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: 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

SUBMISSIONS OF PORT OF NEWCASTLE OPERATIONS PTY LTD IN RELATION TO APPLICANT'S APPLICATION FOR s 44K(6A) NOTICE

Clayton Utz
Level 15, 1 Bligh Street
Sydney NSW 2000

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

Introduction

1. These submissions by Port of Newcastle Operations Pty Ltd (**PNO**) respond to the application and submissions of 7 June 2021 by New South Wales Minerals Council (**NSWMC**).

2. In the Tribunal's review of the Minister's decision not to declare the service, NSWMC seeks to rely on five documents that were not part of the material considered by the Minister: three deeds offered by the Port (tabs 9a – c of the Hearing Book (**HB**)), and two expert reports prepared by the economic consultants, Synergies. One of those reports, dated 8 August 2018 (HB, tab 39), was prepared on behalf of Glencore Coal Ltd, for the purposes of opposing the revocation of the previous declaration in relation to the Port of Newcastle. The second, dated July 2020 (HB, tab 9(g)) was prepared on behalf of NSWMC, for the purpose of supporting NSWMC's application for declaration.

3. The resolution of which material is properly before the Tribunal, or ought to be before the Tribunal, is of central importance to the progress of the matter to hearing, and whether the hearing could occur as currently scheduled. As explained below, if the new material was to come in, the Tribunal would need to have regard to a range of other materials. If the documents are "before the Tribunal" because they were "before the Minister", then a very large body of material indeed is before the Tribunal. If the materials should be provided as information by the NCC pursuant to s 44K(6A) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), then PNO would apply to have other material provided. It is also not possible for PNO to file its submissions until the Tribunal determines the present application, having regard to its potential implications (which are not limited to the 5 documents sought by NSWMC).

The additional material is inconsistent with the statutory scheme

4. The approach of NSWMC is not consistent with the nature of the task being undertaken by the Tribunal. The Tribunal's task was the subject of some discussion in the recent decision of *Application by New South Wales Minerals Council* [2021] ACompT 2, in particular at [31], [40] – [50].

5. In *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 279, the plurality observed at [48] that:

> The requirement that the Tribunal review the Minister's decision neither permits nor requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared. That would not be a "review" of the Minister's decision which was "a re-consideration of the matter".

6. In that regard, NSWMC's submissions that "the relevant documents contain important information as to the Tribunal's reconsideration of the matter" and that "the Synergies

reports provide important market facts and economic analysis as to competition in the tenements market" (at NSWMC submissions (**NS**) [24] and [25]) are inconsistent with a correct understanding of the Tribunal's task.

7. Further, as the plurality observed at [47], the Minister's task in turn is to make a decision quickly according to not only the Minister's view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Minister has to be satisfied before a declaration can be made, and it is the Minister's decision, not the NCC's recommendation, that is the matter that is to be reviewed by the Tribunal.

8. The Tribunal's review is a reconsideration of the matter based on the information, reports and things referred to in s 44ZZOAA of the CCA. Relevantly, this comprises "all of the information that the decision maker [here the Minister] took into account in connecting with the making of the decision to which the review relates:" s 44ZZOAAA(3)(c). In accordance with the Tribunal's direction, the Minister provided the Tribunal with this material on 22 April 2021, which comprised the NCC's final recommendation: HB, tab 7.1. This conformed to the statutory scheme, including s 44H(9), which provides that the Minister's decision is to be made "on the declaration recommendation".

9. Contrary to the submissions by NSWMC,s 44ZZOAAA(3)(c) specifies that the relevant material is the "information that the decision maker took into account", not the material "before the Minister". Even if there was a difference between those two sets of materials (as NSWMC submits, at NS [22]), it is the former to which the Tribunal must have regard, not the latter. In this regard, NSWMC's submissions appear to suggest (at NS [20]) that the notion of "before the Minister" appears in s 44ZZOAA(a)(i). That is not correct. The evidentiary limit in s 44ZZOAA is, relevantly, fixed by reference to the information that was given to the Tribunal under subsection 44ZZOAAA(3), which in turn is relevantly restricted to the information taken into account by the Minister. NSWMC does not cavil with the Minister's solicitors' assertion that the material taken into account by the Minister does not include the 5 documents now sought to be relied upon.

