

**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: 11/06/2021 12:41 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, Bruce Llewellyn Lloyd, of 1 Bligh Street, Sydney in the State of New South Wales, Partner, affirm as follows:

1. I am a partner at Clayton Utz, the solicitors for Port of Newcastle Operations Pty Limited (**PNO**) in these proceedings. I have carriage of this matter for PNO and am authorised to make this affidavit on PNO's behalf.
2. Except where otherwise indicated, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.
3. I make this affidavit pursuant to direction 1 of the directions of the Tribunal dated 8 June 2021, in relation to the application by the applicant, New South Wales Minerals Council (**NSWMC**), for the Tribunal, by way of a notice under s 44K(6A) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), to require production from the National Competition Council (**NCC**) of the documents identified at the Schedule to the draft notice filed by NSWMC on 7 June 2021 (**Notice Application**).

Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000

A handwritten signature in black ink, appearing to read 'B. Lloyd', is written over a horizontal line.

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Telephone: 02 9353 4000  
Fax: 02 8220 6700  
Email: blloyd@claytonutz.com  
Ref: Bruce Lloyd

A handwritten signature in black ink, appearing to read 'B. Lloyd', is written over a horizontal line.

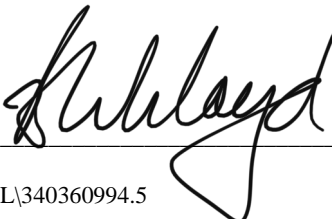
4. I have read the submissions filed by NSWMC (**NS**) and affidavit of Dave Poddar affirmed 7 June 2021 in support of the Notice Application.
5. I previously affirmed an affidavit in these proceedings on 5 June 2021 (**Lloyd 1**).
6. This affidavit:
  - (a) sets out some of the factual propositions and economic analysis advanced by NSWMC in the NS which it seeks to establish by way of reliance on the material sought by way of the Notice Application;
  - (b) identifies additional material which I currently perceive would be necessary for PNO to apply for the Tribunal to request by way of a notice under s 44ZZOAAA(5) of the CCA, should the Notice Application be allowed; and
  - (c) outlines the implications for the timetable in this matter of the foregoing.
7. PNO claims confidentiality over the shaded parts of this affidavit on the basis that they contain commercially sensitive and confidential information concerning the business of PNO.

#### **Information sought by the Notice Application**

8. A notice under s 46K(6A) of the CCA issued by the Tribunal in the form of the draft filed by NSWMC on 7 June 2021 (**Draft Notice**) would require production of the following five documents by the NCC:
  - (a) the draft port user pro forma long term pricing deed (**Port User Deed**) initially sent to port users by PNO in December 2019 for discussion, which following negotiations, was subsequently replaced with the Producer and Agent Deeds;
  - (b) a copy of the template producer pro forma long term pricing deed (**Producer Deed**) made available on PNO's website as at the date of the Declaration Application;
  - (c) a copy of the template vessel agent pro forma long term pricing deed (**Agent Deed**) made available on PNO's website as at the date of the Declaration Application;

(together, **PNO Pricing Deeds**)

  - (d) a report titled "Port of Newcastle Operations ability and incentive to exercise market power and its impact on competition in Newcastle catchment coal




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tenements market” prepared by NSWMC's economic expert Synergies dated July 2020 in support of the Declaration Application (the **2020 Synergies report**); and

- (e) a report titled “Assessment of revocation application by Port of Newcastle Operations” prepared by Synergies dated 8 August 2018 and filed by Glencore Coal Pty Ltd (**Glencore**) in support of its submission to the NCC in respect of PNO's application dated 2 July 2018 for revocation of the declared service at the Port of Newcastle (the **2018 Synergies report**).

(together, the **Synergies Reports**).

