

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Affidavit

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: 07/06/2021 1:30 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.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

AFFIDAVIT

I, Dave Poddar, of 1 O'Connell Street, Sydney, New South Wales, solicitor, affirm:

1. I am a partner at Clifford Chance, the solicitors for New South Wales Minerals Council (NSWMC) in these proceedings. I have carriage of this matter for NSWMC and am authorised to make this affidavit on NSWMC's behalf.
2. I have personal knowledge of the facts and matters referred to in this affidavit, except where indicated otherwise.
3. I make this affidavit in support of the application dated 8 March 2021 by NSWMC for review under s 44K(2) of the *Competition and Consumer Act 2010* (Cth) (CCA) of the decision of the Commonwealth Treasurer (**Minister**) under s 44H(1) of the CCA not to declare the service provided by Port of Newcastle Operations Pty Ltd (**PNO**) (the **Decision**), and more specifically:
 - (a) the application dated 7 June 2021 by NSWMC for a notice under s 44K(6) and (6A) of the CCA directing the National Competition Council (**NCC**) to provide specified information to the Tribunal (**Notice**); and
 - (b) the circumstances regarding the:
 - (i) filing of the Hearing Book by NSWMC pursuant to Direction 11 of the Tribunal's Directions dated 8 April 2021 (**Directions**); and
 - (ii) the filing of the Statement of Facts, Issues and Contentions (**SOFIC**) by NSWMC pursuant to Direction 9 of the Directions.

Notice

4. After reviewing the material filed by the Minister in the Tribunal, and reviewing the processes undertaken in other declaration matters, including the application for declaration made by **Glencore** Coal Assets Australia Pty Ltd in respect of services provided by PNO, on 17 May 2021, NSWMC's solicitors wrote to the Minister's solicitors (annexed and

marked “**DP-1**”) seeking confirmation as to whether the Minister took into account in connection with the making of the Decision:

- (a) the materials identified at Appendix A to the NCC’s Final Recommendation dated 18 December 2020 (**Final Recommendation**); and
- (b) any of the materials referred to within the materials listed at Appendix A,

and noting that Direction 1 of the Directions required the Minister to provide the Tribunal with a copy of “all of the information that he took into account in connection with the making of the decision”.

5. On 19 May 2021, the Minister’s solicitors replied to NSWMC’s solicitors (annexed and marked “**DP-2**”) confirming that the material filed by the Minister’s solicitors on 21 April 2021 (**Decision Information**) “comprised the entirety of the material which the Treasurer took into account in connection with the making of the” Decision.

6. On 2 June 2021, NSWMC’s solicitors wrote again to the Minister’s solicitors (annexed and marked “**DP-3**”) noting that the Decision Information does not contain:

- (a) the application dated 23 July 2020 by NSWMC to the NCC for declaration (**Application**) and the submissions provided by various persons in response to the Application;
- (b) Attachments C, D, E and F of the Treasury Ministerial Submission dated 12 February 2021;

but does contain:

- (c) the Final Recommendation, which includes the Application (hyperlink in footnote 11 of the Final Recommendation) and material provided to the NCC (hyperlink in footnote 41 of the Final Recommendation), which in turn includes two accompanying reports from Synergies Economic Consulting dated July 2020 (Annexure G to the Application) and 8 August 2018 (hyperlink in footnote 49 of the Application) (together, **Synergies Reports**);

and requesting the Minister’s solicitors to:

- (d) clarify whether the materials identified at paragraph [6(c)] of this affidavit was information taken into account by the Treasurer (and if not, why not); and
- (e) provide to the Tribunal Attachments C, D, E and F of the Treasury Ministerial Submission dated 12 February 2021.

7. On 2 June 2021, NSWMC’s solicitors wrote to the NCC’s solicitors (annexed and marked “**DP-4**”):

- (a) noting the NCC’s position in regard to the provision of information to the Minister stated in the NCC’s August 2013 policy entitled “Council recommendations under the Competition and Consumer Act and the National Gas Law: Provision of information to decision-making Ministers” (**NCC Policy**) (annexed and marked “**DP-5**”) reproduced in part below:



1.16 *The constraints on the parties' ability to introduce new material into Tribunal proceedings, particularly in Part IIIA matters, raises the prospect of disputes arising as to what was and was not considered by the Minister or Council and therefore what can be considered by the Tribunal on review.*

1.17 *In the Council's view it is important that the Tribunal is able to consider the same range of material the Council did in making its recommendation to the Minister, as well as other material considered by the Minister. The Council therefore intends on all occasions to provide decision-making Ministers with the submissions it has considered in making a recommendation at the time it provides its final recommendation on applications made under Part IIIA and the NGL. In practice this will comprise all submissions (provided they were made within time and not returned due to unresolved confidentiality issues).⁷ The Council also considers that the Tribunal ought to be provided with any references and information obtained by Council secretariat staff, where material to the recommendation. These will be appended to the Council's recommendation or provided these to the relevant Minister along with the submissions, as appropriate. The intention is to put Ministers in a position to be able to provide all the material necessary to enable the Tribunal to make an informed decision on review.*

7 *In some cases this may involve a considerable volume of material. For example: in the Herbert River tramway declaration recommendation, the application and the four submissions received totalled 583 pages. In relation to the BARA application for declaration of various aircraft fuel services at Sydney Airport the Council received two applications and 24 submissions totalling some 874 pages, provided in two large lever-arch files.*

1.18 *A table summarising the Council's intended approach is Appendix A to this document.*

and

(b) seeking clarification as to whether, acting consistency with its policy, the NCC considers that the Application, Synergies Reports and the submissions provided in response to the Application was information provided to the Minister.


8. On 4 June 2021, the Minister's solicitors replied to NSWMC's solicitors (annexed and marked "DP-6") noting that they were seeking the relevant information.

9. On that same date, NCC's solicitors replied to NSWMC's solicitors (annexed and marked "DP-7") stating amongst other things:

On Friday 18 December 2020, the National Competition Council (NCC) provided by email to Treasury staff, including the Treasury Department Liaison Officer for the Commonwealth Treasurer, the Hon Josh Frydenberg:

- *an electronic copy of the NCC President's letter to the Treasurer dated 18 December 2020*
- *the NCC's Recommendation of the same date, and*
- *a link to the hyperlinked electronic index to Appendix A.*

On the same day, the NCC gave hard copies of the NCC President's letter and the NCC's Recommendation to the Department Liaison Officer in Canberra.



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The NCC cannot know precisely what material was given to the Treasurer personally but notes that based on the Ministerial Information bundle filed with the Tribunal on 22 April 2021 it appears that the documents listed in Appendix A may not have been.

10. On 7 June 2021, NSWMC filed the application for the Notice (annexed and marked “**DP-8**”). The Notice requests, for the avoidance of any doubt, the Tribunal to direct the NCC to provide:
 - (a) the specified annexures contained at the hyperlink in footnote 11 of the Final Recommendation, a screenshot of which is annexed and marked “**DP-9**”;
 - (b) the Synergies Economic Consulting Report dated 8 August 2018 contained at the hyperlink in footnote 44 of the Final Recommendation, screenshots of which are annexed and marked “**DP-10**” and “**DP-11**”.

Glencore Hearing Book

11. NSWMC’s review of the processes undertaken in other Tribunal matters referred to at paragraph [4] of this affidavit included the review application made by Glencore in proceeding ACT 1 of 2016 which included in the Hearing Book Index (annexed and marked “**DP-12**”), amongst other documents, Glencore’s application to the NCC and accompanying annexures, the submissions made by various persons in response to that application and prior NCC recommendations and other relevant documents pertaining to that proceeding.

Hearing Book

12. On 17 May 2021, NSWMC’s solicitors wrote to PNO’s solicitors (annexed and marked “**DP-13**”) circulating a draft index for the Hearing Book.
13. On 19 May 2021, PNO’s solicitors replied to NSWMC’s solicitors (annexed and marked “**DP-14**”) inviting NSWMC to make an application for a notice if NSWMC pressed for the inclusion of certain documents in the Hearing Book.
14. On 20 May 2021, NSWMC’s solicitors wrote to the NCC’s solicitors (annexed and marked “**DP-15**”) asking them to advise on the NCC’s position on the draft index.
15. On 25 May 2021, NSWMC’s solicitors wrote to the NCC’s solicitors (annexed and marked “**DP-16**”) asking for NCC’s reply to NSWMC’s emails.
16. On 28 May 2021, PNO’s solicitors wrote to NSWMC’s solicitors (annexed and marked “**DP-17**”) requesting an update on the Hearing Book.
17. On 30 May 2021, NSWMC’s solicitors wrote to PNO’s solicitors (annexed and marked “**DP-18**”) articulating NSWMC’s position on the matter and providing a proposed joint communication to the Tribunal.



18. On 31 May 2021, PNO's solicitors replied to NSWMC's solicitors (annexed and marked "DP-19") stating that PNO did not object to the proposed joint communication save for the insertion of one additional bullet point.
19. On that same date, NSWMC's solicitors wrote to PNO's solicitors (annexed and marked "DP-20") agreeing with PNO's amendment and requested NCC's solicitors to note its client's position on the matter.
20. On this date, NSWMC's solicitors also separately wrote to PNO's solicitors (annexed and marked "DP-21") noting NSWMC was waiting for the NCC to confirm its position and that PNO had not provided NSWMC with confidential versions of its submissions for inclusion in the Hearing Book.
21. Later that same date, NCC's solicitors wrote to NSWMC's solicitors (annexed and marked "DP-22") stating it would respond the next day.
22. On 1 June 2021, PNO's solicitors wrote to NSWMC's solicitors (annexed and marked "DP-23") opposing the filing of the Hearing Book, requesting a supplementary book to be filed, and proposing further amendments to the proposed joint communication to the Tribunal.
23. On 2 June 2021, NCC's solicitors wrote to NSWMC's solicitors (annexed and marked "DP-24") noting that they had not received final instructions.
24. On that same date, NSWMC's solicitors wrote to PNO's solicitors (annexed and marked "DP-25") stating that NSWMC would be filing the Hearing Book.
25. On 3 June 2021, PNO's solicitors wrote to NSWMC's solicitors (annexed and marked "DP-26") proposing a new proposed joint communication to the Tribunal.
26. On that same date, NSWMC's solicitors replied to PNO's solicitors (annexed and marked "DP-27") proposing some minor amendments to the proposed joint communication.
27. Later that same date, PNO's solicitors responded to NSWMC's solicitors (annexed and marked "DP-28") with no objections to NSWMC's proposed joint communication.
28. On 3 June 2021, NSWMC's solicitors wrote to the Tribunal (annexed and marked "DP-29") confirming that the Hearing Book had been filed.
29. On that same date, PNO's solicitors replied to NSWMC's email to the Tribunal (annexed and marked "DP-30") requesting a case management hearing in this matter. PNO's solicitors also sought to bring to the Tribunal's attention the date NSWMC filed its submissions in this matter, but did not convey the full circumstances, which include the timetable slippage that has occurred in relation to the parties SOFICs (PNO's SOFIC being 3 days late and NSWMC's SOFIC being 2 days late).

SOFIC

30. On 30 May 2021, NSWMC's solicitors wrote to PNO (annexed and marked "DP-31") requesting an extension of time to file NSWMC's SOFIC and a reciprocal extension for PNO.




31. On 3 May 2021, PNO's solicitors replied to NSWMC (annexed and marked "DP-32") consenting to an extension of time for PNO to file by 18 May 2021.
32. On 4 May 2021, NSWMC's solicitors wrote to the Tribunal (annexed and marked "DP-33") attaching NSWMC's SOFIC by way of filing.
33. On 18 May 2021, PNO's solicitors wrote to NSWMC's solicitors (annexed and marked "DP-34") noting that PNO would not be filing its SOFIC in accordance with the extension of time.
34. On 19 May 2021, PNO's solicitors wrote to the Tribunal (annexed and marked "DP-35") attaching a copy of PNO's SOFIC by way of filing.

Affirmed by the deponent
at Sydney
in New South Wales
on 7 June 2021
Before me:



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)
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Signature of deponent

Signature of witness
Michael John Gvozdenovic
Solicitor of the Supreme Court of New South Wales

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-1

This is the Annexure marked “DP-1” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

By E-mail

Jonathon Hutton
Australian Government Solicitor
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17 May 2021

Dear Mr Hutton

ACT 1 of 2021 – Application for review under s 44K(2)

1. We act for New South Wales Minerals Council in relation to this matter.
2. Direction 1 of the Tribunal's **Directions** of 8 April 2021 required the Commonwealth **Treasurer** to provide the Tribunal with a copy of all of the information that the Treasurer took into account in connection with the making of the decision that is the subject of this application by 21 April 2021 (**Decision Information**).
3. The Treasurer provided material to the Tribunal, which was subsequently provided by the Tribunal to the parties on 22 April 2021 (pursuant to Direction 2 of the Tribunal's Directions).
4. The material provided by the Treasurer to the Tribunal does not include any of the materials identified at **Appendix A** to the National Competition Council's (NCC) Final Recommendation. These include, relevantly, the application for declaration filed by NSWMC, submissions made by parties in relation to the Draft and Final Recommendation, prior declarations and determinations, reports, texts, Tribunal and court decisions, legislation and legislative materials.
5. Nor does the material provided by the Treasurer to the Tribunal include any of the materials referred to within the materials listed at Appendix A (such as, by way of example only, the NCC's Final Recommendation: Revocation of the declaration of the shipping channel service at the Port of Newcastle dated 22 July 2019).

6. Please confirm no later than **Wednesday, 19 May 2021**, whether the Treasurer took into account in connection with the making of the decision that is the subject of this application:
- (a) the materials listed at Appendix A;
 - (b) any of the materials referred to within the materials listed at Appendix A.

Regards



Dave Poddar
Partner
Clifford Chance

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-2

This is the Annexure marked “DP-2” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales



Our ref. 21002393

19 May 2021

Dave Poddar
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Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Dear Mr Poddar

ACT 1 of 2021 – Application for review under s 44K(2)

We refer to your letter of 17 May 2021.

We confirm that the material filed on 21 April 2021 comprised the entirety of the material which the Treasurer took into account in connection with the making of the decision under review.

The Treasurer did not look behind the recommendation of the National Competition Council (**NCC**), including by considering the materials listed in Appendix A of the NCC's recommendation, consistently with the High Court's comments in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [46]-[47].

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J. Hutton'.

Jonathon Hutton
A/g Senior Executive Lawyer
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COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-3

This is the Annexure marked “DP-3” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

By E-mail

Jonathon Hutton
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2 June 2021

Dear Mr Hutton

ACT 1 of 2021 - Review of Minister's decision under s 44K(2)

1. We refer to our letter of 17 May 2021 and your reply of 19 May 2021. We adopt terms as earlier defined.

The Treasurer's process

2. The first document in the Decision Information is the "Treasury Ministerial Submission" dated 18 December 2020 (**First Ministerial Submission**). It has a single attachment, being the Council's Final Recommendation dated 18 December 2020. The Treasurer's task, being to "either declare the service or decide not to declare it", began at this point.¹
3. The First Ministerial Submission correctly stated (at page 2 of the Decision Information):
 - **before publishing your decision**, you must provide your proposed decision and reasons to the NSW Minerals Council and the Port of Newcastle for 14 days... (emphasis in original)
4. The First Ministerial Submission then properly contemplated a process whereby the Treasurer would be provided with a "draft decision and statement of reasons" on 20

¹ *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [38].

January 2020 and a "draft decision and reasons" would be provided to the parties for 14 days on 27 January (page 2 of the Decision Information).

5. Notwithstanding, the Treasurer did not provide a draft decision or reasons to New South Wales Minerals Council (**NSWMC**). It is unclear whether a draft was provided to Port of Newcastle Operations Pty Ltd (**PNO**).

Decision Information

6. As you are aware, consistent with the Direction 1 of the Directions, the Treasurer was required to provide the Tribunal with a copy of "all of the information that he took into account in connection with the making of the decision..."
7. The purported Decision Information contains a number of irregularities. The first is the absence of the **Application** for declaration filed by New South Wales Minerals Council (**NSWMC**) on 23 July 2020 and various submissions made by parties to the Council.
8. However, we note that the purported Decision Information includes the NCC's Final Recommendation, which includes the Application (see hyperlink in footnote 11) and the material provided to the Council (see hyperlink in footnote 41). In turn, the Application includes two accompanying reports from Synergies dated July 2020 (at Annexure G) and 8 August 2018 (see hyperlink in footnote 49).
9. The other irregularities can be summarised as follows:
 - (a) The second document in the Decision Information is the "Treasury Ministerial Submission" dated 12 February 2021 (**Second Ministerial Submission**). This document has seven attachments: Attachment A is "the NCC's letter", Attachment B is the NCC's "final recommendation", Attachment C is "[a] proposed decision and statement of reasons (draft statement)", Attachments D, E and F are draft letters to the Council, NSWMC and PNO, and Attachment G is a draft media release.
 - (b) The Decision Information does not contain Attachment B.
 - (c) Nor does the Decision Information contain Attachment C. Instead, it includes a signed version of the Treasurer's Decision and Statement of Reasons, dated 16 February 2021.
 - (d) Attachments D, E and F suffer from the same irregularity as Attachment C. That is, the documents provided in the Decision Information appear to be final versions, signed and dated 16 February 2021.

10. Finally, the Decision Information contains material that is redacted on the basis of "client legal privilege". No attempt has been made to explain the identity of the persons who claim the right to assert the privilege or the basis on which the privilege is claimed.

Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal

11. Your claim in your letter of 17 May 2021 that the Treasurer did not "look behind the recommendation...by considering the materials listed in Appendix A" misstates the issue, and is not consistent with *Pilbara*.
12. *Pilbara* says simply that the statutory supposition appears to have been that the Treasurer could and would make a decision "on the NCC's recommendation without any need for further information from the NCC".² The High Court's reference to "the NCC's recommendation" was plainly a reference to *the whole* of the NCC's recommendation, including its annexures. Taking into account the materials identified at Appendix A is not "looking behind the recommendation"; rather, it is taking into account the Final Recommendation.

