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**Lodgment and Details**

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| Document Lodged: | Submissions |
| 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: 29/04/2021 11:30 AM

**Important information**

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**COMMONWEALTH OF AUSTRALIA**

***Competition and Consumer Act 2010* (Cth)**

**IN THE AUSTRALIAN COMPETITION TRIBUNAL**

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|---|---|
| File No: | ACT 1 of 2021 |
| Re: | 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). |
| Applicant: | New South Wales Minerals Council |

# SUBMISSIONS OF PORT OF NEWCASTLE OPERATIONS PTY LTD ON APPLICATION FOR INTERVENTION BY THE ACCC

*Provided pursuant to the direction of the Tribunal made 8 April 2021*

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## Introduction

1. These submissions by Port of Newcastle Operations Pty Ltd (**PNO**), made pursuant to the Tribunal's directions of 8 April 2021, respond to the application by the Australian Competition and Consumer Commission (**the ACCC**), dated 21 April 2021, to intervene in the proceedings.

2. PNO opposes the application by the ACCC, on two bases: (i) there is no power in the *Competition and Consumer Act 2010* (Cth) (**CCA**) to permit intervention by the ACCC in the present proceeding; and (ii) even if the Tribunal reached a contrary conclusion in relation to its power to permit intervention by the ACCC, the Tribunal should exercise its discretion not to permit the ACCC to intervene in the present case.

## No power to permit intervention

3. The ACCC identifies three possible sources of power for it to intervene in the present proceeding: s 109; s 44K; or as part of its implied powers in respect of matters of procedure. None of these supplies the necessary power.

4. The power in s 109 (and indeed the whole of Part IX, ss 101 – 110) does not apply to the present proceedings, being an application pursuant to s 44K: *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [51] and [141] (***Pilbara***).

5. The submissions of the ACCC (**AS**) refer to *Pilbara*, but significantly understate its effect. The central reasoning of *Pilbara* relied upon the distinction between a "re-consideration" pursuant to s 44K (see s 44K(4)) and a "re-hearing" of certain ACCC decisions provided for in Part IX. The plurality in *Pilbara* referred to the distinct "kinds of tasks" given to the Tribunal under the Act as originally enacted, and observed at [51] that "[b]oth by their location as a Division of Pt IX, and in their terms, the provisions of Div 2 of Pt IX [which include s 109] regulating the procedure of and evidence before the Tribunal were apt to apply only to the particular kind of proceeding for which Div 1 of Pt IX provided – an application under s 101(1) for a review of a determination by the Commission regarding authorisation". Thus s 109 does not apply to an application under s 44K.

6. The plurality also charted the subsequent amendment of the Act, and in particular considered an argument from the respondents that the addition of s 102A into Part IX, which contained an inclusive definition of "proceedings", broadened the position so as to include *all* proceedings. The plurality rejected that approach at [55]-[58]. Therefore, the presence of s 102A, and its subsequent removal, did not affect the construction otherwise reached by the plurality. The submission of the ACCC at [21] is incorrect in that regard. Likewise, the submission of the ACCC at [23], that s 109(2) applies to proceedings of the Tribunal generally, is simply at odds with *Pilbara* and cannot be accepted.

7. In support of its broader construction of s 109, the ACCC relies on the decision of Goldberg J in *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28, in which his Honour held (at [19] – [20]) that the provisions in Div 2 of Part IX of the Act, including relevantly, s 109(2), did apply to reviews by the Tribunal under provisions such as s 44K. However, that aspect of his Honour's decision must be considered incorrect in light of the High Court's subsequent decision in *Pilbara*.

8. At AS [22], the ACCC acknowledges the "majority High Court decision appears to be inconsistent with Goldberg J's decision in *Fortescue Metals*, but it does not say that the decision was not correct". That is not to the point: the High Court is not obliged to identify every decision that its reasoning overturns. In circumstances where the High Court has reached a contrary conclusion on the application of Div 2 of Part IX, it follows that Goldberg J's earlier decision is incorrect, and could not be followed by this Tribunal. Moreover, in Heydon J's concurring opinion his Honour expressly considered *Fortescue Metals* and said (at [143]) that insofar as that decision held that Div 2, Part IX applied to reviews by the Tribunal under s 44K, it was "not correct".

