

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 2 of 2020
File Title:	Re Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Dated: 5/05/2021 4:49 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 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited

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 22 April 2021 by NSWMC for the Tribunal to issue a notice to Port of Newcastle Operations Pty Limited (PNO), and the application dated 22 April 2021 by NSWMC for the Tribunal to make directions in relation to the Affidavit of Simon Byrnes affirmed 15 March 2021 (**Byrnes Affidavit**).
4. On 15 March 2021, PNO's solicitors wrote to the Tribunal (annexed and marked "DP-1") wishing to make a claim for confidentiality in respect of the shaded parts of the Byrnes Affidavit and asserting that the shaded information is "PNO Highly Confidential Information" in accordance with paragraph 20 of the Tribunal's Directions of 25 November 2020.
5. On 7 April 2021, I wrote to PNO's solicitors (annexed and marked "DP-2") in relation to these claims of confidentiality. I noted that the Directions related only to specified paragraphs in the Form I application and its Attachment: Direction 20. I expressed the view that PNO's position as to the use that may be made of the shaded information in the Byrnes Affidavit had the effect of precluding NSWMC from testing and or replying to that evidence, specifically as it relates to statements said to have been made by coal producers and coal producers' views of producer deeds offered to them by PNO.
6. On the same date, I also wrote to PNO's solicitors (annexed and marked "DP-3") regarding the Byrnes Affidavit. I noted that the Byrnes Affidavit does not identify the source of, or produce documents underlying or expressly referred to in, much of Mr Byrnes' evidence. I

A handwritten signature in blue ink, appearing to read 'Dave Poddar', is located at the bottom left of the page.

A handwritten signature in blue ink, appearing to read 'Dave Poddar', is located at the bottom right of the page.

7. On 9 April 2021, I received a reply from PNO's solicitors (annexed and marked "DP-4") stating, inter alia, that they were obtaining instructions in respect of both letters of 7 April 2021. I replied to PNO's solicitors on the same date (annexed and marked "DP-5").
8. On 16 April 2021, I received a response from PNO's solicitors (annexed and marked "DP-6"). The effect of the letter is that:
 - (a) PNO has not provided several documents expressly referred to in the Byrnes Affidavit on the basis that PNO considers them to be confidential.
 - (b) PNO does not press claims for confidentiality over certain parts of the shaded information, which parts do not relate to the statements said to have been made by coal producers.
 - (c) PNO is prepared to apply to vary the confidentiality directions of 12 April 2021 to include the "relevant paragraphs" of the Byrnes Affidavit (which will have the effect of restricting disclosure to, relevantly, the external solicitors for NSWMC).
 - (d) PNO otherwise maintains its position as to the extent of disclosure of the shaded information (that is, that disclosure should be limited to, relevantly, the external solicitors for NSWMC).

10. 

Signature of deponent

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 Nos: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited

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 22 April 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: [Lloyd, Bruce](#); [Arnold, Philip \(Antitrust-SYD\)](#); [Poddar, Dave \(Antitrust-SYD\)](#); EA.OBryan1@fedcourt.gov.au; [Karunakaran, Shameela](#); Associate.OBryan1@fedcourt.gov.au; [Grahame, Scott](#); [Ledden, Isabella \(Antitrust-SYD\)](#); [Fu, Angel \(Antitrust-SYD\)](#); [Barber, Dylan](#); Matthew.Blunn@ags.gov.au; George.Priestley@ags.gov.au; [Richmond, Elizabeth](#)
Subject: [EXT] ACT 2 of 2020: PNO evidence-in-chief
Date: Monday, 15 March 2021 7:37:02 PM
Attachments: [Mimecast Large File Send Instructions.msg](#)

I'm using Mimecast to share large files with you. Please see the attached instructions.

I'm using Mimecast to share large files with you. Please see the attached instructions.

Dear Registry

ACT 2 of 2020: Application by Port of Newcastle Operations Pty Limited

We refer to the direction 13 of the Tribunal's directions of 25 November 2020 in the above proceeding (**Directions**).