9. NSWMC submits that the 2018 Synergies report was before the Minister for the purposes of the decision under review in these proceedings, on the basis that the report “was contained in the hyperlink in footnote 44 of the NCC's Final Recommendation dated 18 December 2020”: NS at [12].
10. I have reviewed the NCC's Final Recommendation, and observe that footnote 44 on page 22 (at Hearing Book (**HB**) 93) contains a hyperlink to the NCC's webpage in relation to PNO's application for revocation, which in turn contains further links to a number of submissions made to the NCC in response to that application, including submissions by Glencore dated 8 August 2018 which annex the 2018 Synergies report. A copy of the NCC's webpage is annexed and marked **BLL-1**.

### **Content of the Synergies Reports**

11. The Synergies Reports contain a number of factual assertions and economic analysis on which NSWMC purports to rely.


#### *Investment decisions in the tenements market*

12. The Synergies Reports express opinions about the effect of revocation (in the case of the 2018 Synergies report) and the absence of declaration (the 2020 Synergies report) on investment conditions in the coal tenements market.

13. By way of example:

- (a) The 2018 Synergies report asserts (at 62-63, [3.3.3], HB 2218-19) that:

*“... revocation of the declaration will result in investors in the coal sector in the Newcastle catchment facing a material risk of substantially higher port charges*




*that will most likely reduce their incentive to invest in the exploration and development of future coal reserves in the Newcastle catchment.”*

(b) The 2020 Synergies report asserts (at 13-14, HB 326-7) that:

*“An imbalance in bargaining power would inhibit the ability of coal producers to effectively manage risks, in particular the risk of hold-up, which would have a significant effect on the expected profitability of entry into (and operations within) the market. The presence of such risks, and an imbalance in the ability of users to address these risks in a future without declaration, would likely deter efficient entry or efficient investments by market participants.”*

14. In the course of the NCC's consideration of PNO's 2018 application for revocation, PNO submitted its own expert reports to the NCC, including:

(a) a report prepared by Ms Cecile Naess of ResourcefulNaess Consulting dated September 2018 which provided an “assessment of navigation and wharfage charges imposed by Port of Newcastle on users of the Port and its impact on coal mine decision making for the Hunter Valley, NSW”; and

(b) a report prepared by HoustonKemp Economists titled “Effect of declaration on incentives to invest in coal mines” dated 14 September 2018.

15. In both the revocation matter and the present matter, the NCC rejected Synergies' opinions. In its Final Recommendation in the present matter, the NCC concluded that the broader coal tenements market is, and is likely to remain, effectively competitive with or without declaration (at [7.147], HB 145) and that declaration would not promote a material increase in competition in the market(s) for thermal coal tenements in the Newcastle catchment (at [7.151], HB 146).

16. As far as I am aware there was no material before the NCC in 2018 or 2020 from any NSWMC member or owner of development stage tenements in the Hunter Valley, describing the influence that that PNO's terms and conditions of access (and in particular a minor difference in port charges) had, or could have, on their tenement investment decisions. The relevant service was declared from 2016 to 2019. Declaration of the service was revoked in September 2019. There is no evidence whether in either of those two periods totalling 5 years there has been any effect on investments in mining tenements in the Hunter Valley.




17. Further, as far as I am aware, there was no material before the NCC in 2018 or 2020 about governmental and institutional policies that are likely to influence coal tenements in the Hunter Valley, such as:

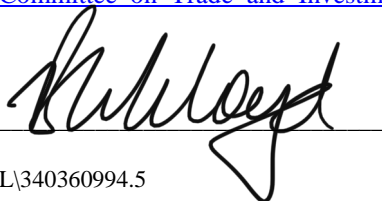
- (a) the NSW government's policy framework for coal exploration and mining, as reflected in the 'Strategic Statement on Coal Exploration and Mining in NSW' published on the NSW Government Department of Mining, Exploration and Geoscience's website at: <https://resourcesandgeoscience.nsw.gov.au/miners-and-explorers/programs-and-initiatives/future-of-coal-statement>, which includes a map which shows the very limited “areas in NSW coal regions available and excluded from future coal exploration and mining”. A copy of that map is annexed and marked **BLL-2**; and
- (b) the appetite of financial institutions to finance or support fossil fuel based investments. For example, in NSWMC's submission to the federal parliamentary joint committee ‘Inquiry into the prudential regulation of investment in Australia's export industries’ in April 2021, NSWMC indicated in its submission<sup>1</sup> (at 4) that:

*“...there has been a trend towards financial institutions adopting policies that withdraw or restrict ongoing support for fossil fuel based investments. NSWMC's members have expressed concerns about this trend and the potential longer-term ramifications it could have for the mining industry and the regional economies and jobs that it supports*

...