9. The alternative source of power identified by the ACCC is s 44K(5), which provides that "for the purposes of the review, the Tribunal has the same powers as the designated Minister". However, this provision does not confer a power to permit intervention either. The Minister's powers in relation to a decision whether to declare a service are set out in s 44H. They are confined, and relevantly, do not include a power to seek assistance from the ACCC.

10. In support of its submission that this statutory power authorises the Tribunal to permit interveners, the ACCC relies on comments by Goldberg J in *Re Fortescue,* quoted at

AS [36]. However, those comments must also be considered incorrect in light of the High Court's decision in *Pilbara*, which specifically discussed the nature of the Minister's task. At [45], the plurality noted that the Minister had only a short time to decide how to respond to a declaration recommendation. At [46], the plurality observed that "the Minister, unlike the Tribunal (s 44K(6)), was given no express power to request any further information, assistance or report from the NCC. The statutory supposition appears to have been that the Minister could and would make a decision on the NCC's recommendation without any need for further information from the NCC". And at [47], the majority concludes that "the content of those provisions of the Pt IIIA to which reference has been made suggests that it was expected that, armed with a recommendation from an expert and non-partisan body (the NCC), the Minister would make a decision quickly and would do so according to not only the Minister's view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Minister had to be satisfied before a declaration could be made". Heydon J expressed a similar view, noting (at [135]) that the CCA contained "no express grant of power to the Minister to seek submissions from interested persons, the public or anyone else". His Honour also noted (at [131]) that the powers conferred by s 44K(5) were conferred "[f]or the purposes of the review" and that the "scope of the review necessarily limited the powers which s 44K(5) conferred".

11. Further, s 44K(6) makes express provision for the NCC, rather the ACCC, to provide the Tribunal with assistance. This reflects a clear legislative logic in Part IIIA: for proceedings involving a review of an ACCC decision, the CCA provides for the ACCC to assist the Tribunal in its review (see s 44ZP(5) and s 102(6)), while in the present proceeding, which involves the review of a decision in which the NCC was involved (by making a recommendation to the Minister), the NCC is identified as the appropriate body to assist the Tribunal, where the Tribunal requires assistance. It would be contrary to this legislative structure for the Tribunal also to permit the ACCC to intervene.

12. The matters set out above in relation to s 44K(5) are also dispositive of the ACCC's fallback submission that the Tribunal has "an implied power" to permit the intervention of the ACCC. The existence of such a broad power is inconsistent with the confined nature of the task which is given to the Tribunal, which has the same powers as the Minister, and the confined nature of the task given to the Minister. It is

inconsistent with the reasoning of the High Court in *Pilbara*, which concluded that the scope of the Tribunal's review was limited by the express terms of the provisions setting out the task of the Minister and subsequently the Tribunal. Further, and in any event, it is inconsistent with the express and limited statutory scheme for obtaining assistance from the NCC for there to be an unconfined "implied power" to permit a general intervention by a different Commonwealth entity, being the ACCC. That is also inconsistent with the careful specification in the Act of the role of the ACCC, and likewise inconsistent with the circumstance that the process of declaration and the application of the declaration criteria is a matter for the NCC, whereas the subsequent resolution of matters concerned with access is a matter for the ACCC. Their respective roles in the statutory scheme are quite distinct.

**Tribunal should exercise its discretion to refuse intervention in any event**

13. For the reasons outlined above, the Tribunal should refuse the ACCC's application on the basis that it does not have power to permit the ACCC to intervene in the present type of proceeding. However, if the Tribunal reaches the contrary conclusion in relation to power, the Tribunal should nevertheless refuse the ACCC's application on discretionary grounds. Several factors support that approach.

14. *First*, the ACCC has failed to demonstrate "the unique contribution" it would make to the proceedings. This is a factor the Tribunal should have regard to in determining whether to allow the ACCC to intervene: see *Re Fortescue,* at [53]. The fact that the ACCC has expertise regarding the access regime in Part IIIA, or competition issues more generally, obviously is insufficient. The Tribunal already has such expertise itself, and to the extent it needs further assistance, it can seek it from the NCC, which is "an expert and non-partisan body": *Pilbara,* [47].