We **attach**, by way of filing, PNO's evidence, comprising the affidavits of:

1. Simon Byrnes;
2. Gabriella Sainsbury; and
3. Bruce Lloyd,

each affirmed 15 March 2021. The affidavits are provided by way of Mimecast download link owing to the size of the files.

The solicitors for the NSWMC and the ACCC are copied to this correspondence by way of service.

Confidentiality

PNO wishes to make a claim for confidentiality in respect of the shaded parts of the Byrnes and Sainsbury affidavits. In accordance with the Tribunal's Practice Direction, we attach both a confidential and public version of these affidavits redacting the confidential parts of those documents.

The shaded information in the Byrnes and Sainsbury affidavits is PNO Highly Confidential Information within the meaning of paragraph 20 of the Directions. Accordingly, pursuant to paragraphs 21 and 24 of the Directions, PNO respectfully requests that the confidential version of these affidavits not be disclosed to any person other than the ACCC, and the external legal advisors or experts retained by NSWMC (and therefore be excluded from publication on the Tribunal's website).

We would be grateful if you could please confirm receipt and provide a stamped copy of PNO's evidence.

Kind regards
Damiano

Damiano Fritz, Lawyer
Clayton Utz

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dfritz@claytonutz.com | www.claytonutz.com
Please consider the environment before printing this e-mail

[CC]Office1[/CC]

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File Nos: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited

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 22 April 2021.

Before me:



Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

By E-mail

Your ref:

Our ref: 21-40741370

Direct Dial: +61 289228512

E-mail: philip.arnold@cliffordchance.com

Bruce Lloyd
Clayton Utz
Level 15, 1 Bligh Street
Sydney NSW 2000

7 April 2021

Dear Mr Lloyd

Re: Application by Port of Newcastle Operations Pty Limited – ACT 2 of 2020 (Proceeding)

1. We refer to the Proceeding and to your clients' evidence filed on 15 March 2021, which consists of the Affidavit of Simon Byrnes affirmed 15 March 2021 (**Byrnes Affidavit**) the Affidavit of Gabriella Sainsbury affirmed 15 March 2021 (**Sainsbury Affidavit**), and the Affidavit of Bruce Lloyd affirmed 15 March 2021.

2. We also refer to Mr Fritz's email to the Tribunal of 15 March 2021, which states:

The shaded information in the Byrnes and Sainsbury affidavits is PNO Highly Confidential Information within the meaning of paragraph 20 of the [Tribunal's] Directions [of 25 November 2020].

3. Paragraph 20 of the Directions defines PNO Highly Confidential Information as follows:

20. Subject to direction 24, the information identified as being confidential to PNO contained at paragraph 3(a)(ii) of the confidential version of the Form I application under s 101 of the *Competition and Consumer Act 2010* (Cth) filed by PNO on 17 September 2020, and paragraphs 29, 29(b) (including footnote 5 contained therein), 29(c), 29(d), 29(e), 29(f) and 60 of the Attachment to Form I (together, **PNO Highly Confidential Information**), is to be disclosed to the external legal advisors and experts retained by NSWMC by 27 November 2020.

4. We accept that the shaded information in the Sainsbury Affidavit is PNO Highly Confidential Information and is covered by 21 and 24 of the Directions. However, it is not clear why it is you claim that the shaded information in the Byrnes Affidavit falls within the definition of PNO Highly Confidential Information.
5. Accordingly, please identify:
 - (a) the aspects of the shaded information in the Byrnes Affidavit that PNO considers to be PNO Highly Confidential Information within the meaning of paragraph 20 of the Directions; and
 - (b) in respect of the balance of the shaded information, whether your client intends to seek confidentiality orders in respect of that information, and the basis for any such orders.
6. As you will appreciate, in order to properly test and respond to Mr Byrnes' evidence as it purports to relay conversations with, and statements made by, coal producers, our client will be required to put Mr Byrnes' evidence to the makers of those statements. Any confidentiality orders that have the effect of precluding our client from doing so will cause prejudice and will be contested.
7. We look forward to your full response no later than **5pm on 9 April 2021**.
8. This letter is without prejudice to our clients' rights and remedies, which are reserved.