*As the pool of lenders and insurers decreases, the owners of fossil fuel-related assets will be forced to increasingly look offshore for support and will face increasing costs. It may reach a point where in some cases they are not able to secure the finance and insurance they require to continue operating ... The financial institutions' climate policies are likely to become much wider in scope over time.”*

<sup>1</sup> Available to download at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Joint\\_Standing\\_Committee\\_on\\_Trade\\_and\\_Investment\\_Growth/ExportIndustries/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Joint_Standing_Committee_on_Trade_and_Investment_Growth/ExportIndustries/Submissions)

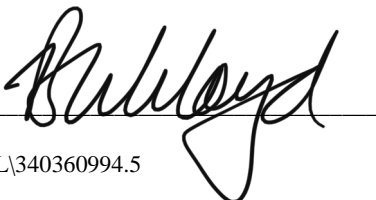



*Geographic dimension of the tenements market*

18. Before the Tribunal could be satisfied that declaration was likely to promote a material increase in competition in the coal tenements market, it would be necessary to determine the geographical dimension of that market.
19. The 2018 Synergies report asserts (at 40, HB 2196) that the geographic dimension of the relevant market is:
- “... the market for prospecting, exploring and developing coal deposits within the Newcastle catchment area (at its broadest level), and that it is likely that is this comprised of smaller regional markets in the areas of the Hunter Valley/Western Basins and the Gunnedah Basin.”*
20. PNO, by contrast, has consistently maintained that the geographic dimension of the tenements market is broader than the Newcastle catchment area: see for example PNO submissions to the NCC dated 4 February 2019 (at 12).
21. In its Final Recommendation in the present matter (at 77-78 [7.146(a)], HB 144-5) the NCC considered that it was possible that the geographic scope of the tenements market extends beyond the Newcastle catchment, but concluded that it was not necessary to precisely determine the geographic scope in order to assess whether declaration would be likely to promote a material increase in competition in this market.

*The outlook for coal commodities*

22. The 2018 Synergies report also discusses at length the production outlook for operating coal mines in Australia, and makes a number of assumptions and predictions about future coal prices, PNO's likely future charges and the impact of future charges on the coal volumes exported through the Port, as at the date of the report in August 2018.
23. The NCC's recommendation records the price arrangements PNO has implemented since the 2018 Synergies report was prepared but does not contain up-to-date information about coal prices, or coal volumes exported through the Port. I am aware that the benchmark spot price for thermal coal exported from the Port of Newcastle is publicly available, and published by the World Bank. Based on this source, I am aware that the spot price for coal has fluctuated significantly since 2018. For example, in July 2020, when NSWMC submitted its application for a declaration, the monthly coal export price in nominal US Dollars was some US \$52 per metric tonne (MT), and as of May 2021 (the most recent





data available), the price is some US \$107 per MT. I am also aware that PNO records the volume of coal exported through the Port of Newcastle, and publishes these figures on its website. Based on this material, I am aware that since the 2018 Synergies report was prepared, coal exports through the Port have remained more or less constant (at approximately 160 million tonnes per year).