Next steps

13. Our client, which represents its members across New South Wales, understandably has serious concerns in relation to the Treasurer's handling of the Application.
14. In the light of the foregoing, no later than **Friday, 4 June 2021** please:
- (a) identify why the Treasurer did not provide NSWMC with a draft decision, as contemplated by the First Treasury Submission;
 - (b) clarify whether the Application, accompanying Synergies reports and the submissions made by parties to the Council was information taken into account by the Treasurer, and if not, why not;
 - (c) provide to the Tribunal, in satisfaction of Direction 1 of the Directions, Attachments C, D, E and F of the Second Treasury Submission. Please also provide the same to NSWMC; and
 - (d) explain the identity of the persons who claim the right to assert the privilege or the basis on which the privilege is claimed.

² *Pilbara* at [46].

15. Our client's rights and remedies, including with respect to judicial review, are reserved.

Yours sincerely



Dave Poddar

Partner

Clifford Chance

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-4

This is the Annexure marked “DP-4” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

By E-mail

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2 June 2021

Dear Mr Jarvis

ACT 1 of 2021 – Application for review under s 44K(2)

1. We refer to the above matter, in respect of which you act for the National Competition Council.
2. Direction 1 of the Tribunal's **Directions** of 8 April 2021 required the Commonwealth **Treasurer** to provide the Tribunal with a copy of all of the information that the Treasurer took into account in connection with the making of the decision that is the subject of this application by 21 April 2021.
3. The Treasurer provided certain documents to the Tribunal as detailed in an accompanying index (**Decision Information**), which was subsequently provided by the Tribunal to the parties on 22 April 2021 purportedly pursuant to Direction 2 of the Tribunal's Directions.
4. The purported Decision Information provided by the Treasurer to the Tribunal does not separately identify any of the materials provided to the Council as identified at **Appendix A** to the Final Recommendation dated 18 December 2020. These include, relevantly, the **Application** for declaration filed by New South Wales Minerals Council (NSWMC) on 23 July 2020 and various submissions made by parties in relation to the Draft and Final Recommendation.
5. However, we note that the purported Decision Information includes the Council's Final Recommendation, which includes the Application (see hyperlink in footnote 11) and the material provided to the Council (see hyperlink in footnote 41). In turn, the

Application includes two accompanying reports from Synergies dated July 2020 (at Annexure G) and 8 August 2018 (see hyperlink in footnote 49).

6. The Council's position in regard to the provision of information to the Treasurer is stated in its August 2013 policy 'Council recommendations under the Competition and Consumer Act and the National Gas Law: Provision of information to decision-making Ministers':

[1.17] ...it is important that the Tribunal is able to consider the same range of material the Council did in making its recommendation to the Minister, as well as other material considered by the Minister. The Council therefore intends on all occasions to provide decision-making Ministers with the submissions it has considered in making a recommendation at the time it provides its final recommendation on applications made under Part IIIA...The Council also considers that the Tribunal ought to be provided with any references and information obtained by Council secretariat staff, where material to the recommendation. These will be appended to the Council's recommendation or provided these [sic] to the relevant Minister along with the submissions, as appropriate. The intention is to put Ministers in a position to be able to provide all the material necessary to enable the Tribunal to make an informed decision on review.

7. In these circumstances, could you please clarify whether, acting consistently with its policy, the Council considers that the Application, accompanying Synergies reports, and the submissions made by parties to the Council was information provided to the Treasurer.
8. Please confirm the position by no later than **Friday, 4 June 2021**. If the Council does not consider the information identified above at [7] was provided to the Treasurer, please identify with precision what information the Council says was provided to the Treasurer in this matter.

Yours sincerely



Dave Poddar

Partner

Clifford Chance

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-5

This is the Annexure marked “DP-5” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales



Council recommendations under the Competition and Consumer Act and the National Gas Law

Provision of information to decision-making Ministers

Introduction

- 1.1 This note sets out the practice the Council proposes to adopt in providing information to decision-making Ministers in relation to the recommendations it makes as a result of various applications to it under Part IIIA of the Competition and Consumer Act 2010 (CCA) and the National Gas Law (NGL).
- 1.2 The information provided to Ministers is an important element in determining the material that is then available to be considered by the Australian Competition Tribunal in the event the Tribunal is called on to review a Minister's decision.

Background

- 1.3 The High Court in its Pilbara appeal decision narrowed the scope of review of declaration decisions under Part IIIA of the CCA by construing 'reconsideration' (in s 44K(4)) as precluding a rehearing of the matter on fresh evidence.¹ Further, the amendments made to the CCA in 2010 inserted new provisions relating to the information that the Tribunal must and may have regard to and limiting the scope of the Tribunal to consider other information.² Under the amended provisions, the Tribunal is to consider only material that was taken into account by the decision-making minister, unless it exercises a discretion to request additional information.³ The Tribunal now has more control over the material it will consider but remains constrained by the High Court's view of the Tribunal's task in reconsidering a decision.
- 1.4 Merits review under the NGL is not expressed to be a 'reconsideration' but is (and has been since the law commenced) limited: it is available only on specified grounds; parties (other than the decision-making minister) may not raise any matter not raised in submissions; and only

¹ *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; (2012) 290 ALR 750 (*Pilbara HCA*), [48] and [65]. The High Court's decision on this point is likely to apply equally to review of a decision not to certify a state or territory access regime as effective since such a review is also expressed (in s 44O) to be a 'reconsideration' on the material and information referred to in s 44ZZOAA.

² These provisions apply to the full range of reviews undertaken by the Tribunal under the CCA, not just reconsideration of decisions relating to declaration.

³ In *Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* [2013] ACompT 2, the Tribunal declined a request that it seek additional information from the Council for consideration in the review of the Pilbara rail declarations on remittal from the High Court (in *Pilbara HCA*). The approach taken by the Tribunal in applying the High Court's decision suggests that the Tribunal will exercise this discretion sparingly.

information falling within the definition of ‘review related matter’ is to be considered by the Tribunal. The High Court’s constraint of the Tribunal’s task in Part IIIA matters may also be expected to influence the scope of limited merits review under the NGL.

- 1.5 Both the CCA and the NGL specify the material to be provided to the Tribunal for the purposes of reviewing declaration, coverage and related decisions.⁴

CCA

- 1.6 Under the CCA, when an application is made for a review of a decision taken by the Minister, the Minister must provide the Tribunal with:

all of the information [the Minister] took into account in connection with the making of the decision to which the review relates (s 44ZZOAAA(3)(c)).

- 1.7 Where a decision period expires without an affirmative decision and a deemed decision results, the Minister must provide the Tribunal with:

all of the information the Council took into account in connection with making the recommendation to which the decision under review relates (s 44ZZOAAA(3)(a)).⁵

- 1.8 In practice the Council, rather than a Minister, provides the relevant information to the Tribunal and takes an active role in such review proceedings. The Council liaises with the Minister’s office in relation to any material produced in the course of the Minister’s consideration of a recommendation which should be provided to the Tribunal. We envisage that this practice will continue.

NGL

- 1.9 The NGL is more prescriptive. In conducting reviews of coverage decisions the Tribunal may consider only a ‘review related matter’ (NGL, s 261).⁶ This is defined (relevantly) as:

- the application for review and supporting submissions
- the decision under review and the written reasons
- any written submissions made to the relevant Minister or Council before the decision or recommendation was made

⁴ Decisions under the CCA relating to ineligibility, revocation or certification are subject to reconsideration by the Tribunal subject to the same limitations as apply to reviews of declaration decisions. NGL decisions relating to revocation, light regulation or revocation are subject to merits review by the Tribunal having regard to information limited by the same provisions as apply to coverage decisions.

⁵ Paradoxically, the Tribunal would be provided with more information where a deemed decision resulted from the expiry of a statutory decision period than when a Minister makes an affirmative decision. Although in the case of a declaration where the Council recommended in favour of declaration yet the deemed outcome results in the application being rejected, there may be only limited material supporting the decision deemed to have been made. This problem does not arise in relation to other deemed decisions where the Council’s recommendation is deemed to have been adopted.

⁶ Unlike under Part IIIA of the CCA, reviews under Part 5 of the NGL are only available with leave of the Tribunal (ss 245 and 248). Leave may not be granted unless the Tribunal considers there to be a serious issue to be heard and that one of the grounds of review (in s 246) exists.

-
- any reports and materials relied on by the relevant Minister or Council in making the decision or recommendation
 - any draft decision or recommendation, and
 - any submissions on the draft or final decision or recommendation considered by the relevant Minister or Council.
- 1.10 The Tribunal must have regard to any document prepared, used and made public by the relevant Minister (or the Council, for light regulation decisions). The Tribunal may allow new information to be submitted if the information would assist any aspect of the determination to be made and if it was not unreasonably withheld from the relevant Minister or the Council.
- 1.11 There is no analogous requirement in the NGL to s 44ZZOAAA(3) requiring the decision maker or Council to provide information to the Tribunal but, as the Tribunal has power to do all things necessary or convenient for the performance of its functions under the NGL (s 91(2)), it is able to request the production of review related matters. As with decisions under the CCA, the Council has generally dealt with provision of the required information to the Tribunal on behalf of the relevant Minister.

Approach to provision of information to the Tribunal

- 1.12 The Council believes the scope of the information to be provided to the Tribunal under the NGL is clear and appropriate. However, issues arise in relation to reviews of decisions under the CCA. Unlike the NGL, determination of the information that should be provided to the Tribunal is somewhat subjective and depends in part on what material is provided to the Minister and the Minister's actions.
- 1.13 For applications under the CCA, the Council's practice has been to provide decision-making Ministers with the application (at the time it is received), its draft recommendation (when it is issued), and of course its final recommendation. While the Council's recommendations summarise the submissions it receives and set out the Council's views on the issues raised in them, the Council has not always provided the submissions themselves to the Minister (public versions of all submissions are available on the Council's website and this is noted in the recommendation).
- 1.14 Where the Minister has not received the submissions, s 44ZZOAAA(3)(c) would only provide for the Tribunal to receive the application, the Council's (draft and final) recommendations and any departmental brief or similar material produced by the Minister's officials or advisors. As the Minister would not have received the various submissions made to the Council, it is likely that they cannot be provided to the Tribunal under s 44ZZOAAA(3)(c).
- 1.15 The Tribunal may request additional information that it considers reasonable and appropriate for making its decision, and may request assistance and reports from the Council. However, the Tribunal's discretion is limited by the nature of the Tribunal's task, as construed by the High Court.
- 1.16 The constraints on the parties' ability to introduce new material into Tribunal proceedings, particularly in Part IIIA matters, raises the prospect of disputes arising as to what was and was not considered by the Minister or Council and therefore what can be considered by the Tribunal on review.

-
- 1.17 In the Council's view it is important that the Tribunal is able to consider the same range of material the Council did in making its recommendation to the Minister, as well as other material considered by the Minister. The Council therefore intends on all occasions to provide decision-making Ministers with the submissions it has considered in making a recommendation at the time it provides its final recommendation on applications made under Part IIIA and the NGL. In practice this will comprise all submissions (provided they were made within time and not returned due to unresolved confidentiality issues).⁷ The Council also considers that the Tribunal ought to be provided with any references and information obtained by Council secretariat staff, where material to the recommendation. These will be appended to the Council's recommendation or provided these to the relevant Minister along with the submissions, as appropriate. The intention is to put Ministers in a position to be able to provide all the material necessary to enable the Tribunal to make an informed decision on review.
- 1.18 A table summarising the Council's intended approach is **Appendix A** to this document.
- 1.19 This approach will also provide for consistency in the information available to the Tribunal when reviewing declaration and similar decisions under the CCA and coverage and similar decisions under the NGL. The Council also considers that this approach best meets the need for it to provide procedural fairness to all parties.
- 1.20 By being provided with all submissions and other information material to the Council's recommendation, the Minister is able to take account of that material. Some subjectivity will remain as it is for the Minister to identify what information he or she has 'taken into account in connection with' a decision.
- 1.21 There is not a clear test for when information has been 'taken into account in connection with' the making of a decision. For a Minister to have taken information into account, the Minister is likely to be required to have been aware of the content of the information or to have had his or her attention drawn to it. The taking into account should not be token or nominal and the Minister should have given the information some weight (although the weight to be given is a matter of discretion).⁸
- 1.22 Generally, where a Minister indicates (if only by passing the information to the Tribunal) that he or she has taken information into account that will be sufficient to enable the information to be used by the Tribunal, unless there is evidence to the contrary.
- 1.23 The meaning of 'in connection with' is dependent upon the statutory context but it seems clear that information will be taken into account by the Minister 'in connection with' the making of a

⁷ In some cases this may involve a considerable volume of material. For example: in the Herbert River tramway declaration recommendation, the application and the four submissions received totaled 583 pages. In relation to the BARA application for declaration of various aircraft fuel services at Sydney Airport the Council received two applications and 24 submissions totaling some 874 pages, provided in two large lever-arch files.

⁸ See discussion of the meaning of 'have regard to' in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th ed), [12.15] and cases there cited. See also *Tickner v Chapman* [1995] FCA 1726; (1995) 57 FCR 451, where Kiefel J (at [40] of her judgment) discussed a statutory requirement that a Minister 'consider' representations prior to making a protection declaration.

decision as long as there is some relationship between the information and the decision; it need not be a causal relationship.⁹

Other related issues

Other material taken into account by Ministers

- 1.24 The Council anticipates that departmental officials and advisors may provide briefs to ministers in relation to Council recommendations. These would need to be included in the material provided to the Tribunal under s 44ZZOAAA(3)(c).
- 1.25 In addition, where the Minister takes any other information into account in connection with making a declaration, certification or similar decision, this information should also be provided to the Tribunal. This could include notes of discussions with officials or other Ministers, although information provided to other ministers advising of a decision that had been taken is unlikely to fall within s 44ZZOAAA(3)(c).

Submissions made directly to the Minister

- 1.26 Neither the CCA nor the NGL obliges the Minister to seek or accept submissions directly from interested parties in addition to the submissions made to the Council in its public consultation process. Seeking (or accepting) additional submissions is discretionary and it is up to the Minister to determine whether to do so and the weight to be given any submissions accepted.
- 1.27 The desirability of a Minister accepting additional submissions must be viewed in light of the process the Council undertakes in making its recommendation and the decision timeframes contained in the CCA and NGL.¹⁰ By the time a Minister receives a Council recommendation, interested parties will have had at least two opportunities to make submissions. The salient elements of these submissions will be noted and discussed in the recommendation. It is only when new facts and issues that are relevant to the criteria for the decision to be made emerge that could not have been raised and considered in the process leading to the Council's recommendation, that it may be either necessary or desirable for a Minister to consider additional submissions.
- 1.28 The ability to maintain the integrity of the public consultation process and afford all parties procedural fairness may be undermined if parties are able (or perceive that they are able) to bypass the Council and make submissions directly to a Minister. If a Minister accepts submissions from or meets with interested parties, procedural fairness is likely to require that the same opportunities be offered to all interested parties. This may be impractical given the time limits on ministerial decisions under the NGL and especially under the CCA, which imposes binding time limits.
- 1.29 Further, both the CCA and the NGL provide for the Council to not have regard to certain submissions if made out of time or if confidentiality issues cannot be resolved. This power

⁹ See Pearce and Geddes, above n 8, [12.8] and cases there cited.

¹⁰ The Council has four months under the NGL and 6 months under the CCA within which to conduct its public consultation. The Minister is given 20 or 30 business days under the NGL and 60 days under the CCA to make his or her decision on the recommendation.

enables the Council to afford procedural fairness to all interested parties and reduce gaming of the Council's processes. The integrity of this process may be undermined if parties are able to make rejected or returned submissions directly to a Minister.

Confidential information

1.30 Some submissions may contain confidential information. This information will be included in the material provided to Ministers, clearly identified as confidential and with advice to Ministers as to the need to protect such material from disclosure.

August 2013



Appendix A Provision of information to decision-making Ministers

Recommendations under Part IIIA (CCA)	Recommendations under the NGL
<ul style="list-style-type: none"> • Declaration of services • Services ineligible to be declared • Certification of effective access regimes 	<ul style="list-style-type: none"> • Pipeline coverage • 15-year no coverage determinations

Material considered by NCC provided to Minister ⁱ	
<ul style="list-style-type: none"> • Application • Draft and final recommendations • All submissions (incl confidential material) • Material references and information obtained by Council secretariat 	<ul style="list-style-type: none"> • Application • Draft and final recommendations • All submissions (incl confidential material) • Any reports and materials relied on by the Council in making its recommendation

+

Additional material obtained and considered by Minister provided to Tribunal ⁱⁱ	
<ul style="list-style-type: none"> • Decision • Statement of reasons • Any further submissions/correspondence with applicant or other interested parties • Departmental brief or advice • File notes of meetings with applicant or interested parties • File notes of discussions and copies of any other materials “taken into account” in Minister’s decisions 	<ul style="list-style-type: none"> • Decision (including any draft decision) • Statement of reasons • Any further submissions/correspondence with applicant or other interested parties • Departmental brief or advice • File notes of meetings with applicant or interested parties • File notes of discussions and copies of any other materials “taken into account” in Minister’s decisions • Any reports and materials relied on by the Minister in making his or her decision

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Material provided to the Competition Tribunal as basis for review	
<ul style="list-style-type: none"> • All of the information taken into account by the Council and Minister in connection with making the recommendation and the decision to which the review relates. 	<ul style="list-style-type: none"> • “Review related material”

ⁱ Applications will be provided to the Minister at the time they are made and draft recommendations are provided to the Minister at the time they are published by the Council.

