NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged:	NSWMC Submissions as to costs
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: 15/09/2021 11:49 AM

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

SUBMISSIONS OF NEW SOUTH WALES MINERALS COUNCIL IN RELATION TO COSTS UNDER SECTION 44KB(1)

Introduction

1. These submissions are made by New South Wales Minerals Council (**NSWMC**) pursuant to direction 3(b) of the Tribunal's determination dated 4 August 2021 in relation to the Tribunal's power to order costs under s 44KB(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and the exercise of the Tribunal's discretion.

2. In *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 (***Application by NSWMC No 3***), the Tribunal stated at [12] that it "…doubts that it has power under s 44KB(1) to make an order for costs in this proceeding, which is a proceeding for review of the Treasurer's decision not to declare the shipping channel service under s 44K(2) (and not a proceeding for a review of a declaration under section 44K(1))".[1]

3. NSWMC submits that the Tribunal's preliminary view is plainly correct. The power to award costs under s 44KB(1) is limited to "proceedings for a review of declaration". Contrary to the submissions made by Port of Newcastle Operations Pty Ltd (**PNO**) there is no basis in the text or context to extend the power to apply to these proceedings for a review of a decision not to declare a service under s 44K(2).

4. If, contrary to NSWMC's submissions, s 44KB(1) does apply to these proceedings, NSWMC submits further that:

   (a) the Tribunal does <u>not</u> have the power under s 44KB(1) to order costs against NSWMC in any event as it is not "a person who has been made a party to the proceedings"; and

   (b) alternatively, the power under s 44KB(1) should only be exercised by the Tribunal in exceptional cases, which do not include the present proceeding.

5. In support of its submissions, PNO has filed an affidavit of Bruce Lloyd. PNO does not have leave to file the affidavit. NSWMC objects to it. The contents of the affidavit are irrelevant to the questions identified above. If the Tribunal were to order that it pay

[1] See also, *Application by NSWMC No 3* at [278].

PNO's costs, NSWMC submits that, as a matter of procedural fairness, there would need to be orders pursuant to s 44KB(3) for an assessment or taxation of costs. [2]

Relevant principles

6. The proper construction of s 44KB(1) involves the application of orthodox principles of statutory construction. The relevant principles can be summarised as follows.

7. The modern approach was described by Kiefel CJ, Nettle and Gordon JJ in ***SZTAL*** *v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

8. In ***Commissioner of Taxation*** *v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39], the High Court summarised the approach to statutory interpretation as follows:

> "'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text.' So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."

9. In ***Alcan*** *(NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, the High Court said similarly at [47]:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear

[2] Cf. PNO's Submissions, at [33].

> meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention".[3]

10. Accordingly, whilst historical considerations and extrinsic materials are relevant to the process of statutory construction, they cannot be relied on to displace the clear meaning of the statutory text. The reason for considering these matters of context is only to assist in fixing the meaning of the text.[4]

11. Further, it would be an error to read legislation with an eye to conforming it to desirable policy,[5] or to "fill gaps" in legislation by reading in words, where those words are "too big, or too much at variance with the language in fact used by the legislature".[6] The process of statutory construction ought not engage in 'judicial legislation' by construing the section in a strained manner to cover another set of circumstances.[7]

Proper construction of s 44KB(1)

12. Section 44KB(1) states:

> If the Tribunal is satisfied that it is appropriate to do so, the Tribunal may order that a person who has been made a party to proceedings for a review of a declaration under section 44K pay all or a specified part of the costs of another person who has been made a party to the proceedings. (Emphasis added).

13. The word "declaration" in s 44KB(1) is clearly used in the statutory sense of Part IIIA. It is not to be read literally.[8] Relevantly, under s 44H, the designated Minister may either "declare the service" or "decide not to declare it". If the Minister declares the service under s 44H, the statutory conception is "declaration". This is clearly evidenced by ss 44I (which deals with the duration and effect of the "declaration"), s 44J (which provides for revocation of the "declaration") and s 44K(1) (see below).

14. In harmony with s 44H, s 44K provides for two kinds of proceedings in the Tribunal:

    (a) as per s 44K(1), if the Minister declares the service, the service provider can apply for "review of the declaration"; and

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[3] See also *SZTAL* at [14], citing *Alcan* at [46]-[47], per Kiefel CJ, Nettle and Gordon JJ.
[4] *Commissioner of Taxation* at [39].
[5] *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at 295.
[6] ***Taylor*** *v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [38].
[7] *Taylor* at [39]-[40].
[8] Cf. PNO's Submissions, at [13].