Yours sincerely



Dave Poddar
Partner
Clifford Chance

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File Nos: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited

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 22 April 2021.

Before me:



Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

By E-mail

Your ref:

Our ref: 21-40741370

Direct Dial: +61 289228512

E-mail: philip.arnold@cliffordchance.com

Bruce Lloyd
Clayton Utz
Level 15, 1 Bligh Street
Sydney NSW 2000

7 April 2021

Dear Mr Lloyd

Re: Application by Port of Newcastle Operations Pty Limited – ACT 2 of 2020 (Proceeding)

1. We refer to the Proceeding and to the Affidavit of Simon Byrnes affirmed 15 March 2021 (**Byrnes Affidavit**).
2. Unfortunately, Mr Byrnes' affidavit fails to identify the source of, or to produce the documents underlying, much of the evidence that is asserted.
3. By way of example only, in relation to coal exports and the coal market, the Byrnes Affidavit does not:
 - (a) state or annex the source of the assertion at [21] that levels of export volumes are forecast to continue in 2021;
 - (b) state or annex the source of the graph at [22] which plots the world coal price on the same graph as the coal exports from the Port over time;
 - (c) annex the various documents and business records referred to at [23], which are relied upon as the basis of evidence given at [24];
 - (d) state or annex the data relied upon in preparing the cost breakdown analysis referred to at [25], which also appears to inform [26], [27] and [28];
 - (e) annex the Wood Mackenzie analysis, referred to at [26(e)]; and
 - (f) annex the whole of the February 2021 Kpler Update, referred to at [29], [30], [31] and [32].

4. Similar failings are repeated in respect of Mr Byrnes' evidence as it relates to "bilateral negotiations with coal producers". In this regard, the Byrnes Affidavit does not:
 - (a) refer to or annex any file notes or other contemporaneous records substantiating the evidence given at [38], [40], [41], [46], [55(a)], [58], [75] and [77];
 - (b) annex the business records referred to at [56];
 - (c) annex the email of Mr Lewis of Whitehaven of 19 March 2020, as referred to at [61];
 - (d) annex the email of 19 February 2021, as referred to at [66].
5. The absence of the source materials and documents which underly the assertions contained in the Byrnes Affidavit renders much of this evidence little more than conjecture.
6. Accordingly, we anticipate that the Tribunal will place little to no reliance on the secondary evidence contained in the Byrnes Affidavit. Although the Tribunal is not bound by the rules of evidence, it has an obligation to act judicially and upon the least speculative and most current admissible evidence available.
7. Further, any failure to provide the source materials for the Byrnes Affidavit will preclude our client from being able to test the propositions contained in the affidavit, and from being able to file evidence in reply, and will constitute a denial of procedural fairness.

Next steps

8. PNO should identify, and provide to NSWMC no later than **5pm on 14 April 2021**, the source materials for the Byrnes Affidavit, including those referred to at [3]-[4] above. We assume PNO will have these documents readily to hand, given they will have been relied upon in the recent drafting process.
9. This letter is without prejudice to our client's rights and remedies, which are reserved.

Yours sincerely



Dave Poddar
Partner
Clifford Chance

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File Nos: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited

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 22 April 2021.

Before me:



Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Email

9 April 2021

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

dave.poddar@cliffordchance.com

Mr Philip Arnold
Senior Associate
Clifford Chance
Level 16
1 O'Connell Street
SYDNEY NSW 2000

philip.arnold@cliffordchance.com

Dear Colleagues

Application by Port of Newcastle Operations Pty Limited – ACT 2 of 2020

1. We refer to your two letters of 7 April 2021 in relation to certain evidentiary and confidentiality matters in the above proceeding.
2. We are obtaining instructions and expect to be in a position to respond to both of your letters by close of business on 14 April 2021.

