NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged:	Submissions
File Number:	ACT 1 of 2021
File Title:	APPLICATION FOR REVIEW LODGED BY NEW SOUTH WALES MINERALS COUNCIL UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) OF THE DECISION OF THE DESIGNATED MINISTER UNDER SUBSECTION 44H(1) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH).
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL

REGISTRAR

Dated: 14/06/2021 9:27 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)**

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

REPLY SUBMISSIONS OF NEW SOUTH WALES MINERALS COUNCIL IN RELATION TO PROPOSED NOTICE

1. These submissions by New South Wales Minerals Council (**NSWMC**) reply to the submissions of Port of Newcastle Operations Pty Ltd (**PNO**) dated 11 June 2021.

2. The submissions of the parties raise three questions for determination:

    a. *First*, whether the relevant documents[1] form part of the information which the Minister "took into account" in making the decision. This question involves the proper construction of s 44ZZOAAA(3)(c);

    b. *Secondly*, whether the Tribunal should issue NSWMC's proposed notice to the NCC to obtain the relevant documents under s 44K(6A);[2] and

    c. *Thirdly*, if the Tribunal issues NSWMC's proposed notice, whether the Tribunal should issue further notices as contemplated by PNO.

3. Before considering these issues, we note an important matter at the outset. Contrary to PNO's submissions, the relevant documents are not new and additional material.[3] In this regard, see below at [15].[4] As such, the Minister had constructive knowledge of the documents and they were clearly *before* the Minister.

The relevant documents: s 44ZZOAAA(3)(c)

The proper construction

4. NSWMC submits that, properly construed, Parliament intended the information which the Minister "took in account" in s 44ZZOAAA(3)(c) to be information *before* the Minister in making the decision.

5. This construction is compelled by the High Court's decision in ***Pilbara*** *Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379. It is also supported by the extrinsic material and principles of administrative law.

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[1] Affidavit of Dave Poddar affirmed 7 June 2021 (**Poddar Affidavit**) at Annexure DP-8.
[2] Alternatively, s 44ZZOAAA(5) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
[3] Cf PNO Submissions (**PS**) at [3]; ***Pilbara*** *Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [65] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[4] See also NSWMC's Submissions dated 7 June 2021 (**NSWMCS**) at [12].

6. In *Pilbara*, the High Court repeatedly characterised the review required by s 44K as concerning the material *before* the Minister.[5] For example, at [60] the plurality said:

> "The contrast is best understood as being between a 're hearing' which requires deciding an issue afresh on whatever material is placed before the new decision maker and a 're consideration' which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed *before* the original decision maker…" (emphasis added).

7. The approach stated in *Pilbara* was followed by the Tribunal: *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [32].[6] "The material considered by the Tribunal … will in the first place be that *before* the Minister [which] may be added to by the proper use of s 44K(6)".[7] The power under s 44K(6) "extends so far as is necessary to facilitate a proper re-consideration of the Minister's decision".[8]

8. Relevantly, s 44K was amended by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) which added at the end of s 44K(4) the words "*based on the information, reports and things referred to in section 44ZZOAA*". The Explanatory Memorandum to the Trade Practices Amendment (Infrastructure Access) Bill at [1.126][9] identifies the purpose of this provision:

> "In reviews of decisions under Part IIIA the Tribunal will be limited to the information that was *before* the original decision-maker. The Tribunal may only seek additional information in two circumstances: for the purposes of clarifying information that was before the original decision-maker; and from the ACCC or NCC in their role of assisting the Tribunal" (emphasis added).

9. Sections 44ZZOAA and 44ZZOAAA were also introduced by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth). Again, the Explanatory Memorandum emphasises at [1.107] that:[10]

> "Under limited merits review…the Tribunal may only consider information *before* the original decision-maker. The Tribunal may make a written request that a person provide information within a specified time period for the purpose of clarifying the information *before* the original decision-maker" (emphasis added).

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[5] French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ at [60], [65] and [73]; see also Heydon J at [130], [131], [152] and [153].