10. Further, if materials "before" the Minister were relevant, the argument that this material was "before" him is tenuous in any event. In the case of the three deeds, and the second Synergies report, it is on the basis that the NCC recommendation included two hyperlinks to the documents (one in a footnote, the other in the appendix): NS [12]. In the case of the 2018 Synergies report, it is even more tenuous. NSWMC contends that the material was before the Minister because the NCC's recommendation contained a hyperlinked footnote (fn 44) to the NCC's webpage in relation to the NCC's recommendation to revoke the previous declaration of service at the Port, which in turn contains links to the submissions received by the NCC, including a submission by Glencore dated 8 August 2018 which annexes the 2018 Synergies report: NS [12]; Lloyd affidavit, [9]-[10]. There is nothing to suggest that the Minister accessed any of this material; on the contrary, the material produced to the

Tribunal, and a subsequent letter from AGS confirming that this was the entirety of the material the Minister took into account, indicates he did not: Poddar affidavit, DP-2.

11. NSWMC accepts (at NS [23]) that if its argument is correct, the relevant material would include not just its five additional documents, but all the submissions received by the NCC. In this event, PNO would wish to rely on its submissions to the NCC. But in fact, if NSWMC is correct, the relevant material would comprise all the material listed in the hyperlinked appendix to the NCC's recommendation (which includes, for example, the ACCC's determination of the access dispute between Glencore and PNO) (HB 168 – 171), as well as all the material accessible through the link to the NCC's webpage. On NSWMC's analysis, all of this material was "before the Minister", and the Tribunal would be required to conduct its review of the Minister's decision by reference to all this material. That result would be contrary to the legislative scheme, as explained in *Pilbara*.

There is no basis for the Tribunal to request the additional material

12. In the alternative, NSWMC submits that the Tribunal should request the additional documents pursuant to s 44K(6A). NSWMC submits (at NS [19] to [23]) that this would help resolve the uncertainty. For the reasons explained above, there is no uncertainty.

13. The alternative justification offered for the request is that the Synergies reports contain important facts and economic analysis as to competition in the tenements market. NSWMC submits (at NS [24]) that the "Ministers' competition analysis in this regard was entirely theoretical and ignored the facts". As explained in the *Pilbara* decision, it is inconsistent with the nature of the exercise undertaken by the Tribunal on a reconsideration of the Minister's decision for the Tribunal to have regard to a body of new material going generally to factual matters.

14. Even if, contrary to the above submission, there was scope to have regard to new material of this sort, there would be no justification for this in the circumstances of the present case and the Tribunal ought not exercise its power under s 44K(6A). The NCC's analysis of competition in the tenements market was not relevantly deficient. It commences at [7.130] of its recommendation. The NCC considers NSWMC's submissions including the 2020 Synergies report (at [7.140]). The NCC concludes (at [7.151]) that given its finding that declaration was unlikely to promote a material increase in competition in the coal export market, it was unlikely to promote a material increase in competition in the tenements market (however defined). This finding, as the NCC noted, is consistent with the Tribunal's analysis of the tenements market and other derivative markets in *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6, at [139]. Notwithstanding this finding, the NCC goes on to address a number of specific issues raised with the NCC, including the possibility of hold-up ([7.153] – [7.155]), the consequences of any pricing differences with and without declaration ([7.156] – [7.157]), whether PNO's pricing arrangements are a form of price

discrimination ([7.158]) and the possibility of Glencore's arbitrated price under the ACCC's determination favouring Glencore in the tenements market ([7.159] - [7.160]). The NCC then states (at [7.161]), taking into account all these factors, that it is not satisfied that access (or increased access) on reasonable terms and conditions as a result of declaration is likely to promote a material increase in competition in the tenements market.