(b) as per s 44K(2), if the Minister decides not to declare the service, a person who applied for declaration may make an application for review of the Minister's decision.

15. The phrase "proceedings for a review of a declaration" in s 44KB(1) is clearly referring to proceedings under s 44K(1). The symmetry of language in ss 44KB(1) and 44K(1) is unambiguous. The former refers to "review of a declaration". The latter refers to "review of the declaration" if the Minister decides to declare a service. They are clearly referring to the same thing. This conclusion is fortified by the presumption that words are used consistently throughout a statute.[9]

16. It is manifest that proceedings under s 44K(2) are not a "review of a declaration" for the purposes of s 44KB(1). Indeed, in the circumstance of s 44K(2), there is no "declaration" at all. That is because the Minister has decided not to declare the service. The decision of the Minister not to declare the service is not "declaration" in the Part IIIA sense.

17. This statutory distinction is well illustrated in r 20B(1) to the *Competition and Consumer Regulations 2010* (Cth) which relevantly states:

> "(1) An application to the Tribunal:
> (a) under subsection 44K(1) of the Act for review of a declaration of a service;
> (b) under subsection 44K(2) of the Act for review of a decision not to declare a service…"

18. Accordingly, the statutory text in s 44KB(1) read in context of ss 44H and 44K is clear. The Tribunal's power to award costs is expressly limited to "proceedings for a review of a declaration". It does not confer power on the Tribunal to order costs in this proceeding for review of the Minister's decision not to declare a service under s 44K(2).[10] There is simply no room in the statutory text for the contrary argument advanced by PNO.

[9] *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1 at [10].
[10] The conclusion is reinforced by the fact that ss 44H, 44K and 44KB were introduced at the same time by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth).

PNO's construction of s 44KB(1)

19. PNO argues that the words "review of a declaration" in s 44KB(1) are an "umbrella" description that refers to both kinds of proceedings under s 44K(1) and (2).[11] This argument finds no support in the text or context.

20. *First*, as to context, PNO relies on the fact that s 44K is headed "Review of declaration".[12] The heading in s 44K cannot be used to defeat the clear meaning of the statutory provisions. While headings may be taken into account in the process of statutory construction, the High Court has recognised headings are "not always reliable and do not form part of a statute, and so may not govern what follows in the provision".[13]

21. In fact, the headings to each of ss 44I, 44J and 44K contain the word "declaration". The Parliamentary draftsperson may well have used the word "declaration" in the heading to s 44K for ease of navigation in the statute by reference to ss 44I and 44K.

22. *Secondly*, PNO relies on the fact that there are other provisions in Part IIIA which refer to sub-section 44K(1) expressly in relation to a review of a declaration.[14] This point lacks substance. None of them use the same language as s 44KB(1). The provisions relied on (ss 44KA(1), 44W(4A)) refer to "application" under s 44K(1). They do not derogate from the conclusion that, as matter of text and context, a "review of a declaration" means an application commenced in s 44K(1). Indeed, if anything, they support it.

23. Relatedly, PNO argues that the failure to expressly refer to sub-section 44K(1) in s 44KB(1) is a "more expansive reference" which "suggests a legislative intention that a provision is confined to a review of decisions to declare a service only where the provision refers expressly to subsection 44K(1)".[15] This argument is clutching at straws.

24. If the Parliamentary draftsperson had intended s 44KB(1) to apply to both types of proceedings under s 44K, it could have easily referred to "proceedings for review" generally under s 44K or to both types of proceedings (like r 20B). However, the draftsperson chose only to refer to "proceedings for a review of a declaration".

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[11] PNO's Submissions, at [21].
[12] PNO's Submissions, at [18]-[19].
[13] *The Queen v A2* [2019] HCA 35; 373 ALR 214 at [40].
[14] PNO's Submissions, at [20]-[21].
[15] PNO's Submissions, at [22].