ⁱⁱ Usually if this material is supplied to the NCC, the Council will arrange for it to be provided to the Competition Tribunal

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-6

This is the Annexure marked “DP-6” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Hutton, Jonathon](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#)
Cc: [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Daley, Simon](#)
Subject: RE: [EXT] ACT 1 of 2021 - Application by New South Wales Minerals Council for review under s 44K(2) of the Competition and Consumer Act 2010 (Cth) [SEC=OFFICIAL] [AGSDMS-DMS.FID4334975]
Date: Friday, 4 June 2021 4:34:55 PM

OFFICIAL

Dear Mr Arnold,

We are seeking information identified in your letter and will revert when we have that information.

Kind regards

Jonathon.

Jonathon Hutton

A/g Senior Executive Lawyer
Australian Government Solicitor
T 02 9581 7408 F 02 9581 7650
jonathon.hutton@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

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From: Philip.Arnold@CliffordChance.com [mailto:Philip.Arnold@CliffordChance.com]
Sent: Wednesday, 2 June 2021 4:18 PM
To: Hutton, Jonathon <Jonathon.Hutton@ags.gov.au>
Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Daley, Simon <Simon.Daley@ags.gov.au>
Subject: RE: [EXT] RE: ACT 1 of 2021 - Application by New South Wales Minerals Council for review under s 44K(2) of the Competition and Consumer Act 2010 (Cth) [SEC=OFFICIAL] [AGSDMS-DMS.FID4334975]

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Dear Jonathon

Please see the **attached** letter.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Hutton, Jonathon <Jonathon.Hutton@ags.gov.au>
Sent: Wednesday, 19 May 2021 5:33 PM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Daley, Simon <Simon.Daley@ags.gov.au>
Subject: [EXT] RE: ACT 1 of 2021 - Application by New South Wales Minerals Council for review under s 44K(2) of the Competition and Consumer Act 2010 (Cth) [SEC=OFFICIAL] [AGSDMS-DMS.FID4334975]

OFFICIAL

Dear Philip,

Please see our attached response.

Kind regards

Jonathon.

Jonathon Hutton

A/g Senior Executive Lawyer
Australian Government Solicitor
T 02 9581 7408 F 02 9581 7650
jonathon.hutton@ags.gov.au

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From: Philip.Arnold@CliffordChance.com [<mailto:Philip.Arnold@CliffordChance.com>]
Sent: Monday, 17 May 2021 4:31 PM
To: Hutton, Jonathon <Jonathon.Hutton@ags.gov.au>
Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com; Isabella.Ledden@CliffordChance.com
Subject: ACT 1 of 2021 - Application by New South Wales Minerals Council for review under s 44K(2) of the Competition and Consumer Act 2010 (Cth)

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Dear Jonathon

Please see the **attached** letter in relation to the above matter.

Kind regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-7

This is the Annexure marked “DP-7” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

JOHNSON WINTER & SLATTERY

Senior Partner: Tom Jarvis +61 3 8611 1336
Email: tom.jarvis@jws.com.au
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Email: Wolfgang.Hellmann@jws.com.au
Our Ref: C6299
DocID: 79776113v1

4 June 2021

Mr Dave Poddar
Partner
Clifford Chance
Level 16, 1 O'Connell Street
SYDNEY NSW 2000

BY EMAIL
dave.poddar@cliffordchance.com

Dear Mr Poddar

ACT 1 of 2021 – Application for review under s 44K(2)

We refer to your letter dated 2 June 2021.

On Friday 18 December 2020, the National Competition Council (**NCC**) provided by email to Treasury staff, including the Treasury Department Liaison Officer for the Commonwealth Treasurer, the Hon Josh Frydenberg:

- an electronic copy of the NCC President's letter to the Treasurer dated 18 December 2020
- the NCC's Recommendation of the same date, and
- a link to a hyperlinked electronic index to Appendix A.

On the same day, the NCC gave hard copies of the NCC President's letter and the NCC's Recommendation to the Department Liaison Officer in Canberra.

The NCC cannot know precisely what material was given to the Treasurer personally but notes that based on the Ministerial Information bundle filed with the Tribunal on 22 April 2021 it appears that the documents listed in Appendix A may not have been.

Yours faithfully



Tom Jarvis
Partner

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-8

This is the Annexure marked “DP-8” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

NOTICE UNDER THE COMPETITION AND CONSUMER ACT 2010 (CTH)

To: National Competition Council
Level 17, Casselden
2 Lonsdale Street
MELBOURNE VIC 3000

THE TRIBUNAL DIRECTS THAT:

1. Pursuant to section 44K(6A) of the *Competition and Consumer Act 2010 (Cth) (CCA)* and regulation 22(1)(a) of the *Competition and Consumer Regulations 2010*, the National Competition Council (NCC) is to provide the information in the Schedule to the Tribunal on or before [DATE] 2021.

SCHEDULE

Information to be provided

The following documents at: <https://ncc.gov.au/application/application-for-declaration-of-certain-services-in-relation-to-the-port-of-newcastle/1>, hyperlinked in the 'NCC – NSWMC application for declaration – Final Recommendation' (footnote 11):

1. Application – Annexure A.
2. Application – Annexure B.
3. Application – Annexure C.
4. Application – Annexure G.

The following document at: <https://ncc.gov.au/application/consideration-of-possible-recommendation-to-revoke-declaration-of-service-a>, hyperlinked in the 'NCC – NSWMC application for declaration – Final Recommendation' (footnote 44):

5. Glencore Coal Pty Ltd, Synergies report dated 8 August 2018.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-9

This is the Annexure marked “DP-9” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Status

- 1 Application Received 23 July 2020
2 Submissions on application Closed 26 August 2020
3 Draft recommendation Submissions due by 5pm on 25 November 2020
4 Submissions on draft recommendation Closed on 25 November 2020
5 Final recommendation and decision Released 18 February 2021
6 Outcome & subsequent events

Application for declaration of certain services in relation to the Port of Newcastle (Application)

On 23 July 2020, the Council received an application from the NSW Minerals Council for declaration of certain services in relation to the Port of Newcastle. This application was made under the provisions of Part IIIA of the Competition and Consumer Act 2010 (CCA).

A copy of the application and the relevant information are available below. The Council invites interested parties to make written submissions on the application. Submissions on the application must be received by 5pm on Wednesday 26 August 2020.

Parties making a submission should refer to the Council's Guide to making a submission on declaration applications and Guide to Declaration which are available below and on the Council's website. Submissions should be emailed in soft copy (both MS Word and PDF formats) to the Council at info@ncc.gov.au

After considering submissions on the application, the Council will release a draft recommendation and provide a further opportunity for public comment before making its final recommendation to the Commonwealth Treasurer.

Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal [2020] FCAFC 145

On 27 August 2020, the Full Court of the Federal Court of Australia published its decision setting aside the Australian Competition Tribunal's (Tribunal) re-arbitration of the ACCC's 30 October 2019 determination in respect of the access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd. The judgment is available at http://www.austlii.edu.au

The Court found that the Tribunal had misconstrued the terms of the declared Service and erred in law by allowing the Port of Newcastle to include the cost of user funded assets in the regulatory asset base in setting its navigation service charge. The Court has remitted the matter to the Tribunal for further determination according to law.

The NCC is aware that interested parties may consider that the Court's decision is relevant to the NCC's assessment of the application by the NSW Minerals Council for declaration of the Port of Newcastle.

The Council invites further submissions from interested parties about whether and, if so, how the Court's decision is relevant to its consideration of the NSW Minerals Council application.

Submissions should be emailed to info@ncc.gov.au and must be received by 5 pm on Monday 7 September 2020.

Documents

- Application, July 2020 (PDF, 1.36MB)
Application cover letter (PDF, 176KB)
Application - Annexure A (PDF, 401KB)
Application - Annexure B (PDF, 321KB)
Application - Annexure C (PDF, 340KB)
Application - Annexure D (PDF, 120KB)
Application - Annexure E (PDF, 217KB)
Application - Annexure F (PDF, 500KB)
Application - Annexure G (PDF, 299KB)
Submission cover sheet (DOCX, 274KB)
Guide to Declaration, April 2018 (PDF, 1.26MB)
Guide to making a submission on declaration applications, December 2017 (PDF, 458KB)

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COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-10

This is the Annexure marked “DP-10” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Status

- [1 Matter](#)
Received 02 July 2018
- [2 Submissions](#)
Received 29 October 2018
- [3 Council's preliminary views](#)
Released 19 December 2018
- [4 Submissions on Council's preliminary views](#)
Received 04 February 2019
- [5 Council's final views](#)
Released 24 September 2019
Council's Recommendation
- [6 Outcome & subsequent events](#)

Home » Current applications » Consideration of possible recommendation to revoke declaration of service at the Port of Newcastle

Consideration of possible recommendation to revoke declaration of service at the Port of Newcastle

In July 2018, the Council received a submission from Port of Newcastle Operations Pty Ltd (PNO) that the Council should recommend under section 44J of the *Competition and Consumer Act 2010 (Act)* that the designated Minister revoke the declaration of the shipping channel service at the Port of Newcastle.

For a copy of PNO's submission and background information relating to this matter, please click on the *Matter* tab in the left navigation panel.

The Council invited submissions from interested parties on whether the Council should make a revocation recommendation, particularly submissions addressing the declaration criteria in section 44CA of the Act, by 8 August 2018.

Submissions and correspondence received by the Council have been published under the *Submissions* tab.

A number of the submissions received raised issues in respect of which the Council considered it required additional information and documents from PNO in order to proceed to preparing a statement of its preliminary views. Accordingly, on 4 September 2018, the Council wrote to PNO requesting additional documents and information to be provided by 17 September 2018. That letter is available under the *Submissions* tab.

PNO has provided submission and documents in response to the Council's letter of 4 September 2018, including certain documents over which PNO has claimed confidentiality on the basis that the documents contain highly confidential and commercially sensitive information about PNO's business and strategy.

The Council has considered PNO's claim that part of its response is confidential, and the reasons in support of that claim and accepts that the information the subject of the claim is confidential. The Council will not publish those documents the subject of the claim at this time or disclose them to any party (except the NCC's advisors, ACCC staff assisting the NCC pursuant to the NCC-ACCC Memorandum of Understanding, and the designated Minister as the circumstances require).

The Council wrote to PNO on 20 September 2018 advising the acceptance of the confidentiality claim. That letter, along with the submission and non-confidential documents provided by PNO in response to the Council's 4 September letter, are published under the *Submissions* tab.

Interested parties were invited to make submissions on the issues raised in the submission and non-confidential material provided by PNO in response to the Council's 4 September letter, by 5.00pm on 5 October 2018. Submissions received have been published under the *Submissions* tab.

On 8 October 2018, the ACCC published its final determination of the arbitrated dispute between Glencore Coal Assets Australia and PNO in relation to the terms and conditions for accessing the declared shipping channel service at the Port of Newcastle.

The Council invited further submissions from interested parties about whether, and if so, how the Council should have regard to the ACCC's final determination when considering whether to make a revocation recommendation, by 29 October. Submissions received have been published under the *Submissions* tab.

On 19 December 2018, the Council released its Statement of Preliminary Views (available under the *Council's preliminary views* tab). The Council's preliminary view was that it proposed to recommend to the designated Minister that the declaration be revoked.

Interested parties were invited to make written submissions on the Council's Statement of Preliminary Views by 5.00pm on 4 February 2019. Submissions and correspondence received by the Council have been published under the *Submissions on Council's preliminary views* tab.

At the request of the Council, NERA Economic Consulting (NERA) produced a report dated 8 April 2019, to assist the Council's consideration of whether declaration of the shipping channel service at the Port of Newcastle would be likely to satisfy the criterion set out in section 44CA(1)(a) of the Act in respect of the coal tenements market. Interested parties were invited to make written submissions to the Council on the opinions expressed in the report by 5.00pm on 26 April 2019. The NERA report and submissions from interested parties are available for download under the *Submissions on Council's preliminary views* tab.

On 26 July 2019, the Minister, the Hon. Josh Frydenberg MP, received a recommendation from the Council under section 44J(1) of the Competition and Consumer Act 2010 (CCA). The Council recommended that the declaration of service at the Port of Newcastle be revoked.

Under s 44J(7) of the CCA, if the Minister has not published a decision on a revocation recommendation within the period starting at the start of the day the recommendation is received and ending 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:

- (a) to have made a decision that the declaration be revoked; and
- (b) to have published that decision in accordance with this section.

The 60-day period in relation to the recommendation made by the Council to revoke declaration of service at the Port of Newcastle ended on 23 September 2019.

Subscribe for email updates relating to this application

Name

Organisation

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COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-11

This is the Annexure marked “DP-11” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Status

- [1 Matter](#)
Received 02 July 2018
- [2 Submissions](#)
Received 29 October 2018
- [3 Council's preliminary views](#)
Released 19 December 2018
- [4 Submissions on Council's preliminary views](#)
Received 04 February 2019
- [5 Council's final views](#)
Released 24 September 2019
Council's Recommendation
- [6 Outcome & subsequent events](#)

Home » Current applications » Consideration of possible recommendation to revoke declaration of service at the Port of Newcastle » Council's final views

Consideration of possible recommendation to revoke declaration of service at the Port of Newcastle (Council's final views)

The period for initial submissions closed on 8 August 2018.

A number of the submissions received raised issues in respect of which the Council considered it required additional information and documents from PNO in order to proceed to preparing a statement of its preliminary views. Accordingly, on 4 September 2018, the Council wrote to PNO requesting additional documents and information to be provided by 17 September 2018.

PNO provided submission and documents in response to the Council's letter of 4 September 2018, including certain documents over which PNO has claimed confidentiality on the basis that the documents contain highly confidential and commercially sensitive information about PNO's business and strategy.

The Council has considered PNO's claim that part of its response is confidential, and the reasons in support of that claim and accepts that the information the subject of the claim is confidential. The Council will not publish those documents the subject of the claim at this time or disclose them to any party (except the NCC's advisors, ACCC staff assisting the NCC pursuant to the NCC-ACCC Memorandum of Understanding, and the designated Minister as the circumstances require).

The Council wrote to PNO on 20 September 2018 advising the acceptance of the confidentiality claim. That letter, along with the submission and non-confidential documents provided by PNO in response to the Council's 4 September letter, are available below.

Interested parties were invited to make submissions on the issues raised in the submission and non-confidential material provided by PNO in response to the Council's 4 September letter, by 5.00pm on 5 October 2018. Submissions received are available for download below.

On 8 October 2018, the ACCC published its final determination of the arbitrated dispute between Glencore Coal Assets Australia and PNO in relation to the terms and conditions for accessing the declared shipping channel service at the Port of Newcastle.

The Council invited further submissions from interested parties about whether, and if so, how the Council should have regard to the ACCC's final determination when considering whether to make a revocation recommendation, by 29 October. Submissions received have been published below.

Following the release of the Council's preliminary views, all interested parties will have an opportunity to make further submissions before the Council decides whether to make a revocation recommendation to the designated Minister.

More details on the process and the indicative timetable in relation to this matter is available [here](#).

- #### Documents
- #### Submissions
- [Yancoal Australia Limited, 27 July 2018 \(PDF, 391KB\)](#)
 - [Port Waratah Coal Services Limited, 6 August 2018 \(PDF, 113KB\)](#)
 - [Yancoal Australia Limited, 8 August 2018 \(PDF, 484KB\)](#)
 - [NSW Minerals Council, 8 August 2018 \(PDF, 102KB\)](#)
 - [Australian Competition and Consumer Commission, 8 August 2018 \(PDF, 689KB\)](#)
 - [Glencore Coal Pty Ltd, cover letter, 8 August 2018 \(PDF, 64KB\)](#)
 - [Glencore Coal Pty Ltd, submission, 8 August 2018 \(PDF, 68KB\)](#)
 - [Glencore Coal Pty Ltd, Synergies report, 8 August 2018 \(PDF, 1.82MB\)](#)
 - [Anglo American Metallurgical Coal Pty Ltd, 8 August 2018 \(PDF, 41KB\)](#)
 - [Newcastle Coal Infrastructure Group, 8 August 2018 \(PDF, 174KB\)](#)
 - [Ports Australia, 8 August 2018 \(PDF, 3.3MB\)](#)
 - [Shipping Australia, 8 August \(PDF, 211KB\)](#)
- #### Correspondence
- [Clifford Chance letter, 30 July 2018](#)
 - [The Council's letter, 3 August 2018](#)

Subscribe for email updates relating to this application

Name

Organisation

Email (required)

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-12

This is the Annexure marked “DP-12” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Application for Review of the decision by the Commonwealth Treasurer under subsection 44K(2) of the *Competition and Consumer Act 2010* (CTH) in relation to the application for declaration of a service provided by Port of Newcastle Operations Pty Ltd

ACT 1 of 2016

Hearing Book Index

Tab	Document	Date
Part A – Procedural matters		
1.	Application for review filed by Applicant	29 January 2016
2.	Order of the Hon. Justice Mansfield	29 February 2016
3.	Notice of Contention filed by Port of Newcastle Operations Pty Ltd	7 March 2016
Part B – Minister's Decision and Statement of Reasons		
4.	Minister's decision re the Application by Glencore Coal Pty Ltd for declaration of shipping channel service at Port of Newcastle (with attachments) (" Port of Newcastle application ")	8 January 2016
5.	Minister's statement of reasons re Port of Newcastle application	8 January 2016
Part C – Material provided by the Minister pursuant to Order 1 of directions made by Justice Mansfield on 29 February 2016		
6.	Treasury Ministerial Submission re Application for Declaration at the Port Of Newcastle (<i>signed by the Treasurer on 22 December 2015</i>) [Note: Version redacted for LPP and relevance]	25 November 2015
7.	Treasury Ministerial Submission re Application for Declaration at the Port Of Newcastle (<i>signed by the Acting Treasurer on 8 January 2016</i>) Attachment: NCC Final recommendation re Port of Newcastle application (2 November 2016) [Note: Version redacted for LPP and relevance]	23 December 2015
Application		
8.	Glencore Coal Pty Ltd - <i>Application for a declaration recommendation in relation to the Port of Newcastle</i> Annexure A: Schedule of Port Pricing effective from 1 Jan 2015 Annexure B: Price increase – calculation of impact Annexure C: Plan of channel Annexure D: Letter from Dr Rob Yeates dated 6 May 2015	13 May 2015
Submissions in response to Port of Newcastle application		
9.	Port of Newcastle Operations – <i>Application for declaration of shipping channel services at the Port of Newcastle –</i>	3 June 2015