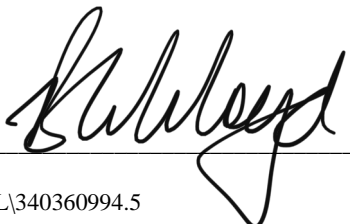
*Pricing arrangements at the Port of Newcastle*

- 24. The 2020 Synergies report asserts that by virtue of seeking to enter into the Producer Deeds and Agent Deeds, PNO has “demonstrated that it has the ability and incentive to negotiate individually with coal miners” and that “[i]ndividual contracts with coal producers will enable PNO to price discriminate between users” (at 12, HB 325).
- 25. The pro forma Producer Deed (HB 267) and Agent Deed (HB 285) impose non-discriminatory pricing obligations on PNO as between Producers and Agents, respectively.

[REDACTED]

**Further information which would be required in response to Synergies Reports**

- 27. If the Tribunal allows NSWMC’s Notice Application and issues the notice seeking the Synergies Reports and PNO Pricing Deeds, in light of the matters outlined at paragraphs

  
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11 to 26 above, PNO would require the opportunity to respond to the various claims made in the Synergies Reports.

28. In my opinion, the ResourcefulNaess and HoustonKemp expert reports relied on by PNO for the purposes of the 2018 revocation application provide a partial response to the matters raised in the Synergies Reports but are not sufficient or appropriate, having regard to the effluxion of time since they were prepared.

29. Accordingly, if the Tribunal allows the Notice Application, PNO would apply to the Tribunal to issue notices under s 44ZZOAAA(5) requesting:

(a) updated expert evidence from PNO in response to the Synergies Reports in relation to:

(i) the investment decision-making process for coal mine tenements and the significance of Port charges at the Port of Newcastle for those decisions; and


(ii) the geographic dimension of the tenements market;

(b) updated evidence from PNO in relation to its knowledge of the coal market outlook, coal prices, PNO's charges and coal volumes shipped through the Port; and

(c) [REDACTED]

30. I estimate that it would take 4 weeks from the time the Tribunal made a determination in respect of NSWMC's Notice Application for PNO to prepare the responsive evidence outlined in paragraph 29.

31. PON would endeavour to file and serve its substantive submissions in the proceedings at the same time.

  
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AFFIRMED by the deponent  
at Sydney in New South Wales  
on 11 June 2021.

Before me:



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Dylan Barber  
NSW solicitor (81514)

*Signature of deponent*



**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**

**BLL-1**

This is the Annexure marked “BLL-1” referred to in the affidavit of Bruce Llewellyn Lloyd affirmed at Sydney in New South Wales on 11 June 2021.

**Before me:**



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**Witness**



## 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](#)

## 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.

The Minister had not published a decision on the Council's recommendation by the end of this date. Accordingly, it is taken that a decision to revoke the declaration has been made. The Minister made a [statement](#) confirming his decision.

The Council's recommendation is available under the *Council's final views* tab.

## 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**

**BLL-2**

This is the Annexure marked “BLL-2” referred to in the affidavit of Bruce Llewellyn Lloyd affirmed at Sydney in New South Wales on 11 June 2021.

