

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Originating Application

File Number: ACT 1 of 2021

File Title: APPLICATION FOR REVIEW LODGED BY NEW SOUTH WALES MINERALS COUNCIL UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) OF THE DECISION OF THE DESIGNATED MINISTER UNDER SUBSECTION 44H(1) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH).

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 8/03/2021 3:15 PM

Important information

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

FORM JA

(subregulation 20A(1))

APPLICATION TO TRIBUNAL FOR REVIEW



File No. of 2021

APPLICATION FOR REVIEW UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) OF THE DECISION OF THE DESIGNATED MINISTER UNDER SUBSECTION 44H(1) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH)

Name of applicant: New South Wales Minerals Council

Address of applicant: Level 3, 12 O'Connell Street, Sydney NSW 2000

1. New South Wales Minerals Council (**NSWMC**) applies to the Australian Competition Tribunal under subsection 44K(2) of the *Competition and Consumer Act 2010 (Act)*, for a review of the decision dated 16 February 2021 (**Decision**) by the designated Minister, the Hon. Josh Frydenberg MP, **Treasurer** of the Commonwealth of Australia, under subsection 44H(1) of the Act, not to declare a service, being the service described below, currently being provided by Port of Newcastle Operations Pty Ltd (**PNO**).
2. NSWMC is the person who applied for the declaration recommendation at the Port of Newcastle (**Port**).

Brief description of the service:

3. The service comprises the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct (**Service**).

Facts and contentions on which NSWMC intends to rely:

NSWMC and PNO

4. NSWMC is the peak industry body representing the mining industry in New South Wales.
5. PNO is a 50:50 joint venture between The Infrastructure Fund (**TIF**) and China Merchants Port Holdings Company Limited (**CMPort**). The PNO website states that: "TIF is one of Australia's top performing infrastructure funds with a portfolio of Australian and overseas assets worth more than \$2.4 billion. ...CMPort is China's largest and a global leading port developer, investor and operator".

The Port

6. The Port is the largest coal exporting port in the world. Coal is the primary commodity exported through the Port.
7. Shipping channels are the only means by which vessels can gain entry to and exit from the Port. The shipping channels at the Port are the only commercially viable option for the export of coal from the Hunter Valley region in New South Wales.
8. The shipping channels are a natural "bottleneck" monopoly. In practical terms, the Service is necessary for the export of coal from the Hunter Valley.

The Hunter Valley coal industry

9. The Hunter Valley coal industry and associated supply chain are the largest coal export operations in the world. The Hunter Valley/Newcastle coalfields produce approximately 170 million tonnes of saleable coal per year.
10. The Hunter Valley coal supply chain is made up of coal producers (or mines) who export their coal, above rail haulage and below rail (track) providers, three coal export terminals operated by Port Waratah Coal Services and Newcastle Coal Infrastructure Group, port managers and the Hunter Valley Coal Chain Coordinator.
11. There are more than 30 coal mines in the Hunter Valley operated by 11 coal producers as well as other coal projects. Coal is transported by rail haulage providers from the

mines to the three terminals at the Port, and is then loaded onto vessels at one of the loading terminals.

12. The Hunter Valley coal industry and its associated supply chain is responsible for around 90% of New South Wales's coal production and around 40% of Australia's total black coal production.
13. The Treasurer in the Decision accepted that the Port is a bottleneck, with Hunter Valley coal producers having no practical alternative to the Port for the export of coal and that this gives PNO considerable bargaining power over coal producers who have sunk costs in the Newcastle catchment.

Application for Declaration and Treasurer's Decision

14. On 6 March 2020, NSWMC on behalf of itself and certain coal exporters lodged an application for authorisation to the Australian Competition and Consumer Commission (ACCC), to collectively negotiate and discuss with PNO terms and conditions of access to the Port, including price with PNO. The ACCC granted authorisation (**Authorisation** AA10000473), but PNO declined (and continues to decline) to enter into negotiations as permitted by the Authorisation. PNO applied to the Tribunal for review of the Authorisation under s 101 of the Act (ACT 2 of 2020).
15. On 23 July 2020, as PNO declined to negotiate with the coal industry, NSWMC applied to the National Competition Council (NCC) for a recommendation that the Service be declared under subsection 44F(1) of the Act (**Application**).
16. On 18 December 2020, the NCC provided its final recommendation (**Recommendation**) to the Treasurer. The NCC recommended that the Service not be declared on the basis that the criteria in subsections 44CA(1)(a) and (d) had not been satisfied.
17. On 16 February 2021, the Treasurer published the Decision. The Treasurer decided that the Application did not satisfy the criteria in subsections 44CA(1)(a) and (d) of the Act, and accordingly decided not to declare the Service. The Treasurer's decision makes it clear that the Treasurer relied heavily upon the Recommendation.