Tab	Document	Date
	<i>Submission on Designated Minister</i>	
10.	Port Waratah Coal Services – <i>Application for a declaration recommendation in relation to the Port of Newcastle</i>	10 June 2015
11.	NSW Minerals Council – <i>Submission in support of Glencore’s application for declaration of shipping channel services at Port of Newcastle under Part IIIA of the Competition and Consumer Act 2010</i>	16 June 2015
12.	The Bloomfield Group – <i>Application for declaration of the shipping channel service at the Port of Newcastle</i>	16 June 2015
13.	Shipping Australia Limited – <i>Declaration of the Shipping Chanel Services at the Port of Newcastle (PoN) – Glencore Application</i>	18 June 2015
14.	Port of Newcastle Operations – <i>Port of Newcastle Operations – submission in response to Glencore’s application to the National Competition Council</i> Attachment 1: Historical port prices applicable to the coal trade FY91 to CY15 (ex GST) Attachment 2: Total port charges by vessel size and per tonne of coal pre and post pricing restructure and realignment 1 January 2015 Attachment 3: Port of Newcastle Operations’ approach to defining the dependent markets Attachment 4: The PAMA regime Attachment 5: The building blocks model Attachment 6: Other factors that affect the availability of finance for coal projects Attachment 7: Report from Ms Cecilie Naess dated 17 June 2015	18 June 2015
15.	Peabody Energy Australia Pty Ltd – <i>Peabody Energy Australia Pty Ltd: Application for the declaration of shipping channel services at the Port of Newcastle</i>	18 June 2015
16.	Whitehaven Coal Ltd – <i>Application for a declaration recommendation in relation to the Port of Newcastle</i>	22 June 2015
17.	Newcastle Coal Infrastructure Group – <i>Submissions – Application for declaration of shipping channel services at the Port of Newcastle</i>	23 June 2015
18.	Victorian Department of Treasury and Finance - <i>National Competition Council: Application by Glencore Coal Pty Ltd for a declaration recommendation under Part IIIA of the Competition and Consumer Act 2010 (Cth)</i>	25 June 2015
19.	Glencore Coal Pty Ltd – <i>Response to the submission by Port of Newcastle Operations in relation to Application to the National Competition Council under Part IIIA of the Consumer & Competition Act 2010 (Cth) in relation to the Port of Newcastle</i>	29 June 2015
20.	NSW Treasury – <i>NSW Treasury Submission to the National Competition Council: Glencore’s application for Declaration of Shipping Channel Services at the Port of Newcastle</i> Attachment A: Comments in relation to the rail component of the Hunter Valley Coal Network Attachment B: (withdrawn)	30 June 2015
21.	Ports Australia – <i>Application by Glencore Coal Pty Ltd for Declaration of the shipping channel at the Port of Newcastle: Ports Australia submission</i>	1 July 2015

Tab	Document	Date
22.	Port of Newcastle Operations – <i>Application for declaration of shipping channel services at the Port of Newcastle – Further submission on Designated Minister</i>	2 July 2015
Submissions in Response to the Council's draft recommendation		
23.	Port of Newcastle Operations – <i>Submission in response to the national Competition Council's draft recommendation</i>	31 August 2015
24.	Virgin Australia Airlines Pty Ltd - <i>declaration of shipping channel services at the Port of Newcastle – draft recommendation</i>	31 August 2015
25.	NSW Minerals Council – <i>Submission on NCC's draft recommendation - Application for Declaration of Shipping Channel Services at Port of Newcastle</i>	31 August 2015
26.	Peabody Energy Australia Pty Ltd – <i>Peabody Energy Australia Pty Ltd Submission: Declaration of shipping channel service at the Port of Newcastle</i>	31 August 2015
27.	NSW Treasury – <i>NSW Treasury Submission to the National Competition Council - draft recommendation on the Access to Shipping Channel Services at the Port of Newcastle</i>	2 September 2015
28.	The Bloomfield Group – <i>Submission on draft Recommendation - Application for declaration of the shipping channel service at the Port of Newcastle</i>	2 September 2015
29.	Port Waratah Coal Services – <i>Submission on the draft recommendation in relation to the Port of Newcastle</i>	3 September 2015
30.	Whitehaven Coal Ltd – <i>Submission on National Competition council (NCC) draft recommendation in relation to the Port of Newcastle</i>	4 September 2015
31.	Glencore Coal Pty Ltd – <i>Submission to the National Competition Council Applicant's response to the draft recommendation not to declare the shipping channel service at the Port of Newcastle</i> Annexure A: Synergies Economic Consulting (received 7 September 2015), Potential for increase in navigation services charges at Port of Newcastle Annexure B1: Simon Bishop, RBB Economics, 10 September 2015 (received 11 September 2015), <i>An Economic Assessment of NCC's Draft Recommendation not to declare the Shipping Channel at the Port of Newcastle</i> Annexure B2: Trent Saunders, Reserve Bank of Australia, Bulletin, June Quarter 2015 (received 11 September), <i>Developments in Thermal Coal Markets</i>	9 September 2015
Submissions in response to the Council's requests for information		
32.	Notice from NCC to Port of Newcastle Operations under s 44FA of the Competition and Consumer Act	18 September 2015
33.	Letter from NCC to Clifford Chance requesting clarification of Glencore Application	25 September 2015
34.	Port of Newcastle Operations, letter – <i>Application for declaration of shipping channel services at the Port of Newcastle [Note: confidential and non-confidential versions]</i> Attachment A: PNO's response to the Notice Attachment B: HoustonKemp Report	2 October 2015

Tab	Document	Date
	Attachment C: Castalia Report Attachment D: Submission by PNO on the correct approach to the assessment of criterion (a) Attachment E: Characterisation of port changes	
35.	Glencore Coal Pty Ltd – <i>Submission to the national Competition Council – response to the National Competition Council's draft recommendation not to declare the shipping channel service at the Port of Newcastle</i>	2 October 2015
Prior NCC Recommendations		
36.	<i>Final Recommendation: Application by Virgin Blue for declaration of airside services at Sydney Airport</i>	November 2003
37.	<i>Final Recommendation: The Lakes R Us application for declaration of water storage and transport services</i>	November 2005
38.	<i>Final Recommendation: Application for declaration of a service provided by the Tasmanian Rail Network</i>	August 2007
39.	<i>Final Recommendation: Application under the National Gas Law for a revocation of coverage – Dawson Valley Pipeline</i>	August 2014
Port of Newcastle Leases		
40.	Lease between Port of Newcastle Lessor Pty Limited and Port of Newcastle Investments (Property) Pty Limited	30 May 2014
41.	Sublease between Port of Newcastle Investments (Property) Pty Limited and Port of Newcastle Operations Pty Limited	30 May 2014
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42.	Australian Competition and Consumer Commission, <i>Decision in relation to Australian Rail Track Corporation's Hunter Valley rail network undertaking</i>	29 June 2011
43.	<i>Competition Principles Agreement</i>	(11 April 1995, as amended to 13 April 2007)
44.	Peter Hanks QC and Frances Gordon, <i>In the matter of the application by Glencore Coal Pty Ltd for declaration of the use of the shipping channels at the Port of Newcastle</i> (Joint memorandum of advice)	10 June 2015
45.	National Competition Council, <i>Declaration of services – A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)</i>	February 2013
46.	National Competition Council, <i>Draft recommendation – Declaration of the shipping channel service at the Port of Newcastle</i>	July 2015
47.	Productivity Commission, <i>Inquiry Report – National Access Regime</i> (No. 66 25 October 2013)	25 October 2013
48.	Productivity Commission, <i>Inquiry Report – Review of the National Access Regime</i> (No. 17)	28 September 2001
49.	Rod Sims, <i>Competition key to restoring Australia's productivity</i> (Speech)	4 September 2015
50.	Glencore Coal Pty Ltd, Final submission and covering letter	4 November 2015
Part D – Other Material before the NCC not provided to the Minister		
51.	Letter from the Applicant to the Federal Treasurer	20 November 2015

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-13

This is the Annexure marked “DP-13” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: [Tom Jarvis](#); blloyd@claytonutz.com
Cc: [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#)
Subject: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Monday, 17 May 2021 3:39:49 PM
Attachments: [Act 1 of 2021 - Hearing Book Index \(Draft\).docx](#)

Dear Bruce, Tom

I refer to Direction 11 of the Tribunal's Directions of 8 April 2021 and **attach** a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing.

Regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-14

This is the Annexure marked “DP-14” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Lloyd, Bruce](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#)
Cc: [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); Tom.Jarvis@jws.com.au; [Ledden, Isabella \(Antitrust-SYD\)](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano \(Antitrust-SYD\)](#)
Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Wednesday, 19 May 2021 6:38:57 PM
Attachments: [ACT 1 of 2021 - Hearing Book Index \(NSWMC Draft\) - PNO edits 19.05.2021.DOCX](#)

Dear Philip

We refer to your client's draft index to the Hearing Book in this proceeding, which lists the documents proposed to be relied upon by NSWMC at the hearing.

For the purpose of direction 12 made on 8 April 2021, we confirm that PNO does not propose to include any additional documents to those listed in the draft index.

However, PNO does not consent to the inclusion of the documents at tabs 9-55 of your client's draft index, as reflected in the **attached** marked-up amendments.

These documents are not before the Tribunal in this proceeding. For the purposes of this review proceeding, the only material to which the Tribunal is to have regard comprises:

1. information that the decision maker took into account in connection with the making of the decision (s 44ZZOAAA(3)(c));
2. such information requested by the Tribunal as is "reasonable and appropriate" for the purposes of the review, by way of written notice to produce information (s 44ZZOAAA(5));
3. assistance given by the NCC at the request of the Tribunal (s 44K(6)); and
4. such information or reports provided by the NCC to the Tribunal in response to a written notice (s 44K(6A)),

by virtue of s 44ZZOAA of the *Competition and Consumer Act 2010*.

In the circumstances, the power of the Tribunal to receive the documents at tabs 9-55 of the draft index can only be enlivened by way of a notice under ss 44ZZOAAA(5) or 44K(6A) on the application of your client. As far as we are aware, your client has not applied to the Tribunal to issue any such notice.

The inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

In the circumstances, we invite you to confirm that:

- your client does not press the inclusion of the documents at tabs 9-55 of the draft index; or
- alternatively, your client intends to apply to the Tribunal to issue a notice under ss 44ZZOAAA(5) or 44K(6A) to request those documents. If so, please confirm when you will serve our client with any such application.

Regards

Bruce

Bruce Lloyd, Partner
Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>
Sent: Monday, 17 May 2021 3:40 PM
To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>
Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;
Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>;
Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz,
Damiano <dfritz@claytonutz.com>
Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

I refer to Direction 11 of the Tribunal's Directions of 8 April 2021 and **attach** a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing.

Regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-15

This is the Annexure marked “DP-15” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Poddar, Dave \(Antitrust-SYD\)](#)
To: Tom.Jarvis@jws.com.au
Cc: [Fu, Angel \(Antitrust-SYD\)](#); Tom.Jarvis@jws.com.au; [Ledden, Isabella \(Antitrust-SYD\)](#); [Richmond, Elizabeth; Grahame, Scott; Barber, Dylan; Fritz, Damiano; Lloyd, Bruce; Arnold, Philip \(Antitrust-SYD\)](#)
Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Thursday, 20 May 2021 9:05:23 AM

Dear Tom
Could you please advise the NCC's position on this.
Regards

Dave Poddar

Partner

CLIFFORD CHANCE

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct: +61 2 8922 8033

Mobile: +61 422 800 415

Switchboard: +61 2 8922 8000

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email: dave.poddar@cliffordchance.com

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From: Lloyd, Bruce <blloyd@claytonutz.com>

Sent: Wednesday, 19 May 2021 6:39 PM

To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>

Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Tom.Jarvis@jws.com.au; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>

Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip

We refer to your client's draft index to the Hearing Book in this proceeding, which lists the documents proposed to be relied upon by NSWMC at the hearing.

For the purpose of direction 12 made on 8 April 2021, we confirm that PNO does not propose to include any additional documents to those listed in the draft index.

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These documents are not before the Tribunal in this proceeding. For the purposes of this review proceeding, the only material to which the Tribunal is to have regard comprises:

1. information that the decision maker took into account in connection with the making of the decision (s 44ZZOAAA(3)(c));
2. such information requested by the Tribunal as is "reasonable and appropriate" for the

- purposes of the review, by way of written notice to produce information (s 44ZZOAAA(5));
3. assistance given by the NCC at the request of the Tribunal (s 44K(6)); and
 4. such information or reports provided by the NCC to the Tribunal in response to a written notice (s 44K(6A)),

by virtue of s 44ZZOAA of the *Competition and Consumer Act 2010*.

In the circumstances, the power of the Tribunal to receive the documents at tabs 9-55 of the draft index can only be enlivened by way of a notice under ss 44ZZOAAA(5) or 44K(6A) on the application of your client. As far as we are aware, your client has not applied to the Tribunal to issue any such notice.

The inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

In the circumstances, we invite you to confirm that:

- your client does not press the inclusion of the documents at tabs 9-55 of the draft index; or
- alternatively, your client intends to apply to the Tribunal to issue a notice under ss 44ZZOAAA(5) or 44K(6A) to request those documents. If so, please confirm when you will serve our client with any such application.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 17 May 2021 3:40 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>;

Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz,

Damiano <dfritz@claytonutz.com>

Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

I refer to Direction 11 of the Tribunal's Directions of 8 April 2021 and **attach** a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing.

Regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-16

This is the Annexure marked “DP-16” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: Tom.Jarvis@jws.com.au
Cc: [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Wolfgang Hellmann](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#); [Lloyd, Bruce](#)
Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Tuesday, 25 May 2021 9:19:10 PM

Dear Tom

Further to Dave's email below, we would be grateful if the NCC would confirm whether it seeks any additional documents to be included in the Hearing Book (having regard to the index we circulated on 17 May 2021 and Direction 12 of the Tribunal's Directions of 8 April 2021).

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

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From: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>
Sent: Thursday, 20 May 2021 9:05 AM
To: Tom.Jarvis@jws.com.au
Cc: Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Tom.Jarvis@jws.com.au; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Lloyd, Bruce <blloyd@claytonutz.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Tom
Could you please advise the NCC's position on this.
Regards

Dave Poddar
Partner

CLIFFORD CHANCE
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct: +61 2 8922 8033
Mobile: +61 422 800 415
Switchboard: +61 2 8922 8000
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email: dave.poddar@cliffordchance.com

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From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Wednesday, 19 May 2021 6:39 PM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Tom.Jarvis@jws.com.au; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>
Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip

We refer to your client's draft index to the Hearing Book in this proceeding, which lists the documents proposed to be relied upon by NSWMC at the hearing.

For the purpose of direction 12 made on 8 April 2021, we confirm that PNO does not propose to include any additional documents to those listed in the draft index.

However, PNO does not consent to the inclusion of the documents at tabs 9-55 of your client's draft index, as reflected in the **attached** marked-up amendments.

These documents are not before the Tribunal in this proceeding. For the purposes of this review proceeding, the only material to which the Tribunal is to have regard comprises:

1. information that the decision maker took into account in connection with the making of the decision (s 44ZZOAAA(3)(c));
2. such information requested by the Tribunal as is "reasonable and appropriate" for the purposes of the review, by way of written notice to produce information (s 44ZZOAAA(5));
3. assistance given by the NCC at the request of the Tribunal (s 44K(6)); and
4. such information or reports provided by the NCC to the Tribunal in response to a written notice (s 44K(6A)),

by virtue of s 44ZZOAA of the *Competition and Consumer Act 2010*.

In the circumstances, the power of the Tribunal to receive the documents at tabs 9-55 of the draft index can only be enlivened by way of a notice under ss 44ZZOAAA(5) or 44K(6A) on the application of your client. As far as we are aware, your client has not applied to the Tribunal to issue any such notice.

The inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

In the circumstances, we invite you to confirm that:

- your client does not press the inclusion of the documents at tabs 9-55 of the draft index; or
- alternatively, your client intends to apply to the Tribunal to issue a notice under ss 44ZZOAAA(5) or 44K(6A) to request those documents. If so, please confirm when you will

serve our client with any such application.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 17 May 2021 3:40 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>;

Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz,

Damiano <dfritz@claytonutz.com>

Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

I refer to Direction 11 of the Tribunal's Directions of 8 April 2021 and **attach** a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing.

Regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

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Email: philip.arnold@cliffordchance.com

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To contact any other office

http://www.cliffordchance.com/about_us/find_people_and_offices.html

For details of how we process personal data, please see our updated [privacy statement](#).

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-17

This is the Annexure marked “DP-17” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Fritz, Damiano](#)
To: [Poddar, Dave \(Antitrust-SYD\)](#); [Arnold, Philip \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Gvozdencovic, Michael \(Antitrust-SYD\)](#)
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; [Lloyd, Bruce](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#)
Subject: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]
Date: Friday, 28 May 2021 3:40:29 PM

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We would be grateful if you could let us know when we might expect to receive the Hearing Book, and your client's submissions, in the above proceeding?