15. Nothing in the material on which NSWMC now seeks to rely casts any doubt on that analysis. The 2018 Synergies report, which runs to more than 100 pages, is not confined to an analysis of the tenements market, but rather, a wide range of issues raised by Glencore in opposition to the revocation of the declaration. Insofar as it addresses the impact of revocation on the tenements market it consists of economic opinions about how revocation would be likely to adversely impact investment conditions. These opinions are not based on any specialised knowledge of investments in mining tenements and are expressed in the most conclusionary terms: see, eg, p 59 (HB 2215) and p 62 (HB 2218). The 2020 Synergies report is more confined, but is similarly lacking in any factual content about the impact of declaration on investment decisions in mining tenements. Rather, it expresses the opinion that, without declaration, PNO has the ability and incentive to engage in price discrimination, and "hold-up" coal producers (HB 315 – 329). This does not engage with the facts before the Minister, including the constraint on pricing provided by the 10 year deeds with shipping agents.

16. Accordingly, even if the Tribunal accepted the premise of NSWMC's application, namely that the NCC had ignored the facts in the tenements market, requesting the two Synergies reports would not cure the problem. The Tribunal would also need to have regard to the responsive material PNO submitted at the time to the NCC. This material is identified in the affidavit of Bruce Lloyd at [14]. However, given NSWMC's claim the NCC ignored the facts, it would also be necessary to seek other information, as follows.

17. *Evidence about the nature of investment decisions in the tenements market*. The Synergies reports contain a series of assertions about the operation of the tenements market, including the timeframe over which investments are made (asserted to be 30 years (HB 327)), and the likelihood of increases in Port charges affecting existing coal operations and investment decisions about new operations. The latter is inherently improbable. As noted above, Synergies does not possess any specialised knowledge about these matters and the reports do not reference any sources for the various factual assertions. Nor do the reports seek to assess the actual effect of the previous declaration or its subsequent revocation on investment decisions. If the Tribunal considered that the NCC had "ignored the facts" in the manner contended by NSWMC, it would be appropriate to obtain evidence about investment decisions in mining tenements, the significance of Port charges to those decisions, and whether revocation of the previous declaration did in fact deter investors in the manner predicted by the 2018 Synergies report.

18. *Evidence about the geographic dimension of the tenements market*. On the NCC's analysis it was unnecessary to determine the precise geographic boundaries of the tenements market, given its finding that there was unlikely to be an effect even on a narrower market: NCC recommendation, [7.146]. However, if the Synergies reports are admitted for the purposes of demonstrating that there was an impact in the Hunter Valley area, it would be necessary to determine whether the Hunter Valley is a discrete market, or part of a broader geographic market for mining tenements, which would require factual material.

19. *Evidence about coal prices, PNO's charges, and coal volumes shipped through the Port of Newcastle.* Synergies' 2018 analysis makes various assumptions or predictions about coal prices, PNO's likely future charges, and the likely impact of increases in PNO's charges on the volume of coal exported through the Port. The NCC's recommendation records the pricing arrangements at the Port, but if the Tribunal was inclined to request Synergies' reports, it would be appropriate to obtain up-to-date evidence about coal prices and volumes exported through the Port: see Lloyd affidavit at [23].

20. *Evidence about the pricing arrangements at the Port*. Synergies concludes in its 2020 report that the producer deeds illustrate PNO's incentive and ability to engage in price discrimination. This argument overlooks the non-discriminatory pricing provisions in both the producer and vessel agent deeds, and the fact that PNO has already entered into vessel agent deeds which apply to any covered vessel, regardless who supplied the coal. Although these matters are referred to in the NCC's recommendation (see [5.26], [7.63], [7.81]), if the Tribunal considered that the NCC had ignored the facts, it would be appropriate to request information about whether in fact PNO does price discriminate between different coal producers. This would include the confidential information referred to in the affidavit of Bruce Lloyd at paragraphs [26] and [29(c)].

DATED: 11 June 2021

Cameron Moore SC

Declan Roche

Counsel for Port of Newcastle Operations Pty Ltd