25. *Thirdly*, PNO relies on what it describes as "other shorthand expressions of a kind similar" to review of a declaration elsewhere in Part IIIA.[16] The argument relies on the ordinary meaning of the words "declaration recommendation" in s 44H.[17]

26. However, PNO has overlooked the fact that the words are a defined term. Under s 44B, "declaration recommendation" is defined as "a recommendation made by the [National Competition] Council under s 44F". Once this is recognised, there is nothing in the point that "declaration recommendation" encompasses a recommendation by the Council not to declare the service.[18] That is, because such a recommendation is simply "a recommendation under s 44F" for the purposes of the defined term in s 44B.

27. *Fourthly*, PNO relies on statements made in the Explanatory Memorandum to the *Trade Practices Amendment (Infrastructure Access) Bill 2009*.[19] However, they cannot displace the clear language in the statute. Where there is a discrepancy between the explanatory materials and the text of the statute, the language which has actually been employed in the text of the legislation is the surest guide to legislative intention.[20]

28. Further, the passages relied on by PNO do not support its argument. The Explanatory Memorandum at [5.8] refers to the absence of "provisions for costs to be paid or awarded with respect to applications to the Tribunal for review of a decision-maker's decision in relation to a declaration application".[21] Next, at [5.14], the Explanatory Memorandum describes s 44KB as giving the Tribunal the power to order costs in a review of "a declaration decision under section 44K".[22] This is no different to the statutory text of "review of a declaration under section 44K".

29. PNO's submissions about the mischief to which s 44KB is directed are based on these misconstructions.[23] Whilst not strictly necessary, it is possible to discern a reason why Parliament chose to limit the power in s 44KB(1) to proceedings for a review of a declaration and not to proceedings for a review of a decision not to declare a service.

[16] PNO's Submissions, at [23].
[17] PNO's Submissions, at [23] and [25].
[18] PNO's Submissions, at [24]-[25].
[19] PNO's Submissions, at [15].
[20] *Alcan* at [47]; *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 at [23] and [70].
[21] PNO's Submissions, at [15].
[22] PNO's Submissions, at [17].
[23] PNO's Submissions, at [16].

Imposing a potential liability on an applicant for declaration (access seeker) for payment of the service provider's costs would disincentivise applications for review of decisions not to declare a service which runs contrary to Part IIIA involving "very significant economic decisions where the costs of making a wrong decision are likely to be high".[24]

30. *Finally*, PNO places undue reliance on the Tribunal's statement in *Re Glencore Coal Pty Ltd (No 2)* (2016) 309 FLR 358 at [5] that "…s 44KB was inserted to provide the Tribunal with a discretion to order costs in reviews of decisions of the Minister to declare, or not to declare, a service under Pt IIIA of the Act".[25] This statement was made without consideration of the relevant issues. As noted by the Tribunal at [277] of *Application by NSWMC No 3*:

> "…no party questioned the power of the Tribunal to make an order for costs under s 44KB(1) in a proceeding for review of a decision not to declare a service. The Tribunal did not address the issue and proceeded on the assumption that s 44KB(1) empowered it to make an order for costs."[26]

Further construction of s 44KB(1)

31. If, contrary to NSWMC's submissions, the Tribunal finds that s 44KB(1) applies to this proceeding, the power in s 44KB(1) is expressly confined to costs orders against "a person who has <u>been made</u> a party to proceedings" (emphasis added). On a proper construction, the power does not extend to NSWMC, as the applicant.

32. This conclusion is supported by the text and context. As to text, the notion that the applicant makes itself a party to the proceedings by commencing the proceedings is not readily embraced in the ordinary meaning of the words "been made a party to the proceeding". As to context, s 44K(6B)(a)(iv) relevantly provides that notice of any assistance requested by the Tribunal of the Council should be given to "any other person who has been made a party to the proceedings for review".[27] This section draws the distinction between, on the one hand, an applicant and, on the other hand, "a person who has been made a party to proceedings".

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[24] Competition Policy Review, Final Report (March 2015) (**Harper Report**), p 74.
[25] PNO's Submissions, at [7].
[26] *Application by NSWMC No 3* at [277].
[27] See e.g., *Application by New South Wales Minerals Council (No 2)* [2021] ACompT 3 (***Application by NSWMC No 2***) at [63].

33. If Parliament had intended s 44KB(1) to give the Tribunal the power to order costs against the applicant, it could have simply omitted the expression "a person who has been made a party to proceedings" and used a far simpler expression such as "…the Tribunal may order a party to proceedings…to pay the costs of another party". But it did not.