Regards

Damiano Fritz, Lawyer
Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4881 | F +612 8220 6700 |

dfritz@claytonutz.com | www.claytonutz.com

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-18

This is the Annexure marked “DP-18” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: [Lloyd, Bruce](#); Tom.Jarvis@jws.com.au
Cc: [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdzenovic, Michael \(Antitrust-SYD\)](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#); [Wolfgang Hellmann](#)
Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Sunday, 30 May 2021 12:18:42 PM

Dear Bruce, Tom

We refer to Mr Lloyd's email below and note that:

- PNO does not seek to include any additional documents to those listed in the **Draft Index** for the Hearing Book circulated by NSWMC on 17 May 2021; and
- PNO does not consent to the inclusion in the Hearing Book of the documents listed at tabs 9-55 of the Draft Index, on the basis that PNO does not consider the documents to be before the Tribunal in the proceeding.

Direction 11 of the Tribunal's Directions of 8 April 2021 provide for the inclusion of all documents proposed to be relied upon at the hearing. The Draft Index achieves that purpose and is consistent with that direction.

NSWMC does not agree that the documents identified in the Draft Index are not before the Tribunal in the proceeding. With limited exception, the documents included in the Draft Index are those identified at Appendix A to the NCC's Final Recommendation. They plainly form part of the Final Recommendation, which was taken into account by the Treasurer, and are before the Tribunal pursuant to s 44ZZOAAA(3)(c). In that regard, we note that the material before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016) was not limited in the unusual way PNO now seeks.

In this context NSWMC intends to file a Hearing Book that is consistent with the Draft Index. However, in light of the dispute raised by PNO, and without prejudice to NSWMC's position as outlined above, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.

Please let us know if your respective clients consent to the below email to the Tribunal.

Dear Ms Young, Associate

We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016).
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing

Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The NCC has not indicated any view on this matter.

This email is sent with the consent of the parties and the NCC.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

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From: Lloyd, Bruce <blloyd@claytonutz.com>

Sent: Wednesday, 19 May 2021 6:39 PM

To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>

Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Tom.Jarvis@jws.com.au; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>

Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip

We refer to your client's draft index to the Hearing Book in this proceeding, which lists the documents proposed to be relied upon by NSWMC at the hearing.

For the purpose of direction 12 made on 8 April 2021, we confirm that PNO does not propose to include any additional documents to those listed in the draft index.

However, PNO does not consent to the inclusion of the documents at tabs 9-55 of your client's draft index, as reflected in the **attached** marked-up amendments.

These documents are not before the Tribunal in this proceeding. For the purposes of this review proceeding, the only material to which the Tribunal is to have regard comprises:

1. information that the decision maker took into account in connection with the making of the

decision (s 44ZZOAAA(3)(c));

2. such information requested by the Tribunal as is "reasonable and appropriate" for the purposes of the review, by way of written notice to produce information (s 44ZZOAAA(5));
3. assistance given by the NCC at the request of the Tribunal (s 44K(6)); and
4. such information or reports provided by the NCC to the Tribunal in response to a written notice (s 44K(6A)),

by virtue of s 44ZZOAA of the *Competition and Consumer Act 2010*.

In the circumstances, the power of the Tribunal to receive the documents at tabs 9-55 of the draft index can only be enlivened by way of a notice under ss 44ZZOAAA(5) or 44K(6A) on the application of your client. As far as we are aware, your client has not applied to the Tribunal to issue any such notice.

The inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

In the circumstances, we invite you to confirm that:

- your client does not press the inclusion of the documents at tabs 9-55 of the draft index; or
- alternatively, your client intends to apply to the Tribunal to issue a notice under ss 44ZZOAAA(5) or 44K(6A) to request those documents. If so, please confirm when you will serve our client with any such application.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 17 May 2021 3:40 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>;

Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>

Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

I refer to Direction 11 of the Tribunal's Directions of 8 April 2021 and **attach** a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing.

Regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-19

This is the Annexure marked “DP-19” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Lloyd, Bruce](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#); Tom.Jarvis@jws.com.au
Cc: [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#); wolfgang.hellmann@jws.com.au
Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Monday, 31 May 2021 10:38:54 AM

Dear Philip and Tom

PON maintains its objection set out in our email of 19 May and does not agree with the rationale being advanced by NSWMC.

PON does not object to the email to the Associate and suggests an additional point below shown in yellow:

Dear Ms Young, Associate

We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016).
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).
- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The NCC has not indicated any view on this matter.
- The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.

This email is sent with the consent of the parties and the NCC.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Sunday, 30 May 2021 12:19 PM

To: Lloyd, Bruce <blloyd@claytonutz.com>; Tom.Jarvis@jws.com.au

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; wolfgang.hellmann@jws.com.au

Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

We refer to Mr Lloyd's email below and note that:

- PNO does not seek to include any additional documents to those listed in the **Draft Index** for the Hearing Book circulated by NSWMC on 17 May 2021; and
- PNO does not consent to the inclusion in the Hearing Book of the documents listed at tabs 9-55 of the Draft Index, on the basis that PNO does not consider the documents to be before the Tribunal in the proceeding.

Direction 11 of the Tribunal's Directions of 8 April 2021 provide for the inclusion of all documents proposed to be relied upon at the hearing. The Draft Index achieves that purpose and is consistent with that direction.

NSWMC does not agree that the documents identified in the Draft Index are not before the Tribunal in the proceeding. With limited exception, the documents included in the Draft Index are those identified at Appendix A to the NCC's Final Recommendation. They plainly form part of the Final Recommendation, which was taken into account by the Treasurer, and are before the Tribunal pursuant to s 44ZZOAAA(3)(c). In that regard, we note that the material before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016) was not limited in the unusual way PNO now seeks.

In this context NSWMC intends to file a Hearing Book that is consistent with the Draft Index. However, in light of the dispute raised by PNO, and without prejudice to NSWMC's position as outlined above, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.

Please let us know if your respective clients consent to the below email to the Tribunal.

Dear Ms Young, Associate

We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016).
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).
- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The NCC has not indicated any view on this matter.

This email is sent with the consent of the parties and the NCC.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Wednesday, 19 May 2021 6:39 PM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Tom.Jarvis@jws.com.au; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>

Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip

We refer to your client's draft index to the Hearing Book in this proceeding, which lists the documents proposed to be relied upon by NSWMC at the hearing.

For the purpose of direction 12 made on 8 April 2021, we confirm that PNO does not propose to include any additional documents to those listed in the draft index.

However, PNO does not consent to the inclusion of the documents at tabs 9-55 of your client's draft index, as reflected in the **attached** marked-up amendments.

These documents are not before the Tribunal in this proceeding. For the purposes of this review proceeding, the only material to which the Tribunal is to have regard comprises:

1. information that the decision maker took into account in connection with the making of the decision (s 44ZZOAAA(3)(c));
2. such information requested by the Tribunal as is "reasonable and appropriate" for the purposes of the review, by way of written notice to produce information (s 44ZZOAAA(5));
3. assistance given by the NCC at the request of the Tribunal (s 44K(6)); and
4. such information or reports provided by the NCC to the Tribunal in response to a written notice (s 44K(6A)),

by virtue of s 44ZZOAA of the *Competition and Consumer Act 2010*.

In the circumstances, the power of the Tribunal to receive the documents at tabs 9-55 of the draft index can only be enlivened by way of a notice under ss 44ZZOAAA(5) or 44K(6A) on the application of your client. As far as we are aware, your client has not applied to the Tribunal to issue any such notice.

The inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

In the circumstances, we invite you to confirm that:

- your client does not press the inclusion of the documents at tabs 9-55 of the draft index; or
- alternatively, your client intends to apply to the Tribunal to issue a notice under ss 44ZZOAAA(5) or 44K(6A) to request those documents. If so, please confirm when you will serve our client with any such application.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 17 May 2021 3:40 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;
Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>;
Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz,
Damiano <dfritz@claytonutz.com>
Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

I refer to Direction 11 of the Tribunal's Directions of 8 April 2021 and **attach** a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing.

Regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

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Fax: +61 2 8922 8088

To contact any other office
http://www.cliffordchance.com/about_us/find_people_and_offices.html

For details of how we process personal data, please see our updated [privacy statement](#).

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-20

This is the Annexure marked “DP-20” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: [Lloyd, Bruce](#); Tom.Jarvis@jws.com.au
Cc: [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdencovic, Michael \(Antitrust-SYD\)](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#); wolfgang.hellmann@jws.com.au
Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Monday, 31 May 2021 11:40:41 AM

Dear Bruce

We are content with your suggested amendment in highlight yellow below.

Tom – can you please let me know your client's position in respect of the Hearing Book and the email below.

Regards

Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Monday, 31 May 2021 10:39 AM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Tom.Jarvis@jws.com.au
Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Gvozdencovic, Michael (Antitrust-SYD) <Michael.Gvozdencovic@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; wolfgang.hellmann@jws.com.au
Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip and Tom

PON maintains its objection set out in our email of 19 May and does not agree with the rationale being advanced by NSWMC.

PON does not object to the email to the Associate and suggests an additional point below shown in yellow:

Dear Ms Young, Associate

We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016).
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).
- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The NCC has not indicated any view on this matter.
- The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.

This email is sent with the consent of the parties and the NCC.

Regards

Bruce

Bruce Lloyd, Partner
Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Sunday, 30 May 2021 12:19 PM

To: Lloyd, Bruce <blloyd@claytonutz.com>; Tom.Jarvis@jws.com.au

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>;

wolfgang.hellmann@jws.com.au

Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

We refer to Mr Lloyd's email below and note that:

- PNO does not seek to include any additional documents to those listed in the **Draft Index** for the Hearing Book circulated by NSWMC on 17 May 2021; and
- PNO does not consent to the inclusion in the Hearing Book of the documents listed at tabs 9-55 of the Draft Index, on the basis that PNO does not consider the documents to be before the Tribunal in the proceeding.

Direction 11 of the Tribunal's Directions of 8 April 2021 provide for the inclusion of all documents proposed to be relied upon at the hearing. The Draft Index achieves that purpose and is consistent with that direction.

NSWMC does not agree that the documents identified in the Draft Index are not before the Tribunal in the proceeding. With limited exception, the documents included in the Draft Index are those identified at Appendix A to the NCC's Final Recommendation. They plainly form part of the Final Recommendation, which was taken into account by the Treasurer, and are before the Tribunal pursuant to s 44ZZOAAA(3)(c). In that regard, we note that the material before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016) was not limited in the unusual way PNO now seeks.

In this context NSWMC intends to file a Hearing Book that is consistent with the Draft Index. However, in light of the dispute raised by PNO, and without prejudice to NSWMC's position as outlined above, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.

Please let us know if your respective clients consent to the below email to the Tribunal.

Dear Ms Young, Associate

We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016).
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High

Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The NCC has not indicated any view on this matter.

This email is sent with the consent of the parties and the NCC.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Wednesday, 19 May 2021 6:39 PM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Tom.Jarvis@jws.com.au; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>
Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip

We refer to your client's draft index to the Hearing Book in this proceeding, which lists the documents proposed to be relied upon by NSWMC at the hearing.

For the purpose of direction 12 made on 8 April 2021, we confirm that PNO does not propose to include any additional documents to those listed in the draft index.

However, PNO does not consent to the inclusion of the documents at tabs 9-55 of your client's draft index, as reflected in the **attached** marked-up amendments.

These documents are not before the Tribunal in this proceeding. For the purposes of this review proceeding, the only material to which the Tribunal is to have regard comprises:

1. information that the decision maker took into account in connection with the making of the decision (s 44ZZOAAA(3)(c));
2. such information requested by the Tribunal as is "reasonable and appropriate" for the

- purposes of the review, by way of written notice to produce information (s 44ZZOAAA(5));
3. assistance given by the NCC at the request of the Tribunal (s 44K(6)); and
 4. such information or reports provided by the NCC to the Tribunal in response to a written notice (s 44K(6A)),

by virtue of s 44ZZOAA of the *Competition and Consumer Act 2010*.

In the circumstances, the power of the Tribunal to receive the documents at tabs 9-55 of the draft index can only be enlivened by way of a notice under ss 44ZZOAAA(5) or 44K(6A) on the application of your client. As far as we are aware, your client has not applied to the Tribunal to issue any such notice.

The inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

In the circumstances, we invite you to confirm that:

- your client does not press the inclusion of the documents at tabs 9-55 of the draft index; or
- alternatively, your client intends to apply to the Tribunal to issue a notice under ss 44ZZOAAA(5) or 44K(6A) to request those documents. If so, please confirm when you will serve our client with any such application.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 17 May 2021 3:40 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>;

Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz,

Damiano <dfritz@claytonutz.com>

Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

I refer to Direction 11 of the Tribunal's Directions of 8 April 2021 and **attach** a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing.

Regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

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To contact any other office

http://www.cliffordchance.com/about_us/find_people_and_offices.html

For details of how we process personal data, please see our updated [privacy statement](#).

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-21

This is the Annexure marked “DP-21” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: [Fritz, Damiano](#)
Cc: [Tom.Jarvis@jws.com.au](#); [wolfgang.hellmann@jws.com.au](#); [Lloyd, Bruce](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#)
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]
Date: Monday, 31 May 2021 6:37:01 PM

Dear Damiano

Hearing book

We await the NCC's confirmation of its position prior to filing the Hearing Book.

We note that we have not been provided with the confidential version of PNO's submissions to the NCC dated 26 August 2020 (Tab 14 of the Draft Index), 7 September 2020 (Tab 21), and 25 November 2020 (Tab 28). We would be grateful if you would provide a copy of these if you would like them to be included in the Hearing Book.

Submissions

We expect to be in a position to file and serve no later than tomorrow.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Fritz, Damiano <dfritz@claytonutz.com>
Sent: Friday, 28 May 2021 3:40 PM
To: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>
Subject: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We would be grateful if you could let us know when we might expect to receive the Hearing Book, and your client's submissions, in the above proceeding?

Regards

Damiano Fritz, Lawyer

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4881 | F +612 8220 6700 |
dfritz@claytonutz.com | www.claytonutz.com

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-22

This is the Annexure marked “DP-22” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Tom Jarvis](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#); blloyd@claytonutz.com
Cc: [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); erichmond@claytonutz.com; sgrahame@claytonutz.com; dbarber@claytonutz.com; dfritz@claytonutz.com; [Wolfgang Hellmann](#)
Subject: RE: [EXT] ACT 1 of 2021: Application by New South Wales Minerals Council [JWS-DOCUMENTS.FID516820]
Date: Monday, 31 May 2021 7:58:11 PM

Dear all

Apologies for being slow to respond. Our new lockdown has created all sorts of logistical challenges for me today. I expect to be in a position to at least respond in relation to your proposed email in the morning.

Regards

Tom Jarvis

Partner | Johnson Winter & Slattery

D +61 3 8611 1336

M +61 414 811 601

E tom.jarvis@jws.com.au

[Website](#) | [LinkedIn](#)

DISPUTE RESOLUTION TEAM OF THE YEAR
LAWYERS WEEKLY AUSTRALIAN LAW AWARDS

ALTERNATIVE DISPUTE RESOLUTION PRACTICE OF THE YEAR
BEST LAWYERS AUSTRALIA

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From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 31 May 2021 11:41 AM

To: blloyd@claytonutz.com; Tom Jarvis <Tom.Jarvis@jws.com.au>

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;
Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com;
erichmond@claytonutz.com; sgrahame@claytonutz.com; dbarber@claytonutz.com;
dfritz@claytonutz.com; Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>

Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Bruce

We are content with your suggested amendment in highlight yellow below.

Tom – can you please let me know your client's position in respect of the Hearing Book and the email below.

Regards

Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Monday, 31 May 2021 10:39 AM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Tom.Jarvis@jws.com.au
Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; wolfgang.hellmann@jws.com.au
Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip and Tom

PON maintains its objection set out in our email of 19 May and does not agree with the rationale being advanced by NSWMC.

PON does not object to the email to the Associate and suggests an additional point below shown in yellow:

Dear Ms Young, Associate

We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016).
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).
- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6)

and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.

- The NCC has not indicated any view on this matter.
- The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.

This email is sent with the consent of the parties and the NCC.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Sunday, 30 May 2021 12:19 PM

To: Lloyd, Bruce <blloyd@claytonutz.com>; Tom.Jarvis@jws.com.au

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Richmond,

Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber,

Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>;

wolfgang.hellmann@jws.com.au

Subject: RE: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

We refer to Mr Lloyd's email below and note that:

- PNO does not seek to include any additional documents to those listed in the **Draft Index** for the Hearing Book circulated by NSWMC on 17 May 2021; and
- PNO does not consent to the inclusion in the Hearing Book of the documents listed at tabs 9-55 of the Draft Index, on the basis that PNO does not consider the documents to be before the Tribunal in the proceeding.

Direction 11 of the Tribunal's Directions of 8 April 2021 provide for the inclusion of all documents proposed to be relied upon at the hearing. The Draft Index achieves that purpose and is consistent with that direction.

NSWMC does not agree that the documents identified in the Draft Index are not before the

Tribunal in the proceeding. With limited exception, the documents included in the Draft Index are those identified at Appendix A to the NCC's Final Recommendation. They plainly form part of the Final Recommendation, which was taken into account by the Treasurer, and are before the Tribunal pursuant to s 44ZZOAAA(3)(c). In that regard, we note that the material before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016) was not limited in the unusual way PNO now seeks.

In this context NSWMC intends to file a Hearing Book that is consistent with the Draft Index. However, in light of the dispute raised by PNO, and without prejudice to NSWMC's position as outlined above, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.

Please let us know if your respective clients consent to the below email to the Tribunal.

Dear Ms Young, Associate

We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in *Re Application by Glencore Coal Pty Ltd* (ACT 1 of 2016).
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).
- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The NCC has not indicated any view on this matter.

This email is sent with the consent of the parties and the NCC.

Kind regards
Philip

Philip Arnold
Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Wednesday, 19 May 2021 6:39 PM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Tom.Jarvis@jws.com.au; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>
Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip

We refer to your client's draft index to the Hearing Book in this proceeding, which lists the documents proposed to be relied upon by NSWMC at the hearing.

For the purpose of direction 12 made on 8 April 2021, we confirm that PNO does not propose to include any additional documents to those listed in the draft index.