Dependent Markets

18. The dependent markets were set out in the Decision, and are as outlined in the Application.

Section 44CA(1)(a) of the Act – criterion (a)

19. Declaration of the Service at the Port would promote a material (or not trivial) increase in competition in one or more dependent markets, in circumstances where:

- (a) PNO has monopoly power as a monopoly infrastructure provider:
 - (i) The Port is a bottleneck facility. The Service is a necessary input for effective competition in the dependent coal export market. Hunter Valley coal producers have no practical and realistic commercial alternative to the Port for the export of their coal.
 - (ii) PNO is able to exert its monopoly power through the unconstrained and unilateral imposition of access prices. PNO has the ability to impose further material charges for access to the Service in the future.
 - (iii) The significant price increases imposed by PNO shortly after taking over the Port in 2016 without consulting users of the Service (as outlined at [4.3] of the Application) were the result of the exercise of monopoly power by PNO. The increased access prices materially impacted the profit margins of coal producers operating in the Hunter Valley. PNO's unconstrained pricing discretion creates costs uncertainties particularly at the present time given the volatilities in the global export coal market.
 - (iv) PNO has considerable bargaining power over coal producers who have sunk costs in the Hunter Valley region. Any further cost imposts by PNO will be material to the cost of production and sale of coal for individual coal producers.

- (b) The commercial constraints on PNO imposing future increased charging structures are limited:
- (i) Whilst PNO has a 98-year lease on the Port and contractual obligations with the State of New South Wales to maintain the Port as a major seaborne gateway, PNO has stated publicly that coal exports from the Port have a limited commercial window of no more than 15 years and it is seeking to transition the Port to use as a container port. PNO's proposed expenditure at the Port on container terminal development and channel dredging is around \$2 billion. Users of the Service have no capacity to affect user-funded industry expenditure imposed by PNO through levies for the development of the Port for PNO's long term commercial goals.
 - (ii) As a monopolist, PNO has a clear incentive to maximise profits from the provision of access to the Port. PNO also has the potential to do so through unconstrained pricing, even if this means reduced volumes or reduced use of the Service. PNO is specifically incentivised to do so in the short to medium term, in light of the 15-year commercial window referred to above.
 - (iii) PNO is not constrained in the exercise of its monopoly power by its option to enter into collective bargaining negotiations with users of the Service. PNO has declined to meet or collectively negotiate with NSWMC and the coal industry, its future expenditure plans at the Port, even in circumstances where the ACCC had granted authorisation to engage in discussions with PNO.
 - (iv) PNO is not constrained in the exercise of its monopoly power by its option to enter into bilateral negotiations with users of the Service. Such negotiations only occur at PNO's option and

involve a monopoly infrastructure service provider negotiating with a party that has no choice but to export coal through the Port.

- (v) PNO's is not constrained in the exercise of its monopoly power by any effective regulation. There is no meaningful likelihood (or evidence) that the New South Wales Government, or any other regulatory agency, would (or in some circumstances, could) intervene if PNO imposed further excessive price increases on users of the Service.
 - (vi) PNO is not constrained in the exercise of its monopoly power by the prospect of reputational damage in the coal export industry.
 - (vii) There is no means for users of the Service to negotiate or arbitrate prices or terms of access imposed by PNO other than through declaration of the Service.
- (c) Declaration of the Service would create certainty for investment:
- (i) The coal mining industry in the Hunter Valley is facing fragile market conditions, given disruptions in coal exports to China. The uncertainty associated with the unfettered ability of PNO to set and increase prices compounds broader global pressures, threatening the ability of Hunter Valley coal producers to compete in this market.
 - (ii) Declaration of the Service will allow PNO to obtain a reasonable rate of return while providing the coal industry clarity on a price path that will provide certainty for continued investment and employment in the Hunter Valley coal industry.
 - (iii) The certainty of access on terms fixed by agreement or by ACCC arbitration under Division 3 of Part IIIA of the Act

would likely remove the risk of PNO imposing terms of access which would or could largely absorb the profit margin otherwise available to coal producers in the Hunter Valley.

(iv) The listing of the Dalrymple Bay coal terminal by Brookfield demonstrates that such a declaration does not inhibit the infrastructure owner realizing both a good price for the asset and also a commercial rate of return.

(d) Derivative markets:

(i) It does not follow that if declaration is unlikely to promote a material increase in competition in the coal exports market, there is unlikely to be a material increase in competition in any derivative market.

Section 44CA(1)(d) of the Act – criterion (d)

20. NSWMC contends that declaration of the Service at the Port would promote the public interest, in circumstances where:

(a) Declaration would impose meaningful constraints on PNO (in particular under an ACCC arbitration). Regulatory constraint of terms and conditions would increase certainty in respect to:

(i) Future cost increases and access issues arising from such investment and expenditure.

(ii) Future exports which will support the more than 13,000 people employed in the Hunter Valley in the coal industry.

Issues as NSWMC sees them:

(a) Whether access (or increased access) to the Service on reasonable terms and conditions, as a result of a declaration of the Service would promote a material increase in competition in any dependent market.

(b) Whether access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration of the Service, would promote the public interest.

(c) Whether the Service should be declared.

21. **Address for service of documents:**

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Dated: 8 March 2021

Signed on behalf of the applicant



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Dave Poddar, Partner
Clifford Chance LLP
Solicitor for the applicant