15. In this regard, an important consideration is that the ACCC does not have a role under the Act in relation to declaration, or the interpretation or application of the declaration criteria. That role is given to the NCC. The ACCC therefore has no specialist role in relation to the matters the subject of the present proceeding.

16. *Secondly,* one of the considerations relevant to the grant of leave in judicial proceedings is "whether the intervention is apt to assist the Court in deciding the instant case": *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377,

381. The ACCC says (at AS [35]) that it "has a contribution to make in respect of issue of the proper construction and application of criteria (a) and (d)". But having regard to the ACCC's submissions on criteria (a) and (d), and the Mineral's Council's application, it is not apparent how the ACCC's contribution would assist the Tribunal in the determination of the Minerals Council's application. Rather, it appears that the ACCC wishes to propound its own, different case as to why the Minister's decision should be set aside. The ACCC wishes to advance an alternative construction of criterion (a) which focuses on whether declaration would promote the efficient use of infrastructure, rather than the impact on competition: see AS [12.2]). That issue of construction forms no part of the Minerals Council's application. In relation to criterion (d), it appears that the ACCC simply disputes the factual conclusion reached by the NCC: AS [14.2]. Neither point is framed by reference to the Minerals Council's application, or how it would assist to resolve that application. Rather, they are simply grounds on which the ACCC wishes to propound that the Minister reached the wrong conclusion. In effect, the ACCC seeks to become a second (de facto) applicant. This should not be permitted under the guise of intervention.

17. *Thirdly,* it is not apparent that the ACCC has a "sufficient interest in the subject matter of the proceeding" (*Re Qantas Airways Ltd* (2003) ATPR 41-972, at 47,837) by virtue of its status as a "specialist competition regulator". Even Goldberg J, whose decision the ACCC seeks to rely upon, clearly envisages that applicants for intervention will be "participants or potential participants in the economy", rather than a regulator seeking to augment their existing statutory role: *Re Fortescue,* at [42]; see also [35] referring to applicants' business activities.

18. *Fourthly,* the intervention of the ACCC is likely to unnecessarily lengthen the preparation and hearing time for the matter. The ACCC seeks leave "principally" (i.e. but not necessarily solely) to make both written and oral submissions: AS [39.1]. The ACCC proposes to file written submissions in accordance with the current timetable, which provides for any intervener to file and serve its outline of submissions at the same time as PNO. But this timetable would be unsuitable if the ACCC were allowed to intervene, as it would not allow PNO an opportunity to respond in writing to what will presumably be detailed, and wide-ranging submissions from the competition regulator as to why the service should be declared.

19. *Fifthly*, the intervention of the ACCC is inappropriate. As already noted, the role demarcated for the ACCC under Part IIIA of the Act is in relation to the second stage of the Part IIIA process – namely, arbitrating disputes (where it acts as a decision-maker), and deciding whether to register contracts, or accept undertakings. These are roles that require the ACCC to act with independence, both actual and perceived. The ACCC's independence in executing these roles would be jeopardised if it were allowed to advocate for a particular result in the present proceedings. The ACCC should stay above the fray, not enter it.

20. In *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145, the Full Court held that it was not a proper step for the ACCC to bring an application challenging the decision of the Tribunal: [309]. The Court held that it was not appropriate for an independent decision-maker to commence proceedings, or play an active role in proceedings, challenging the correctness of its decision. In reaching this view, the Full Court referred to the High Court's decision in ***R v Australian Broadcasting Tribunal; ex parte Hardiman*** (1980) 144 CLR 13, where the High Court held (at p 35-36) that "if a tribunal becomes a protagonist in this Court there is a risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings". Here, the circumstances are different, but the concern is the same – allowing the ACCC to play an active role risks endangering the impartiality the ACCC would be expected to maintain if the Minister's decision is reversed, and the ACCC is called upon to arbitrate an access dispute.

**Conclusion**

21. The ACCC's application should be dismissed.

**DATED:** 28 April 2021

**Cameron Moore SC**
**Declan Roche**

Counsel for Port of Newcastle Operations Pty Ltd