However, PNO does not consent to the inclusion of the documents at tabs 9-55 of your client's draft index, as reflected in the **attached** marked-up amendments.

These documents are not before the Tribunal in this proceeding. For the purposes of this review proceeding, the only material to which the Tribunal is to have regard comprises:

1. information that the decision maker took into account in connection with the making of the decision (s 44ZZOAAA(3)(c));
2. such information requested by the Tribunal as is "reasonable and appropriate" for the purposes of the review, by way of written notice to produce information (s 44ZZOAAA(5));
3. assistance given by the NCC at the request of the Tribunal (s 44K(6)); and
4. such information or reports provided by the NCC to the Tribunal in response to a written notice (s 44K(6A)),

by virtue of s 44ZZOAA of the *Competition and Consumer Act 2010*.

In the circumstances, the power of the Tribunal to receive the documents at tabs 9-55 of the draft index can only be enlivened by way of a notice under ss 44ZZOAAA(5) or 44K(6A) on the application of your client. As far as we are aware, your client has not applied to the Tribunal to issue any such notice.

The inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

In the circumstances, we invite you to confirm that:

- your client does not press the inclusion of the documents at tabs 9-55 of the draft index; or
- alternatively, your client intends to apply to the Tribunal to issue a notice under ss

44ZZOAAA(5) or 44K(6A) to request those documents. If so, please confirm when you will serve our client with any such application.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 17 May 2021 3:40 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>

Cc: Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>;

Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz,

Damiano <dfritz@claytonutz.com>

Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce, Tom

I refer to Direction 11 of the Tribunal's Directions of 8 April 2021 and **attach** a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing.

Regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

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Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

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Fax: +61 2 8922 8088

To contact any other office

http://www.cliffordchance.com/about_us/find_people_and_offices.html

For details of how we process personal data, please see our updated [privacy statement](#).

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-23

This is the Annexure marked “DP-23” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Lloyd, Bruce](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#)
Cc: [Tom.Jarvis@jws.com.au](#); [wolfgang.hellmann@jws.com.au](#); [Richmond, Elizabeth](#); [Fritz, Damiano](#); [Grahame, Scott](#); [Barber, Dylan](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#)
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]
Date: Tuesday, 1 June 2021 8:36:16 PM

Dear Philip

PNO opposes:

1. the filing of a Hearing Book that includes the contested documents (at tabs 9-55 of the draft index) which are to be the subject of an interlocutory hearing before the Tribunal; and
2. the applications by your client for the issue of notices under ss 44K(6A) or 44ZZOAAA(5) you have foreshadowed.

PNO's position is that the contested documents should not be filed as part of a Hearing Book in this proceeding until the Tribunal has determined whether they are properly before it on review.

Accordingly, we consider that the appropriate approach in the circumstances is for your client to prepare:

1. a Hearing Book containing the uncontroversial material (being tabs 1-8 of the draft index) for filing; and
2. a separate supplementary book containing the controversial material, to be circulated to the parties only.

Whether the book of further material described at (2) should be received by the Tribunal will be the subject of the interlocutory hearing.

In relation to PNO's confidential submissions to the NCC (identified at tabs 14, 21 and 28 of your client's draft index), PNO will await the determination of the Tribunal as to whether these documents are requested for the purpose of the review hearing, and reserves its position in relation to the confidentiality of these documents.

We therefore propose the amendments shaded yellow to your proposed joint communication to the Tribunal:

Dear Ms Young, Associate

We attach by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- *NSWMC considers that there are additional documents other than those currently in the Hearing Book which are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016).*
- *PNO does not consent to the inclusion of the additional the documents proposed by NSWMC. As a result, these have not been included in the Hearing Book at this time. at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the that material at tabs 9-55 is contrary to the conclusion of the High Court in The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).*
- *In light of the dispute raised by PNO, and in order to ensure the efficient disposition*

of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.

- *The NCC has not indicated any view on this matter.*
- *The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.*

This email is sent with the consent of the parties and the NCC.

Please let us know if your client agrees to this approach.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>
Sent: Monday, 31 May 2021 6:37 PM
To: Fritz, Damiano <dfritz@claytonutz.com>
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdencovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

External Email

Dear Damiano

Hearing book

We await the NCC's confirmation of its position prior to filing the Hearing Book.

We note that we have not been provided with the confidential version of PNO's submissions to the NCC dated 26 August 2020 (Tab 14 of the Draft Index), 7 September 2020 (Tab 21), and 25 November 2020 (Tab 28). We would be grateful if you would provide a copy of these if you would like them to be included in the Hearing Book.

Submissions

We expect to be in a position to file and serve no later than tomorrow.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Fritz, Damiano <dfritz@claytonutz.com>
Sent: Friday, 28 May 2021 3:40 PM
To: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>
Subject: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We would be grateful if you could let us know when we might expect to receive the Hearing Book, and your client's submissions, in the above proceeding?

Regards

Damiano Fritz, Lawyer

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4881 | F +612 8220 6700 |

dfritz@claytonutz.com | www.claytonutz.com

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For further information about Clifford Chance please see our website at <http://www.cliffordchance.com> or refer to any Clifford Chance office.

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Fax: +61 2 8922 8088

To contact any other office

http://www.cliffordchance.com/about_us/find_people_and_offices.html

For details of how we process personal data, please see our updated [privacy statement](#).

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-24

This is the Annexure marked “DP-24” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Tom Jarvis](#)
To: [Lloyd, Bruce](#); [Arnold, Philip \(Antitrust-SYD\)](#)
Cc: [Wolfgang Hellmann](#); [Richmond, Elizabeth](#); [Fritz, Damiano](#); [Grahame, Scott](#); [Barber, Dylan](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#)
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]
Date: Wednesday, 2 June 2021 4:05:59 PM

Dear Bruce and Philip

So that we can get final instructions from our client about the proposed communication to the Tribunal, we would appreciate hearing from Clifford Chance whether they agree with the most recent amendments suggested by Clayton Utz.

Assuming we receive that confirmation, I expect to be able to obtain instructions by COB tomorrow.

Regards

Tom Jarvis

Partner | Johnson Winter & Slattery

D +61 3 8611 1336

M +61 414 811 601

E tom.jarvis@jws.com.au

[Website](#) | [LinkedIn](#)

**DISPUTE RESOLUTION TEAM OF THE YEAR
LAWYERS WEEKLY AUSTRALIAN LAW AWARDS**

**ALTERNATIVE DISPUTE RESOLUTION PRACTICE OF THE YEAR
BEST LAWYERS AUSTRALIA**

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From: Lloyd, Bruce <blloyd@claytonutz.com>

Sent: Tuesday, 1 June 2021 8:36 PM

To: Philip.Arnold@CliffordChance.com

Cc: Tom Jarvis <Tom.Jarvis@jws.com.au>; Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Philip

PNO opposes:

1. the filing of a Hearing Book that includes the contested documents (at tabs 9-55 of the draft index) which are to be the subject of an interlocutory hearing before the Tribunal; and
2. the applications by your client for the issue of notices under ss 44K(6A) or 44ZZOAAA(5) you have foreshadowed.

PNO's position is that the contested documents should not be filed as part of a Hearing Book in this proceeding until the Tribunal has determined whether they are properly before it on review.

Accordingly, we consider that the appropriate approach in the circumstances is for your client to prepare:

1. a Hearing Book containing the uncontroversial material (being tabs 1-8 of the draft index) for filing; and
2. a separate supplementary book containing the controversial material, to be circulated to the parties only.

Whether the book of further material described at (2) should be received by the Tribunal will be the subject of the interlocutory hearing.

In relation to PNO's confidential submissions to the NCC (identified at tabs 14, 21 and 28 of your client's draft index), PNO will await the determination of the Tribunal as to whether these documents are requested for the purpose of the review hearing, and reserves its position in relation to the confidentiality of these documents.

We therefore propose the amendments shaded yellow to your proposed joint communication to the Tribunal:

Dear Ms Young, Associate

We attach by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- *NSWMC considers that there are additional documents other than those currently in the Hearing Book which are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016).*
- *PNO does not consent to the inclusion of the additional the documents proposed by NSWMC. As a result, these have not been included in the Hearing Book at this time. ~~at tabs 9-55 of the Hearing Book.~~ PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the that material at tabs 9-55 is contrary to the conclusion of the High Court in The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).*
- *In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.*
- *The NCC has not indicated any view on this matter.*
- *The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.*

This email is sent with the consent of the parties and the NCC.

Please let us know if your client agrees to this approach.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 31 May 2021 6:37 PM

To: Fritz, Damiano <dfritz@claytonutz.com>

Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

External Email

Dear Damiano

Hearing book

We await the NCC's confirmation of its position prior to filing the Hearing Book.

We note that we have not been provided with the confidential version of PNO's submissions to the NCC dated 26 August 2020 (Tab 14 of the Draft Index), 7 September 2020 (Tab 21), and 25 November 2020 (Tab 28). We would be grateful if you would provide a copy of these if you would like them to be included in the Hearing Book.

Submissions

We expect to be in a position to file and serve no later than tomorrow.

Kind regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Fritz, Damiano <dfritz@claytonutz.com>

Sent: Friday, 28 May 2021 3:40 PM

To: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Arnold, Philip (Antitrust-

SYD) <Philip.Arnold@CliffordChance.com>; Fu, Angel (Antitrust-SYD)
<Angel.Fu@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD)
<Michael.Gvozdenovic@CliffordChance.com>
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce
<blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott
<sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>
Subject: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We would be grateful if you could let us know when we might expect to receive the Hearing Book, and your client's submissions, in the above proceeding?

Regards

Damiano Fritz, Lawyer

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4881 | F +612 8220 6700 |

dfritz@claytonutz.com | www.claytonutz.com

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Fax: +61 2 8922 8088

To contact any other office

http://www.cliffordchance.com/about_us/find_people_and_offices.html

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-25

This is the Annexure marked “DP-25” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: [Tom Jarvis](#); [Lloyd, Bruce](#)
Cc: [Wolfgang Hellmann](#); [Richmond, Elizabeth](#); [Fritz, Damiano](#); [Grahame, Scott](#); [Barber, Dylan](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdencovic, Michael \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#)
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]
Date: Wednesday, 2 June 2021 5:45:25 PM
Attachments: [Act 1 of 2021 - Hearing Book Index.docx](#)

Dear Tom, Bruce

The Tribunal's directions of 8 April 2021 required, at Direction 13(c) that the Hearing Book be divided into folders. NSWMC has accordingly prepared a Hearing Book comprising different folders for each part of the Draft Index (**attached**). The practical consequence is that the Hearing Book has different folders for Part A (Tabs 1-4), Part B (Tab 5), Part C (Tabs 6-8.6), Part D (Tabs 9-28), and Part E (Tabs 29-55).

The Hearing Book is accordingly structured in a way which separates the material to which PNO objects (Tabs 9-55) from the material to which it does not object (Tabs 1-8). No functional purpose or utility would be served by further isolating that material and referring to it as "Supplementary Material". That course would also disturb the electronic structure of the Hearing Book and cause wasted time and cost. And it would result in a Hearing Book that is plainly inconsistent with Direction 11 which requires the Hearing Book to list "all documents proposed to be relied upon at the hearing".

The substance of the parties' dispute appears to be whether the material contained at Tabs 9-55 is able to be taken into account by the Tribunal. That dispute should be dealt with on its merits, rather than in proxy through the contents of the Hearing Book. If the Tribunal determines it cannot have regard to any material contained in the Hearing Book, it will disregard it, as courts and tribunals regularly do.

In the circumstances, NSWMC is content to file the Hearing Book under cover of the email proposed by Mr Lloyd on 31 May 2021 at 10.39am. Alternatively, it will file the Hearing Book without comment (noting the Directions do not require the Hearing book to be agreed by the parties).

Regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Tom Jarvis <Tom.Jarvis@jws.com.au>
Sent: Wednesday, 2 June 2021 4:06 PM
To: Lloyd, Bruce <blloyd@claytonutz.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

Dear Bruce and Philip

So that we can get final instructions from our client about the proposed communication to the Tribunal, we would appreciate hearing from Clifford Chance whether they agree with the most recent amendments suggested by Clayton Utz.

Assuming we receive that confirmation, I expect to be able to obtain instructions by COB tomorrow.

Regards

Tom Jarvis

Partner | Johnson Winter & Slattery

D +61 3 8611 1336

M +61 414 811 601

E tom.jarvis@jws.com.au

[Website](#) | [LinkedIn](#)

DISPUTE RESOLUTION TEAM OF THE YEAR
LAWYERS WEEKLY AUSTRALIAN LAW AWARDS

ALTERNATIVE DISPUTE RESOLUTION PRACTICE OF THE YEAR
BEST LAWYERS AUSTRALIA

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From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Tuesday, 1 June 2021 8:36 PM
To: Philip.Arnold@CliffordChance.com
Cc: Tom Jarvis <Tom.Jarvis@jws.com.au>; Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Philip

PNO opposes:

1. the filing of a Hearing Book that includes the contested documents (at tabs 9-55 of the draft index) which are to be the subject of an interlocutory hearing before the Tribunal; and
2. the applications by your client for the issue of notices under ss 44K(6A) or 44ZZOAAA(5) you have foreshadowed.

PNO's position is that the contested documents should not be filed as part of a Hearing Book in this proceeding until the Tribunal has determined whether they are properly before it on review.

Accordingly, we consider that the appropriate approach in the circumstances is for your client to prepare:

1. a Hearing Book containing the uncontroversial material (being tabs 1-8 of the draft index) for filing; and
2. a separate supplementary book containing the controversial material, to be circulated to the parties only.

Whether the book of further material described at (2) should be received by the Tribunal will be the subject of the interlocutory hearing.

In relation to PNO's confidential submissions to the NCC (identified at tabs 14, 21 and 28 of your client's draft index), PNO will await the determination of the Tribunal as to whether these documents are requested for the purpose of the review hearing, and reserves its position in relation to the confidentiality of these documents.

We therefore propose the amendments shaded yellow to your proposed joint communication to the Tribunal:

Dear Ms Young, Associate

We attach by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- *NSWMC considers that there are additional documents other than those currently in the Hearing Book which are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016).*
- *PNO does not consent to the inclusion of the additional the documents proposed by NSWMC. As a result, these have not been included in the Hearing Book at this time. at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the that material at tabs 9-55 is contrary to the conclusion of the High Court in The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).*
- *In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.*

The NCC has not indicated any view on this matter.

- *The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.*

This email is sent with the consent of the parties and the NCC.

Please let us know if your client agrees to this approach.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 31 May 2021 6:37 PM

To: Fritz, Damiano <dfritz@claytonutz.com>

Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

External Email

Dear Damiano

Hearing book

We await the NCC's confirmation of its position prior to filing the Hearing Book.

We note that we have not been provided with the confidential version of PNO's submissions to the NCC dated 26 August 2020 (Tab 14 of the Draft Index), 7 September 2020 (Tab 21), and 25 November 2020 (Tab 28). We would be grateful if you would provide a copy of these if you would like them to be included in the Hearing Book.

Submissions

We expect to be in a position to file and serve no later than tomorrow.

Kind regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Fritz, Damiano <dfritz@claytonutz.com>
Sent: Friday, 28 May 2021 3:40 PM
To: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>
Subject: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We would be grateful if you could let us know when we might expect to receive the Hearing Book, and your client's submissions, in the above proceeding?

Regards

Damiano Fritz, Lawyer
Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4881 | F +612 8220 6700 |
dfritz@claytonutz.com | www.claytonutz.com
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To contact any other office

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-26

This is the Annexure marked “DP-26” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Lloyd, Bruce](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#)
Cc: [wolfgang.hellmann@jws.com.au](#); [Tom.Jarvis@jws.com.au](#); [Richmond, Elizabeth](#); [Fritz, Damiano](#); [Grahame, Scott](#); [Barber, Dylan](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#)
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]
Date: Thursday, 3 June 2021 12:45:15 PM

Dear Philip

We refer to Ms Young's email to the parties of 12.12pm today.

PNO is willing to adopt the course proposed in your email below, namely for your client to:

1. file a Hearing Book divided into Part A (tabs 1-4), Part B (tab 5), Part C (tabs 6-8.6), Part D (tabs 9-28), and Part E (tabs 29-55), such that the contested material is separated at Parts D and E;
2. under cover of the following email:

Dear Ms Young, Associate

*We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.*

We note that:

- *NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016).*
- *PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).*
- *In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.*
- *The NCC has not indicated any view on this matter.*
- *The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.*

This email is sent with the consent of the parties and the NCC.

We look forward to receiving your client's foreshadowed applications under ss 44K(6A) and/or 44ZZOAAA(5) as soon as practicable.

Regards

Bruce

Bruce Lloyd, Partner
Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Wednesday, 2 June 2021 5:46 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <bllloyd@claytonutz.com>

Cc: wolfgang.hellmann@jws.com.au; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

External Email

Dear Tom, Bruce

The Tribunal's directions of 8 April 2021 required, at Direction 13(c) that the Hearing Book be divided into folders. NSWMC has accordingly prepared a Hearing Book comprising different folders for each part of the Draft Index (**attached**). The practical consequence is that the Hearing Book has different folders for Part A (Tabs 1-4), Part B (Tab 5), Part C (Tabs 6-8.6), Part D (Tabs 9-28), and Part E (Tabs 29-55).

The Hearing Book is accordingly structured in a way which separates the material to which PNO objects (Tabs 9-55) from the material to which it does not object (Tabs 1-8). No functional purpose or utility would be served by further isolating that material and referring to it as "Supplementary Material". That course would also disturb the electronic structure of the Hearing Book and cause wasted time and cost. And it would result in a Hearing Book that is plainly inconsistent with Direction 11 which requires the Hearing Book to list "all documents proposed to be relied upon at the hearing".