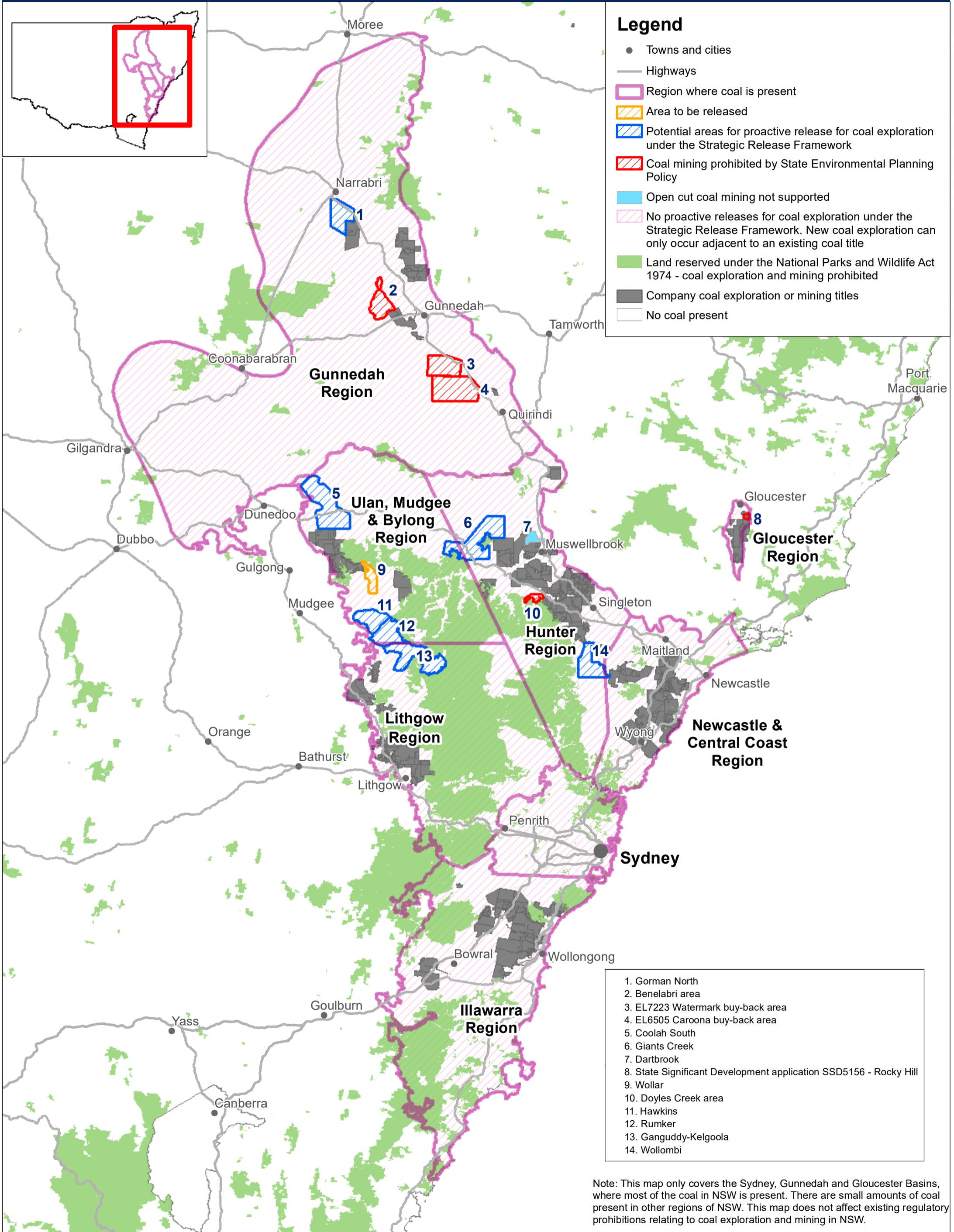
**Before me:**



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**Witness**

# Areas in NSW coal regions available and excluded from future coal exploration and mining



### Legend

- Towns and cities
- Highways
- Region where coal is present
- Area to be released
- Potential areas for proactive release for coal exploration under the Strategic Release Framework
- Coal mining prohibited by State Environmental Planning Policy
- Open cut coal mining not supported
- No proactive releases for coal exploration under the Strategic Release Framework. New coal exploration can only occur adjacent to an existing coal title
- Land reserved under the National Parks and Wildlife Act 1974 - coal exploration and mining prohibited
- Company coal exploration or mining titles
- No coal present

1. Gorman North
2. Benelabri area
3. EL7223 Watermark buy-back area
4. EL6505 Caroonia buy-back area
5. Coolah South
6. Giants Creek
7. Dartbrook
8. State Significant Development application SSD5156 - Rocky Hill
9. Wollar
10. Doyles Creek area
11. Hawkins
12. Rumker
13. Ganguddy-Kelgoola
14. Wollombi

Note: This map only covers the Sydney, Gunnedah and Gloucester Basins, where most of the coal in NSW is present. There are small amounts of coal present in other regions of NSW. This map does not affect existing regulatory prohibitions relating to coal exploration and mining in NSW.

