (via Marsden Maritime Holdings) being the only publicly listed ports, albeit with local governments retaining large shareholdings.

Ports in New Zealand benefit from a stable regulatory environment and are not subject to price or quality regulation. The New Zealand Commerce Commission can conduct competition studies and investigate whether port services should be subject to economic regulation under the Commerce Act 1986 and the Commerce Amendment Bill 2018 as required. Such investigations are initiated by the Minister of Commerce and Consumer Affairs or the Commerce Commission itself. The Commerce Commission is then able to make recommendations to the Minister for changes to the industry, including amendments to legislation and policy.

The Commerce Commission noted, in a release made on 18 December 2018 associated with the publication of its annual Consumer Issues Report, that it had received complaints regarding regional ports, primarily relating to the conduct of ports in competitive markets for the supply of services, and that it will be maintaining a close watch on the sector over the next year. Napier Port has not been contacted by the Commerce Commission in relation to this matter.

In addition, Napier Port is subject to other regulations including the Health and Safety at Work Act 2015, Resource Management Act 1991 (New Zealand land use and environmental consents), Maritime Transport Act 1994 (Napier Port is a Maritime Transport Operator for both passenger and

non-passenger operations), Customs and Excise Act 1996 (Napier Port is licensed as a Customs Controlled Area) and the Biosecurity Act 1993 (Napier Port is an approved "place of first arrival").

### ***Port Companies Act***

Port of Napier is a "port company" for the purposes of the Port Companies Act. Napier Port Holdings is a related company of Port of Napier, and is therefore deemed to be a related company of a port company for the purposes of the Port Companies Act. As such, the constitution of each of Napier Port Holdings and Port of Napier is required to provide for certain matters, including that:

- there must be no fewer than six directors of the company; and
- not more than two members or employees of a harbour board, territorial authority, regional council or united council that holds any equity securities in the company of any class that confer rights to vote at any meeting of the company may be directors of the company.

In addition, the Port Companies Act provides that no amendment may be made to the constitution of either Napier Port Holdings or Port of Napier without the prior written approval of the Minister of Transport. Napier Port Holdings has been granted an exemption by the Minister of Transport from this requirement and certain other Port Companies Act requirements provided it does not carry on port related activities (other than acting as an NZX listed holding company, owning all of the shares in Napier Port (or shares in other ports) or otherwise undertaking activities typical of a parent company of an NZX listed group of companies).

### ***Council Controlled Organisation***

Napier Port Holdings is, and will continue to be following Listing, a council-controlled organisation (CCO) under the Local Government Act. A CCO for the purposes of the Local Government Act includes a company in which one or more local authorities hold or control 50% or more of the voting rights or have the right to appoint 50% or more of the directors. As a result of being a CCO, Napier Port Holdings is subject to limited obligations under:

- the Local Government Act, including around the appointment and role of directors, having a "principal objective"<sup>1</sup> and having the auditor general as its auditor; and
- the Local Government Official Information and Meetings Act 1987, in relation to making "official information" available.

## **7. Privacy**

Your personal information will be used for considering, processing and corresponding with you about your Application and in connection with your holding of Shares, including sending you information concerning Napier Port, your Shares and other matters Napier Port considers may be of interest to you by virtue of your Application or holding of Shares. Napier Port and the Share Registrar may also hold personal information in accordance with their record-keeping policies.

To do these things, Napier Port and the Share Registrar may disclose your personal information to each other, their respective related companies and agents, contractors and third party service providers to whom they outsource services such as mailing and registry functions. However, all of these parties will be bound by the same privacy policies as Napier Port and the Share Registrar.

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<sup>1</sup> As defined in section 59 of the Local Government Act, which includes achieving the objectives of its shareholders, being a good employer, exhibiting a sense of social and environmental responsibility and conducting its affairs in accordance with sound business practice.

In addition, if you elect to pay by one-time direct debit, the Share Registrar will communicate with your nominated bank (including providing your personal information) for the purposes of processing your payment.

Failure to provide the required personal information may mean that your Application Form is not able to be processed efficiently, if at all.

Where Napier Port and the Share Registrar hold personal information about you in such a way that it can be readily retrieved, you have a right to obtain from Napier Port and the Share Registrar confirmation of whether or not they hold such personal information, and to access and seek correction of that personal information under the Privacy Act 1993 by contacting the privacy officers of Napier Port and the Share Registrar at their respective addresses shown in Section 12 of the PDS (*Contact information*). Your personal information will be held by Napier Port or the Share Registrar at their respective addresses or on their behalf by a cloud storage provider.

## **8. Total estimated costs of offer and issue**

The total estimated costs of the Offer and issue are approximately \$14.0 million. Of this:

- \$4.9 million is an estimate of the total amount to be paid by Napier Port Holdings to the Joint Lead Managers. The amounts to be paid to the Joint Lead Managers will depend on a number of factors, including the amount raised under the Offer. From its fees, the Joint Lead Managers will pay firm allocation commissions of 1.0% of the gross proceeds raised from firm allocations to Brokers and stamping fees of 0.5% of the gross proceeds raised from all valid applications bearing NZX Firms' stamps pursuant to an allocation under the Priority Offer; and
- \$700,000 is an estimate of the total amount to be paid by Napier Port Holdings to Ernst & Young Transaction Advisory Services Limited as fees in respect of its accounting and taxation due diligence services and the preparation of an Investigating Accountant's Independent Limited Assurance Report dated 15 July 2019, a copy of which is included on the Offer Register in the document entitled "*Investigating Accountant's Independent Limited Assurance Report*".

## **9. No recommendation by Joint Lead Managers**

Neither the PDS nor any information on the Offer Register constitutes a recommendation by the Joint Lead Managers or any of their respective affiliates, or any of the directors, officers, employees, agents or advisers of such persons, to subscribe for, or purchase, any securities. You must make your own independent investigation and assessment of the financial condition and affairs of Napier Port before deciding whether or not to apply for Shares.