The substance of the parties' dispute appears to be whether the material contained at Tabs 9-55 is able to be taken into account by the Tribunal. That dispute should be dealt with on its merits, rather than in proxy through the contents of the Hearing Book. If the Tribunal determines it cannot have regard to any material contained in the Hearing Book, it will disregard it, as courts and tribunals regularly do.

In the circumstances, NSWMC is content to file the Hearing Book under cover of the email proposed by Mr Lloyd on 31 May 2021 at 10.39am. Alternatively, it will file the Hearing Book without comment (noting the Directions do not require the Hearing book to be agreed by the parties).

Regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Tom Jarvis <Tom.Jarvis@jws.com.au>
Sent: Wednesday, 2 June 2021 4:06 PM
To: Lloyd, Bruce <blloyd@claytonutz.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

Dear Bruce and Philip

So that we can get final instructions from our client about the proposed communication to the Tribunal, we would appreciate hearing from Clifford Chance whether they agree with the most recent amendments suggested by Clayton Utz.

Assuming we receive that confirmation, I expect to be able to obtain instructions by COB tomorrow.

Regards

Tom Jarvis

Partner | Johnson Winter & Slattery

D +61 3 8611 1336
M +61 414 811 601
E tom.jarvis@jws.com.au

[Website](#) | [LinkedIn](#)

DISPUTE RESOLUTION TEAM OF THE YEAR
LAWYERS WEEKLY AUSTRALIAN LAW AWARDS

ALTERNATIVE DISPUTE RESOLUTION PRACTICE OF THE YEAR
BEST LAWYERS AUSTRALIA

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From: Lloyd, Bruce <blloyd@claytonutz.com>

Sent: Tuesday, 1 June 2021 8:36 PM

To: Philip.Arnold@CliffordChance.com

Cc: Tom Jarvis <Tom.Jarvis@jws.com.au>; Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Philip

PNO opposes:

1. the filing of a Hearing Book that includes the contested documents (at tabs 9-55 of the draft index) which are to be the subject of an interlocutory hearing before the Tribunal; and
2. the applications by your client for the issue of notices under ss 44K(6A) or 44ZZOAAA(5) you have foreshadowed.

PNO's position is that the contested documents should not be filed as part of a Hearing Book in this proceeding until the Tribunal has determined whether they are properly before it on review.

Accordingly, we consider that the appropriate approach in the circumstances is for your client to prepare:

1. a Hearing Book containing the uncontroversial material (being tabs 1-8 of the draft index) for filing; and
2. a separate supplementary book containing the controversial material, to be circulated to the parties only.

Whether the book of further material described at (2) should be received by the Tribunal will be the subject of the interlocutory hearing.

In relation to PNO's confidential submissions to the NCC (identified at tabs 14, 21 and 28 of your client's draft index), PNO will await the determination of the Tribunal as to whether these documents are requested for the purpose of the review hearing, and reserves its position in relation to the confidentiality of these documents.

We therefore propose the amendments shaded yellow to your proposed joint communication to the Tribunal:

Dear Ms Young, Associate

We attach by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that there are additional documents other than those currently in the Hearing Book which are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in *Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016)*.
- PNO does not consent to the inclusion of the additional the documents proposed by

NSWMC. As a result, these have not been included in the Hearing Book at this time. at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of **the that** material **at tabs 9-55** is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).

- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The NCC has not indicated any view on this matter.
- The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.

This email is sent with the consent of the parties and the NCC.

Please let us know if your client agrees to this approach.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 31 May 2021 6:37 PM

To: Fritz, Damiano <dfritz@claytonutz.com>

Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

External Email

Dear Damiano

Hearing book

We await the NCC's confirmation of its position prior to filing the Hearing Book.

We note that we have not been provided with the confidential version of PNO's submissions to the NCC dated 26 August 2020 (Tab 14 of the Draft Index), 7 September 2020 (Tab 21), and 25 November 2020 (Tab 28). We would be grateful if you would provide a copy of these if you would like them to be included in the Hearing Book.

Submissions

We expect to be in a position to file and serve no later than tomorrow.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Fritz, Damiano <dfritz@claytonutz.com>
Sent: Friday, 28 May 2021 3:40 PM
To: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>
Subject: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We would be grateful if you could let us know when we might expect to receive the Hearing Book, and your client's submissions, in the above proceeding?

Regards

Damiano Fritz, Lawyer Clayton Utz

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dfritz@claytonutz.com | www.claytonutz.com
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Fax: +61 2 8922 8088

To contact any other office

http://www.cliffordchance.com/about_us/find_people_and_offices.html

For details of how we process personal data, please see our updated [privacy statement](#).

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-27

This is the Annexure marked “DP-27” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: [Lloyd, Bruce](#)
Cc: [wolfgang.hellmann@jws.com.au](#); [Tom.Jarvis@jws.com.au](#); [Richmond, Elizabeth](#); [Fritz, Damiano](#); [Grahame, Scott](#); [Barber, Dylan](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#)
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]
Date: Thursday, 3 June 2021 1:04:19 PM

Dear Bruce

In the absence of agreement from the NCC, we suggest the amendments in red to the below email. The NCC will be able to indicate its position separately. If the amendments are acceptable to your client, we will file the Hearing Book imminently under cover of the below email.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Thursday, 3 June 2021 12:45 PM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: wolfgang.hellmann@jws.com.au; Tom.Jarvis@jws.com.au; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

Dear Philip

We refer to Ms Young's email to the parties of 12.12pm today.

PNO is willing to adopt the course proposed in your email below, namely for your client to:

1. file a Hearing Book divided into Part A (tabs 1-4), Part B (tab 5), Part C (tabs 6-8.6), Part D (tabs 9-28), and Part E (tabs 29-55), such that the contested material is separated at Parts D and E;

2. under cover of the following email:

Dear Ms Young, Associate

*We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.*

We note that:

- *NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. ~~The approach taken by NSWMC is consistent with the material that was before the Tribunal in Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016).~~*
- *PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).*
- *In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.*
- ~~*The NCC has not indicated any view on this matter.*~~
- *The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.*

*This email is sent with the consent of the parties **and the NCC.***

We look forward to receiving your client's foreshadowed applications under ss 44K(6A) and/or 44ZZOAAA(5) as soon as practicable.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Wednesday, 2 June 2021 5:46 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>

Cc: wolfgang.hellmann@jws.com.au; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

External Email

Dear Tom, Bruce

The Tribunal's directions of 8 April 2021 required, at Direction 13(c) that the Hearing Book be divided into folders. NSWMC has accordingly prepared a Hearing Book comprising different folders for each part of the Draft Index (**attached**). The practical consequence is that the Hearing Book has different folders for Part A (Tabs 1-4), Part B (Tab 5), Part C (Tabs 6-8.6), Part D (Tabs 9-28), and Part E (Tabs 29-55).

The Hearing Book is accordingly structured in a way which separates the material to which PNO objects (Tabs 9-55) from the material to which it does not object (Tabs 1-8). No functional purpose or utility would be served by further isolating that material and referring to it as "Supplementary Material". That course would also disturb the electronic structure of the Hearing Book and cause wasted time and cost. And it would result in a Hearing Book that is plainly inconsistent with Direction 11 which requires the Hearing Book to list "all documents proposed to be relied upon at the hearing".

The substance of the parties' dispute appears to be whether the material contained at Tabs 9-55 is able to be taken into account by the Tribunal. That dispute should be dealt with on its merits, rather than in proxy through the contents of the Hearing Book. If the Tribunal determines it cannot have regard to any material contained in the Hearing Book, it will disregard it, as courts and tribunals regularly do.

In the circumstances, NSWMC is content to file the Hearing Book under cover of the email proposed by Mr Lloyd on 31 May 2021 at 10.39am. Alternatively, it will file the Hearing Book without comment (noting the Directions do not require the Hearing book to be agreed by the parties).

Regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Tom Jarvis <Tom.Jarvis@jws.com.au>

Sent: Wednesday, 2 June 2021 4:06 PM

To: Lloyd, Bruce <blloyd@claytonutz.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>

Cc: Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

Dear Bruce and Philip

So that we can get final instructions from our client about the proposed communication to the Tribunal, we would appreciate hearing from Clifford Chance whether they agree with the most recent amendments suggested by Clayton Utz.

Assuming we receive that confirmation, I expect to be able to obtain instructions by COB tomorrow.

Regards

Tom Jarvis

Partner | Johnson Winter & Slattery

D +61 3 8611 1336

M +61 414 811 601

E tom.jarvis@jws.com.au

[Website](#) | [LinkedIn](#)

**DISPUTE RESOLUTION TEAM OF THE YEAR
LAWYERS WEEKLY AUSTRALIAN LAW AWARDS**

**ALTERNATIVE DISPUTE RESOLUTION PRACTICE OF THE YEAR
BEST LAWYERS AUSTRALIA**

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From: Lloyd, Bruce <blloyd@claytonutz.com>

Sent: Tuesday, 1 June 2021 8:36 PM

To: Philip.Arnold@CliffordChance.com

Cc: Tom Jarvis <Tom.Jarvis@jws.com.au>; Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Philip

PNO opposes:

1. the filing of a Hearing Book that includes the contested documents (at tabs 9-55 of the draft index) which are to be the subject of an interlocutory hearing before the Tribunal; and
2. the applications by your client for the issue of notices under ss 44K(6A) or 44ZZOAAA(5) you have foreshadowed.

PNO's position is that the contested documents should not be filed as part of a Hearing Book in this proceeding until the Tribunal has determined whether they are properly before it on review.

Accordingly, we consider that the appropriate approach in the circumstances is for your client to prepare:

1. a Hearing Book containing the uncontroversial material (being tabs 1-8 of the draft index) for filing; and
2. a separate supplementary book containing the controversial material, to be circulated to the parties only.

Whether the book of further material described at (2) should be received by the Tribunal will be the subject of the interlocutory hearing.

In relation to PNO's confidential submissions to the NCC (identified at tabs 14, 21 and 28 of your client's draft index), PNO will await the determination of the Tribunal as to whether these documents are requested for the purpose of the review hearing, and reserves its position in relation to the confidentiality of these documents.

We therefore propose the amendments shaded yellow to your proposed joint communication to the Tribunal:

Dear Ms Young, Associate

We attach by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- *NSWMC considers that there are additional documents other than those currently in the Hearing Book which are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016).*
- *PNO does not consent to the inclusion of the additional the documents proposed by NSWMC. As a result, these have not been included in the Hearing Book at this time. at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the that material at tabs 9-55 is contrary to the conclusion of the High Court in The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).*
- *In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.*
- *The NCC has not indicated any view on this matter.*
- *The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.*

This email is sent with the consent of the parties and the NCC.

Please let us know if your client agrees to this approach.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 31 May 2021 6:37 PM

To: Fritz, Damiano <dfritz@claytonutz.com>

Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

External Email

Dear Damiano

Hearing book

We await the NCC's confirmation of its position prior to filing the Hearing Book.

We note that we have not been provided with the confidential version of PNO's submissions to the NCC dated 26 August 2020 (Tab 14 of the Draft Index), 7 September 2020 (Tab 21), and 25 November 2020 (Tab 28). We would be grateful if you would provide a copy of these if you would like them to be included in the Hearing Book.

Submissions

We expect to be in a position to file and serve no later than tomorrow.

Kind regards

Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Fritz, Damiano <dfritz@claytonutz.com>
Sent: Friday, 28 May 2021 3:40 PM
To: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>
Subject: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We would be grateful if you could let us know when we might expect to receive the Hearing Book, and your client's submissions, in the above proceeding?

Regards

Damiano Fritz, Lawyer
Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4881 | F +612 8220 6700 |
dfritz@claytonutz.com | www.claytonutz.com
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Fax: +61 2 8922 8088

To contact any other office

http://www.cliffordchance.com/about_us/find_people_and_offices.html

For details of how we process personal data, please see our updated [privacy statement](#).

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-28

This is the Annexure marked “DP-28” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Lloyd, Bruce](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#)
Cc: [wolfgang.hellmann@jws.com.au](#); [Tom.Jarvis@jws.com.au](#); [Richmond, Elizabeth](#); [Fritz, Damiano](#); [Grahame, Scott](#); [Barber, Dylan](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Gvozdenovic, Michael \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#)
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]
Date: Thursday, 3 June 2021 1:13:52 PM

Philip

For our part, we have no objection to your proposed edits in red.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>
Sent: Thursday, 3 June 2021 1:04 PM
To: Lloyd, Bruce <blloyd@claytonutz.com>
Cc: wolfgang.hellmann@jws.com.au; Tom.Jarvis@jws.com.au; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

External Email

Dear Bruce

In the absence of agreement from the NCC, we suggest the amendments in red to the below email. The NCC will be able to indicate its position separately. If the amendments are acceptable to your client, we will file the Hearing Book imminently under cover of the below email.

Kind regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Thursday, 3 June 2021 12:45 PM
To: Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: wolfgang.hellmann@jws.com.au; Tom.Jarvis@jws.com.au; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

Dear Philip

We refer to Ms Young's email to the parties of 12.12pm today.

PNO is willing to adopt the course proposed in your email below, namely for your client to:

1. file a Hearing Book divided into Part A (tabs 1-4), Part B (tab 5), Part C (tabs 6-8.6), Part D (tabs 9-28), and Part E (tabs 29-55), such that the contested material is separated at Parts D and E;
2. under cover of the following email:

Dear Ms Young, Associate

*We **attach** by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.*

We note that:

- *NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. – ~~The approach taken by NSWMC is consistent with the material that was before the Tribunal in Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016).~~*
- *PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).*
- *In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.*

- *The NCC has not indicated any view on this matter.*
- *The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.*

This email is sent with the consent of the parties and the NCC.

We look forward to receiving your client's foreshadowed applications under ss 44K(6A) and/or 44ZZOAAA(5) as soon as practicable.

Regards

Bruce

Bruce Lloyd, Partner
Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Wednesday, 2 June 2021 5:46 PM

To: Tom.Jarvis@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>

Cc: wolfgang.hellmann@jws.com.au; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

External Email

Dear Tom, Bruce

The Tribunal's directions of 8 April 2021 required, at Direction 13(c) that the Hearing Book be divided into folders. NSWMC has accordingly prepared a Hearing Book comprising different folders for each part of the Draft Index (**attached**). The practical consequence is that the Hearing Book has different folders for Part A (Tabs 1-4), Part B (Tab 5), Part C (Tabs 6-8.6), Part D (Tabs 9-28), and Part E (Tabs 29-55).

The Hearing Book is accordingly structured in a way which separates the material to which PNO objects (Tabs 9-55) from the material to which it does not object (Tabs 1-8). No functional purpose or utility would be served by further isolating that material and referring to it as "Supplementary Material". That course would also disturb the electronic structure of the Hearing Book and cause wasted time and cost. And it would result in a Hearing Book that is plainly inconsistent with Direction 11 which requires the Hearing Book to list "all documents proposed to be relied upon at the hearing".

The substance of the parties' dispute appears to be whether the material contained at Tabs 9-55 is able to be taken into account by the Tribunal. That dispute should be dealt with on its merits, rather than in proxy through the contents of the Hearing Book. If the Tribunal determines it cannot have regard to any material contained in the Hearing Book, it will disregard it, as courts and tribunals regularly do.

In the circumstances, NSWMC is content to file the Hearing Book under cover of the email proposed by Mr Lloyd on 31 May 2021 at 10.39am. Alternatively, it will file the Hearing Book without comment (noting the Directions do not require the Hearing book to be agreed by the parties).

Regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Tom Jarvis <Tom.Jarvis@jws.com.au>
Sent: Wednesday, 2 June 2021 4:06 PM
To: Lloyd, Bruce <blloyd@claytonutz.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>
Cc: Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>
Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377] [JWS-DOCUMENTS.FID516820]

Dear Bruce and Philip

So that we can get final instructions from our client about the proposed communication to the Tribunal, we would appreciate hearing from Clifford Chance whether they agree with the most recent amendments suggested by Clayton Utz.

Assuming we receive that confirmation, I expect to be able to obtain instructions by COB tomorrow.

Regards

Tom Jarvis

Partner | Johnson Winter & Slattery

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M +61 414 811 601

E tom.jarvis@jws.com.au

[Website](#) | [LinkedIn](#)

**DISPUTE RESOLUTION TEAM OF THE YEAR
LAWYERS WEEKLY AUSTRALIAN LAW AWARDS**

**ALTERNATIVE DISPUTE RESOLUTION PRACTICE OF THE YEAR
BEST LAWYERS AUSTRALIA**

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From: Lloyd, Bruce <blloyd@claytonutz.com>

Sent: Tuesday, 1 June 2021 8:36 PM

To: Philip.Arnold@CliffordChance.com

Cc: Tom Jarvis <Tom.Jarvis@jws.com.au>; Wolfgang Hellmann <wolfgang.hellmann@jws.com.au>; Richmond, Elizabeth <erichmond@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com; Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Philip

PNO opposes:

1. the filing of a Hearing Book that includes the contested documents (at tabs 9-55 of the draft index) which are to be the subject of an interlocutory hearing before the Tribunal; and
2. the applications by your client for the issue of notices under ss 44K(6A) or 44ZZOAAA(5) you have foreshadowed.

PNO's position is that the contested documents should not be filed as part of a Hearing Book in this proceeding until the Tribunal has determined whether they are properly before it on review.

Accordingly, we consider that the appropriate approach in the circumstances is for your client to prepare:

1. a Hearing Book containing the uncontroversial material (being tabs 1-8 of the draft index) for filing; and
2. a separate supplementary book containing the controversial material, to be circulated to the parties only.

Whether the book of further material described at (2) should be received by the Tribunal will be the subject of the interlocutory hearing.

In relation to PNO's confidential submissions to the NCC (identified at tabs 14, 21 and 28 of your client's draft index), PNO will await the determination of the Tribunal as to whether these documents

are requested for the purpose of the review hearing, and reserves its position in relation to the confidentiality of these documents.