Evidence to be adduced by the NSW Minerals Council

3. You refer in your second letter to the directions of the Australian Competition Tribunal (Middleton P) of 25 November 2020 in this proceeding (**Directions**).
4. Under direction 14 of the Directions, your client was required to file and serve any evidence in this proceeding on or before 29 March 2021. As at the date of this letter, your client has not served any proposed evidence upon our client pursuant to direction 14.
5. In his email of 30 March 2021 (3:39pm) sent to us and the solicitors for the ACCC, Mr Arnold stated that:

NSWMC intends to rely in this matter upon its submissions to the ACCC, including the confidential annexure to the Application dated 6 March 2020 and the redacted portions of the submission dated 17 August 2020.

6. We assume from the above that your client does not intend to file any evidence in this proceeding pursuant to direction 14 of the Directions.
7. If your client does intend to put on any evidence in default of the time stipulated by direction 14 of the Directions, please confirm by **4pm on 12 April 2021** whether it intends to seek a variation to the existing Directions and when it will be in a position to file any such evidence.
8. Our client fully reserves its rights in relation to these matters.

Yours sincerely

Bruce Lloyd, Partner
+61 2 9353 4219
blloyd@claytonutz.com

Our ref 219/20838/80207163

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File Nos: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited

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 22 April 2021.

Before me:



Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

**C L I F F O R D
C H A N C E**

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Our ref: 21-40741370
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E-mail: dave.poddar@cliffordchance.com

9 April 2021

Dear Bruce

Application by Port of Newcastle Operations Pty Limited – ACT 2 of 2020

1. We refer to your letter dated 9 April 2021, and acknowledge your commitment to respond to our two letters dated 7 April 2021 by the close of business on 14 April 2021.
2. We confirm that NSWMC intends to rely in this matter upon its submissions to the ACCC, including the confidential annexure to the Application dated 6 March 2020 and the redacted portions of the submission dated 17 August 2020.
3. The appropriate time for our client to finalise its position as to what evidence it will file in this proceeding is once it is in possession of your client's full responses to our letters and has taken any steps that flow from those responses, including after the resolution of any necessary applications.
4. This letter is without prejudice to our client's rights and remedies, which are reserved.

Yours sincerely



Dave Poddar
Partner
Clifford Chance

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File Nos: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited

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 22 April 2021.

Before me:



Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Confidential**Email**

16 April 2021

Mr Dave Poddar
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Mr Philip Arnold
Senior Associate
Clifford Chance
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1 O'Connell Street
SYDNEY NSW 2000

philip.arnold@cliffordchance.com

Dear Colleagues

Application by Port of Newcastle Operations Pty Limited – ACT 2 of 2020

1. We refer to:
 - (a) your letters dated 7 April 2021 received by email at 12:43pm (**First Letter**) and at 12:45pm (**Second Letter**);
 - (b) our letter of 9 April 2021; and
 - (c) your letter in response of the same date,

in relation to certain evidentiary and confidentiality matters in connection with the affidavit of Simon Byrnes affirmed 15 March 2021 in this proceeding (**Byrnes Affidavit**).

Evidence of Simon Byrnes

2. We do not accept your assertion that your client is in any way precluded from being able to file its evidence (as it was required to do on 29 March 2021 under the directions of the Tribunal of 25 November 2020 (**Directions**)), nor that your client has been denied "*procedural fairness*", as a result of the form or contents of the Byrnes Affidavit.
3. We also reject your claim that Mr Byrnes "*fails to identify the source of, or to produce the documents underlying*" the matters to which Mr Byrnes deposes in his affidavit. In many of the paragraphs to which you refer in your First Letter, Mr Byrnes expressly identifies the sources, and/or annexes the underlying material, for the matters to which he deposes.
4. Notwithstanding the above, in relation to the matters identified at paragraph 3 of your First Letter, we are instructed that:
 - (a) Mr Byrnes' statement that the levels of export volumes described at [21] are forecast to continue in 2021 is based on:
 - (i) Mr Byrnes' knowledge acquired from his personal experience as described at [2] and [5]-[7] of the Byrnes Affidavit; and
 - (ii) a *Scenario Development and Planning* report prepared by Wood Mackenzie for PNO in the ordinary course of PNO's business. That report contains commercially sensitive and confidential information concerning the business of PNO, and is the subject of contractual obligations of confidentiality owed by PNO to Wood Mackenzie;