[6] "… the Tribunal is to review the decision of the Minister on the merits under s 44K, as a reconsideration based on the material *before* the Minister" (emphasis added).

[7] *Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* [2013] ACompT 2 at [84] (***Pilbara Tribunal Remitter***).

[8] *Pilbara Tribunal Remitter* at [100], where the Tribunal also noted s 44K(6) should not be used "beyond obtaining the Minister's Material" (at [99]).

[9] See also [1.117]: "Despite the Tribunal's discretion to ask for assistance, information or reports from the NCC or ACCC it is expected that the review will still largely be limited to the *information submitted to the original decision-maker*" (emphasis added).

[10] See also [1.129]-[1.133] and [1.137].

10. This construction is also supported by the following principles of administrative law which form part of the context in which s 44ZZOAAA(3)(c) must be construed.[11] This context must be considered at the same time as looking at the text.[12]

    a. *First*, a decision maker such as the Minister is entitled to rely on a departmental summary to reach his or her decision.[13] However, if a summary fails to bring to the Minister's attention a material fact which he or she is bound to consider, the decision will not have been made according to law.[14]

    b. *Secondly*, a decision maker such as the Minister is taken to have constructive knowledge of information contained on a departmental file.[15] Material in the possession of the department is treated as being in the possession of the Minister. Even if the department in fact withholds information from him or her, that material remains before the Minister.[16]

    c. *Thirdly*, a reference to a hyperlinked document is sufficient for that document to be considered to be in the possession of the Minister. This includes a document hyperlinked in a primary document and also a hyperlinked document within the hyperlinked document.[17]

11. Contrary to PNO's contentions, s 44ZZOAAA(3)(c) does not (on a proper construction) contemplate a factual enquiry about what information the Minister *in fact* took into account in making his or her decision.[18] Such a construction would be contrary to administrative law principles. Parliament should not be taken to have departed from these principles in the absence of any indication in the text or context to this effect.[19]

12. PNO's construction would also lead to unworkable and impractical outcomes, as well illustrated by this case. In this case, there is no evidence before the Tribunal as to what material the Minister *in fact* took into account. Relevantly, as PNO correctly notes, there is no evidence as to whether the Minister *accessed* the hyperlinks to the relevant documents.[20] All we have is assertions in correspondence from the Minister's solicitors.[21]

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[11] *AB v Western Australia* (2011) 244 CLR 390 at [10]; *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Aust) Pty Ltd* (2000) 201 CLR 520 at [20].
[12] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14].
[13] *Minister for Aboriginal Affairs v* ***Peko-Wallsend*** *Ltd* (1986) 162 CLR 24 at 30-31 (Gibbs CJ).
[14] *Peko-Wallsend* at 31.
[15] *Peko-Wallsend* at 31 (Gibbs CJ) and 45 (Mason J); *Minister for Immigration and Multicultural Affairs v Huynh* (2004) 139 FCR 505 at [80] (Kiefel and Bennett JJ).
[16] *Peko-Wallsend* at 31; *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 at 179.
[17] *Kirkman v Minister Administering the Crown Lands Act (No 2)* [2020] NSWSC 1494, where the court noted that the Minister could access documents hyperlinked in submissions (at [42]); *Polaris Coomera Pty Ltd v Minister for the Environment* [2021] FCA 254 at [88] and [117].
[18] PS at [9].
[19] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [15]; *South Australia v Totani* (2010) 242 CLR 1 at [31]; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Potter v Minahan* (1908) 7 CLR 277 at 304.
[20] PS at [10].
[21] Poddar Affidavit at Annexure DP-2.

13. In order for the Tribunal to make any finding as to these matters, the Tribunal would need to receive evidence from the Minister – that is, as to what material he *in fact* took into account or whether he *accessed* the relevant documents via hyperlinks. It is then possible that any such evidence would be challenged under cross-examination. Parliament would not have intended such an unworkable or impractical result.[22]

The relevant documents

14. In the present case, the relevant documents were provided to the Minister's office in circumstances where NSWMC was relying on them as containing important information to the Minister's decision.