We therefore propose the amendments shaded yellow to your proposed joint communication to the Tribunal:

Dear Ms Young, Associate

We attach by way of filing and service a Hearing Book in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- *NSWMC considers that there are additional documents other than those currently in the Hearing Book which are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer. The approach taken by NSWMC is consistent with the material that was before the Tribunal in Re Application by Glencore Coal Pty Ltd (ACT 1 of 2016).*
- *PNO does not consent to the inclusion of the additional the documents proposed by NSWMC. As a result, these have not been included in the Hearing Book at this time. at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the that material at tabs 9-55 is contrary to the conclusion of the High Court in The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).*
- *In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.*
- *The NCC has not indicated any view on this matter.*
- *The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.*

This email is sent with the consent of the parties and the NCC.

Please let us know if your client agrees to this approach.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

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blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Monday, 31 May 2021 6:37 PM

To: Fritz, Damiano <dfritz@claytonutz.com>

Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Isabella.Ledden@CliffordChance.com; Michael.Gvozdenovic@CliffordChance.com;

Angel.Fu@CliffordChance.com; Dave.Poddar@CliffordChance.com

Subject: RE: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

External Email

Dear Damiano

Hearing book

We await the NCC's confirmation of its position prior to filing the Hearing Book.

We note that we have not been provided with the confidential version of PNO's submissions to the NCC dated 26 August 2020 (Tab 14 of the Draft Index), 7 September 2020 (Tab 21), and 25 November 2020 (Tab 28). We would be grateful if you would provide a copy of these if you would like them to be included in the Hearing Book.

Submissions

We expect to be in a position to file and serve no later than tomorrow.

Kind regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: Fritz, Damiano <dfritz@claytonutz.com>

Sent: Friday, 28 May 2021 3:40 PM

To: Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Gvozdenovic, Michael (Antitrust-SYD) <Michael.Gvozdenovic@CliffordChance.com>

Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Lloyd, Bruce <blloyd@claytonutz.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>

Subject: [EXT] ACT 1 of 2021: Hearing Book and NSWMC submissions [CU-Legal.FID3240377]

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We would be grateful if you could let us know when we might expect to receive the Hearing Book, and your client's submissions, in the above proceeding?

Regards

Damiano Fritz, Lawyer

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4881 | F +612 8220 6700 |
dfritz@claytonutz.com | www.claytonutz.com

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To contact any other office

http://www.cliffordchance.com/about_us/find_people_and_offices.html

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-29

This is the Annexure marked “DP-29” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: [EA - O'Bryan J](#); blloyd@claytonutz.com; [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Kelly, Tegan \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; erichmond@claytonutz.com; sgrahame@claytonutz.com; [Barber, Dylan](#); [Fritz, Damiano](#)
Cc: [Associate O'BryanJ](#); [CompetitionTribunal Registry](#)
Subject: RE: [EXT] ACT 1 of 2021 Application by New South Wales Minerals Council
Date: Thursday, 3 June 2021 1:53:34 PM

Dear Ms Young

The Hearing Book has now been filed and served via ShareFile link, in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer.
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).
- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.

This email is sent with the consent of the parties.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: EA - O'Bryan J <EA.OBryanJ@fedcourt.gov.au>
Sent: Thursday, 3 June 2021 12:12 PM
To: blloyd@claytonutz.com; [Poddar, Dave \(Antitrust-SYD\) <Dave.Poddar@CliffordChance.com>](mailto:Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>);

Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Kelly, Tegan (Antitrust-SYD) <Tegan.Kelly@CliffordChance.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>; Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Fleur.Gibbons@dlapiper.com; Joely.Wilkinson-Hayes@dlapiper.com; erichmond@claytonutz.com; sgrahame@claytonutz.com; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Sophia.Grace@dlapiper.com
Cc: Associate O'BryanJ <Associate.OBryanJ@fedcourt.gov.au>; CompetitionTribunal Registry <CompetitionTribunalRegistry@fedcourt.gov.au>
Subject: [EXT] ACT 1 of 2021 Application by New South Wales Minerals Council

UNCLASSIFIED

Dear Practitioners

By paragraph 13 of the Directions made on 8 April 2021, NSWMC was required to file an electronic hearing book by 24 May 2021. That does not appear to have occurred. Would the parties please advise as a matter of urgency what the current position is in relation to the hearing book.

Yours sincerely

Nicole Young | Executive Assistant to the Hon Justice O'Bryan
Federal Court of Australia | 305 William Street Melbourne VIC 3000
t. +61 3 8600 3618 | e. ea.obryanj@fedcourt.gov.au | www.fedcourt.gov.au

Please ensure all official correspondence to Chambers is copied to associate.obryanj@fedcourt.gov.au



[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-30

This is the Annexure marked “DP-30” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Lloyd, Bruce](#)
To: [Associate.OBryanJ@fedcourt.gov.au](#); [EA.OBryanJ@fedcourt.gov.au](#)
Cc: [CompetitionTribunalRegistry@fedcourt.gov.au](#); [Arnold, Philip \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Kelly, Tegan \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Tom.Jarvis@jws.com.au](#); [wolfgang.hellmann@jws.com.au](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#)
Subject: RE: [EXT] ACT 1 of 2021 Application by New South Wales Minerals Council
Date: Thursday, 3 June 2021 3:37:11 PM

Dear Ms Young, Dear Associate

ACT 1 of 2021: Application by NSW Minerals Council

We refer to the above proceeding.

PNO wishes to bring to the Tribunal's attention two issues which have arisen in relation to the conduct and case management of this matter.

The first is that NSWMC filed its submissions a week late on 2 June 2021 (in default of paragraph 14 of the directions made by the Tribunal on 8 April 2021). This has material consequences for the existing timetable to have the matter ready for a hearing commencing on 22 June 2021.

The second is that, as is apparent from Mr Arnold's email of 1.54pm today, an issue has arisen as to which material will properly be before the Tribunal, and NSWMC has foreshadowed an application under ss 44K(6) and/or 44ZZOAAA(5) in relation to the material behind tabs 9 – 55 of the Hearing Book.

NSWMC's submissions have also referred extensively to this material in support of the arguments propounded. That creates a potential difficulty for the completion of PNO's submissions, and the conduct of the matter more generally, as it is not clear which material, and which issues, will properly be before the Tribunal.

In these circumstances, PNO seeks that the proceeding be re-listed for a case management hearing, including so as to resolve the timetable to hearing in this matter.

PNO respectfully requests the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.

Regards

Bruce Lloyd

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Thursday, 3 June 2021 1:54 PM

To: EA.OBryanJ@fedcourt.gov.au; Lloyd, Bruce <blloyd@claytonutz.com>;

Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com;

Tegan.Kelly@CliffordChance.com; Isabella.Ledden@CliffordChance.com;

Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Richmond, Elizabeth

<erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan

<dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>

Cc: Associate.OBryanJ@fedcourt.gov.au; CompetitionTribunalRegistry@fedcourt.gov.au

Subject: RE: [EXT] ACT 1 of 2021 Application by New South Wales Minerals Council

External Email

Dear Ms Young

The Hearing Book has now been filed and served via ShareFile link, in accordance with Direction 13 of the Tribunal's Directions of 8 April 2021.

We note that:

- NSWMC considers that the documents in the Hearing Book are properly before the Tribunal. With limited exception, they are identified at Appendix A to the NCC's Final Recommendation and form part of the NCC's Final Recommendation, which was taken into account by the Treasurer.
- PNO does not consent to the inclusion of the documents at tabs 9-55 of the Hearing Book. PNO considers those documents are not before the Tribunal in this proceeding, and that the inclusion of the material at tabs 9-55 is contrary to the conclusion of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 and the observations of O'Bryan J at the case management hearing on 7 April 2021 (see T11.28-35, 13.20-25, 13.35-40).
- In light of the dispute raised by PNO, and in order to ensure the efficient disposition of that dispute, NSWMC intends to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application.
- The parties respectfully request the Tribunal to indicate some possible dates and times (or any periods of availability) for a hearing so that the parties can identify a date that is suitable to counsel.

This email is sent with the consent of the parties.

Kind regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

From: EA - O'Bryan J <EA.OBryanJ@fedcourt.gov.au>

Sent: Thursday, 3 June 2021 12:12 PM

To: blloyd@claytonutz.com; Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Kelly, Tegan (Antitrust-SYD)

<Tegan.Kelly@CliffordChance.com>; Ledden, Isabella (Antitrust-SYD)
<Isabella.Ledden@CliffordChance.com>; Tom.Jarvis@jws.com.au;
wolfgang.hellmann@jws.com.au; Fleur.Gibbons@dlapiper.com; Joely.Wilkinson-Hayes@dlapiper.com; erichmond@claytonutz.com; sgrahame@claytonutz.com; Barber, Dylan
<dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Sophia.Grace@dlapiper.com
Cc: Associate O'BryanJ <Associate.OBryanJ@fedcourt.gov.au>; CompetitionTribunal Registry
<CompetitionTribunalRegistry@fedcourt.gov.au>
Subject: [EXT] ACT 1 of 2021 Application by New South Wales Minerals Council

UNCLASSIFIED

Dear Practitioners

By paragraph 13 of the Directions made on 8 April 2021, NSWMC was required to file an electronic hearing book by 24 May 2021. That does not appear to have occurred. Would the parties please advise as a matter of urgency what the current position is in relation to the hearing book.

Yours sincerely

Nicole Young | Executive Assistant to the Hon Justice O'Bryan
Federal Court of Australia | 305 William Street Melbourne VIC 3000
t. +61 3 8600 3618 | e. ea.obryanj@fedcourt.gov.au | www.fedcourt.gov.au

Please ensure all official correspondence to Chambers is copied to
associate.obryanj@fedcourt.gov.au



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To contact any other office

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[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-31

This is the Annexure marked “DP-31” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: [Lloyd, Bruce](#)
Cc: [Tom Jarvis](#); [Wolfgang Hellmann](#); [Sophia Grace](#); [Fleur Gibbons](#); [Joely Wilkinson-Hayes](#); [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); erichmond@claytonutz.com; sgrahame@claytonutz.com; [Barber, Dylan](#); [Fritz, Damiano](#)
Subject: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Friday, 30 April 2021 1:05:00 PM

Dear Bruce

We refer to the Tribunal's Directions of 8 April 2021, which requires at Direction 9 that NSWMC file and serve a Statement of Facts, Issues and Contentions on or before Friday, 30 April 2021.

Owing to factors including constraints in the availability of counsel, NSWMC will not be in a position to file its SOFIC today. We propose to do so by 4pm on Tuesday, 4 May 2021. We would consent to a reciprocal extension of time for your client to file its SOFIC under Direction 10, to 18 May 2021. We do not consider this course causes any prejudice to your client, but if it is opposed please let us know the basis of your client's objection.

Regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

[CC]30-40751612[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-32

This is the Annexure marked “DP-32” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Lloyd, Bruce](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#)
Cc: [Tom.Jarvis@jws.com.au](#); [wolfgang.hellmann@jws.com.au](#); [Sophia.Grace@dlapiper.com](#); [Fleur.Gibbons@dlapiper.com](#); [Joely.Wilkinson-Hayes@dlapiper.com](#); [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#)
Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Monday, 3 May 2021 4:13:08 PM

Dear Philip

PNO consents to an extension of time for NSWMC's SOFIC to 4pm tomorrow, Tuesday 4 May, on the basis of a reciprocal extension for PNO's SOFIC to 18 May 2021, as you propose.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>
Sent: Friday, 30 April 2021 1:05 PM
To: Lloyd, Bruce <blloyd@claytonutz.com>
Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Sophia.Grace@dlapiper.com; Fleur.Gibbons@dlapiper.com; Joely.Wilkinson-Hayes@dlapiper.com; Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com; Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>
Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce

We refer to the Tribunal's Directions of 8 April 2021, which requires at Direction 9 that NSWMC file and serve a Statement of Facts, Issues and Contentions on or before Friday, 30 April 2021.

Owing to factors including constraints in the availability of counsel, NSWMC will not be in a position to file its SOFIC today. We propose to do so by 4pm on Tuesday, 4 May 2021. We would consent to a reciprocal extension of time for your client to file its SOFIC under Direction 10, to 18 May 2021. We do not consider this course causes any prejudice to your client, but if it is opposed please let us know the basis of your client's objection.

Regards
Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

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For details of how we process personal data, please see our updated [privacy statement](#).

[CC]30-40751612[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-33

This is the Annexure marked “DP-33” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Arnold, Philip \(Antitrust-SYD\)](#)
To: registry@competitiontribunal.gov.au
Cc: [Tom Jarvis](#); [Wolfgang Hellmann](#); [Lloyd, Bruce](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#); [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Associate O'Bryan J](#); [EA - O'Bryan J](#)
Subject: ACT 1 of 2021 - Application by New South Wales Minerals Council - SOFIC
Date: Tuesday, 4 May 2021 4:12:25 PM
Attachments: [ACT 1 of 2021 - NSWMC SOFIC - 4 May 2021.pdf](#)

Dear Registry

I refer to the Tribunal's directions of 8 April 2021, Direction 9 of which requires NSWMC to file and serve a Statement of Facts, Issues and Contentions.

I **attach** NSWMC's Statement of Facts, Issues and Contentions by way of filing.

The solicitors for PNO and the NCC are copied by way of service.

Kind regards
Philip

Philip Arnold

Senior Associate
Clifford Chance LLP
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct Dial: [+61 2 8922 8503](tel:+61289228503)
Mobile: [+61 422 947 403](tel:+61422947403)
Email: philip.arnold@cliffordchance.com

Pronouns / He, Him, His

[CC]21-40735926[/CC]

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-34

This is the Annexure marked “DP-34” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Lloyd, Bruce](#)
To: [Arnold, Philip \(Antitrust-SYD\)](#)
Cc: [Tom.Jarvis@jws.com.au](#); [wolfgang.hellmann@jws.com.au](#); [Sophia.Grace@dlapiper.com](#); [Fleur.Gibbons@dlapiper.com](#); [Joely.Wilkinson-Hayes@dlapiper.com](#); [Poddar, Dave \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#); [Fritz, Damiano](#)
Subject: [EXT] RE: ACT 1 of 2021: Application by New South Wales Minerals Council
Date: Tuesday, 18 May 2021 7:05:16 PM

Dear Colleagues

ACT 1 of 2021: Application by NSW Minerals Council

We refer to direction 10 of the Tribunal's directions made 8 April 2021 in the above proceeding, and the extensions agreed for each party's SOFIC below.

Owing to matters beyond PNO's control, PNO will be unable to file and serve its SOFIC today, and expects to do so as soon as practicable tomorrow.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Lloyd, Bruce

Sent: Monday, 3 May 2021 4:13 PM

To: Philip.Arnold@CliffordChance.com

Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Sophia.Grace@dlapiper.com; Fleur.Gibbons@dlapiper.com; Joely.Wilkinson-Hayes@dlapiper.com; Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com; Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>

Subject: RE: ACT 1 of 2021: Application by New South Wales Minerals Council

Dear Philip

PNO consents to an extension of time for NSWMC's SOFIC to 4pm tomorrow, Tuesday 4 May, on the basis of a reciprocal extension for PNO's SOFIC to 18 May 2021, as you propose.

Regards

Bruce

Bruce Lloyd, Partner

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | www.claytonutz.com

From: Philip.Arnold@CliffordChance.com <Philip.Arnold@CliffordChance.com>

Sent: Friday, 30 April 2021 1:05 PM

To: Lloyd, Bruce <blloyd@claytonutz.com>

Cc: Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; Sophia.Grace@dlapiper.com; Fleur.Gibbons@dlapiper.com; Joely.Wilkinson-Hayes@dlapiper.com; Dave.Poddar@CliffordChance.com; Angel.Fu@CliffordChance.com; Isabella.Ledden@CliffordChance.com; Richmond, Elizabeth <erichmond@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>

Subject: ACT 1 of 2021: Application by New South Wales Minerals Council

External Email

Dear Bruce

We refer to the Tribunal's Directions of 8 April 2021, which requires at Direction 9 that NSWMC file and serve a Statement of Facts, Issues and Contentions on or before Friday, 30 April 2021.

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Regards

Philip

Philip Arnold

Senior Associate

Clifford Chance LLP

Level 16, No. 1 O'Connell Street

Sydney NSW 2000 Australia

Direct Dial: [+61 2 8922 8503](tel:+61289228503)

Mobile: [+61 422 947 403](tel:+61422947403)

Email: philip.arnold@cliffordchance.com

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[CC]30-40751612[/CC]

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COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

ANNEXURE CERTIFICATE
DP-35

This is the Annexure marked “DP-35” referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 7 June 2021.

Before me:



.....
Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

From: [Fritz, Damiano](#)
To: registry@competitiontribunal.gov.au
Cc: Associate.OBryanJ@fedcourt.gov.au; EA.OBryanJ@fedcourt.gov.au; [Poddar, Dave \(Antitrust-SYD\)](#); [Arnold, Philip \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Ledden, Isabella \(Antitrust-SYD\)](#); Tom.Jarvis@jws.com.au; wolfgang.hellmann@jws.com.au; [Lloyd, Bruce](#); [Richmond, Elizabeth](#); [Grahame, Scott](#); [Barber, Dylan](#)
Subject: [EXT] ACT 1 of 2021: PNO Statement of Facts, Issues and Contentions
Date: Wednesday, 19 May 2021 10:59:27 PM
Attachments: [ACT 1 of 2021 - PNO SOFIC.pdf](#)

Dear Registry

ACT 1 of 2021: Application by NSW Minerals Council

We refer to direction 10 of the Tribunal's directions made on 8 April 2021 in the above proceeding.

We **attach**, by way of filing, PNO's Statement of Facts, Issues and Contentions.
The solicitors for NSWMC and the NCC are copied by way of service.

Kind regards
Damiano

Damiano Fritz, Lawyer

Clayton Utz

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4881 | F +612 8220 6700 |
dfritz@claytonutz.com | www.claytonutz.com

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[CC]Office1[/CC]