Supplementary submissions on the Tribunal's discretion to order costs

34. If, contrary to NSWMC's submissions, the Tribunal considers it has power to order costs against NSWMC, NSWMC submits that the Tribunal should not exercise its discretion on the facts of this case.

35. NSWMC relies on the oral submissions on costs made at the hearing on 24 June 2021: see hearing transcript at T273.35– T275.15 and the following further submissions.

36. As a matter of principle, costs orders in the Tribunal should be made sparingly. Proceedings before the Tribunal under Part IIIA are not the equivalent of *inter partes* litigation, where the parties are seeking to vindicate private rights.[28] In this case, proceedings brought under Part IIIA involve important public interest considerations. Thus, the general principle applicable in *inter partes* litigation that, absent special circumstances, costs ordinarily follow the event, is not apt in the Tribunal.[29]

37. In *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3 at [8], the Tribunal emphasised that:

> "Generally, the power to award costs should be reserved for cases where a party's participation in the proceedings before the Tribunal materially and unnecessarily increases what would otherwise have been the costs of those proceedings". (emphasis added)

38. In the present matter, it cannot reasonably be concluded that NSWMC's conduct materially and unnecessarily increased the costs of the proceedings. PNO points to only one matter in this regard.[30] NSWMC made an application in respect of the scope of the

[28] *Application by Glencore (No 2)* [2016] ACompT 7 at [15]; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [133]-[134]; *Application by NSWMC No 2* at [58].
[29] *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3. Although the statutory regime addressed in *Duke Eastern Gas* was a little different from that applicable to the present application under Pt IIIA of the Act, it is not different in material respects.
[30] PNO's Submissions, at [30].

material to which the Tribunal could have regard.[31] The application was reasonably made.[32] It concerned the proper construction of s 44ZZOAAA(3)(c) and s 44K. It was partially successful. The Tribunal issued a notice under s 44K(6A) requiring the Council to produce further documents to the Tribunal (the Pro Forma Pricing Deeds).[33]

39. In addition, contrary to PNO's assertions, the Tribunal should not conclude that NSWMC's application was "unmeritorious"[34], "lacked utility" [35] or was "always unlikely to succeed".[36] In this regard, NSWMC relies on the following:

(a) *First*, NSWMC's application was based on errors in the Council's recommendation, which were adopted by the Minister. These errors, in part, were acknowledged by the Tribunal: see e.g. *Application by NSWMC No 3* at [145]-[146].

(b) *Secondly*, contrary to PNO submissions,[37] the Tribunal's earlier decision in *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [157] under the predecessor provisions of Part IIIA was not determinative of this application. This is clear from the Tribunal's determination in *Application by NSWMC No 3*.

(c) *Thirdly*, as also evident from the determination in *Application by NSWMC No 3*, there were important issues in this application as to the proper construction of the new declaration criteria (e.g. the meaning of the expression "promote a material increase in competition").[38]

(d) *Fourthly*, the ACCC sought to intervene in NSWMC's application, on the basis that it disagreed with the approach of the Council to criteria (a) and (d).[39] The ACCC's support for the application tells against PNO's assertions.

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[31] *Application by NSWMC No 2*.
[32] Indeed, it was accompanied by a similar informal application by the Council: *Application by NSWMC No 2* at [59].
[33] *Application by NSWMC No 2* at [92]. Any lateness in bringing that application had no bearing on the quantum of costs arising by virtue of it.
[34] PNO's Submissions, at [28].
[35] PNO's Submissions, at [30].
[36] PNO's Submissions, at [32].
[37] PNO's Submissions, at [31]-[32].
[38] *Application by NSWMC No 3* at [135]-[136].
[39] *Application by New South Wales Mineral Council* [2021] ACompT 2 at [74].

40. In any event, the notions raised by PNO ("unmeritorious", "lacked utility" or was "always unlikely to succeed") should be an insufficient basis to ground a costs order in this Tribunal under s 44KB(1) for the reasons identified above.

Oral hearing

41. NSWMC is content to rely on its written submissions, but would be happy to make further oral submissions if that would assist the Tribunal.

DATED: 15 September 2021

Nicholas De Young QC
Daniel Tynan

Counsel for New South Wales Mineral Council