15. In opposing NSWMC's proposed notice, PNO misstates at PS[10] the factual position. To clarify:

    a. In the case of the three deeds and the 2020 Synergies Report:

        i. These were referred to and relied upon in the Application (see, by way of example only, at [2.3], [8.3], [8.4], [9.9]).

        ii. They were annexed to the Application (Annexures A, B, C and G).

        iii. They were included in Appendix A to the NCC's Final Recommendation.

        iv. They were included in the NCC's Final Recommendation via hyperlink (at footnote 11).

        v. They were provided via a hyperlinked electronic index in an email from the NCC to Treasury (Poddar Affidavit at [9], Annexure "DP-7").

    b. In the case of the 2018 Synergies Report:

        i. This report was referred to and relied upon in the Application (at [9.6]):

        As rightly predicted by Synergies in its report which was submitted to the Council in August 2018 together with Glencore's submission,[49] following revocation of the declaration of the Port in 2019:

        > • PNO has materially increased access prices at the Port, once again demonstrating its propensity to unilaterally materially increase prices without regard for industry circumstances;
        >
        > • this will lead to reduced investor confidence and higher cost of capital for new coal mining projects in the Newcastle catchment area; and
        >
        > • smaller coal producers or producers with relatively high marginal costs in the Newcastle catchment areas have been most affected.

[22] See, for example, *Meade v Nillumbik Australia Pty Ltd & Anor (Ruling)* [2019] VSC 786 at [58].

ii. It was included in the Application via direct hyperlink (at footnote 49).

iii. It was included in the NCC's Final Recommendation via hyperlink (at footnotes 44 and 45).

16. In the circumstances, the Minister had constructive knowledge of the relevant documents and they were clearly before him. As such, NSWMC submits that they were part of the information which the Minister "took into account" on a proper construction of s 44ZZOAAA(3)(c).

17. NSWMC's proposed notice is consistent (not inconsistent[23]) with the High Court's decision in *Pilbara*. Indeed, in that case, Heydon J relevantly said:[24]

> "If the Tribunal remained in doubt about whether it was confining itself to the material that had been *before* the Minister, it could make a s 44K(6) request for the Council's assistance" (emphasis added).

18. It is clear that the parties join issue on whether the Minister's competition analysis was deficient.[25] Contrary to PNO's contention,[26] the Tribunal need not determine the probative value of the Synergies reports for the purposes of deciding whether to issue the proposed notice. It suffices that the documents were before the Minister (in the sense described above) and are relevant to that issue. Likewise, the contractual documents.

PNO's contemplated notice

19. PNO submits that, if the Tribunal issues NSWMC's proposed notice, then PNO could apply to have other material provided.[27] The other material falls into two categories.

20. *First*, PNO contends that the Tribunal would also need to have regard to the responsive material which PNO submitted to the NCC.[28] That material comprises two expert reports submitted by PNO to the NCC.[29] Neither of these reports were referred to or relied upon by PNO in material submitted to the NCC in respect of NSWMC's application.[30] The position in respect of those reports is unlike that of the 2018 Synergies report.

21. *Secondly*, PNO asserts that it would also be necessary to seek other information.[31] In contrast to the relevant documents, this material would be new and additional material. As such, it does not follow from NSWMC's proposed notice.

Dated: 14 June 2021

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[23] Cf PS at [13].
[24] *Pilbara* at [153] ("*Transmission of the 'record'*").
[25] NSWMCS at [25]-[27]; PS, [14]-[15].
[26] PS at [15] and [17].
[27] PS at [3].
[28] PS at [16].
[29] Affidavit of Bruce Lloyd affirmed 11 June 2021 (**Lloyd Affidavit**) at [14].
[30] Affidavit of Dave Poddar dated 14 June 2021 (**Second Poddar Affidavit**) at [7].
[31] PS at [17]-[20].