- (b) the graph at [22] which plots the world coal price against coal exports from the Port of Newcastle (**Port**) over time was, as the Byrnes Affidavit states, caused to be produced by Mr Byrnes. We are instructed that the underlying data used to produce that graph is derived from:
- (i) actual coal export volume data from the Port (records of which are produced and retained in the ordinary course of PNO's business); and
 - (ii) the Newcastle thermal coal spot price over time, based on publicly available data from the commodities price ("pink sheet") data published by the World Bank, available at <https://www.worldbank.org/en/research/commodity-markets> (and described at [23(c)] of the Byrnes Affidavit).

The working sheets underpinning the graph at [22] of the Byrnes Affidavit are subject to contractual obligations of confidentiality owed by PNO;

- (c) the matters to which Mr Byrnes deposes at [24(a)-(d)] are identified in the chapeau to [24] as being based upon the publicly available sources listed at [23(a)-(c)]. For the avoidance of doubt:
- (i) the statement at [24(a)] is based upon the publicly available sources cited at [23(a)] and [23(b)];
 - (ii) the statement at [24(b)] is based upon the publicly available source cited at [23(b)];
 - (iii) the statements at [24(c)] are based upon the publicly available source cited at [23(b)]; and
 - (iv) the statements at [24(d)] is based upon the publicly available source cited at [23(c)].

In relation to the graph at [24(e)], this was, as the Byrnes Affidavit states, caused to be produced by Mr Byrnes. We are instructed that the underlying data used to produce that graph is derived from records of export destinations for coal exported through the Port, which records are produced and retained in the ordinary course of PNO's business;

- (d) as Mr Byrnes states at [25], the data on which the cost breakdown analysis referred to at [25], which also informs the statements at [26], [27] and [28], is annexed and marked Confidential Annexure SB-3 to the Byrnes Affidavit. In relation to the matters at [26(a)-(d)], for the avoidance of doubt:
- (i) the average specifications for coal export vessels calling at the Port in the relevant period at [26(a)] are, as Mr Byrnes expressly identifies, based on records of vessels calling at the Port produced and retained in the ordinary course of PNO's business;
 - (ii) the figure at [26(b)] is, as Mr Byrnes expressly identifies, based on the publicly available World Bank data cited at [23(c)]; and
 - (iii) the figure at [26(c)] is derived from records of export destinations for coal exported through the Port, which records are produced and

retained in the ordinary course of PNO's business, including the publicly available *Annual Trade Reports* published by PNO at <https://www.portofnewcastle.com.au/about-our-port/#facts-and-figures>;

- (e) the source of the various inputs to the cost breakdown analysis described at [25]-[27] and at Confidential Annexure SB-3 (including the Wood Mackenzie data to which Mr Byrnes refers at [26(e)]) appears as **Attachment 1** to this letter; and
 - (f) the February 2021 Kpler Update to which Mr Byrnes refers at [29], [30], [31] and [32] appears at Confidential Annexure SB-4 and was using certain data extracted from the Kpler commodity data and analytics service to which PNO subscribes. The entire Kpler commodity and analytics database is accessible to Kpler subscribers at <https://www.kpler.com/>.
5. In relation to the matters identified at paragraph 4 of your First Letter:
- (a) it was made explicitly plain by:
 - (i) confidential paragraph 60 the Form I lodged under s 101 of the *Competition and Consumer Act 2010* (Cth) dated 17 September 2020 (**Form I**), (confidential version served on you on 30 November 2020);
 - (ii) confidential paragraphs 43 and 49 of the PNO Statement of Facts, Issues and Contentions (**SOFIC**) dated 14 December 2020 and served on you on that date,

that the terms of the individual negotiations with representatives of Hunter Valley coal producers who are members of your client in the period prior to grant of interim authorisation on 2 April 2020 would be in issue in these proceedings;
 - (b) the NSWMC SOFIC dated 28 January 2021 puts in issue factual assertions about the effect of those bilateral negotiations prior to 2 April 2020 at paragraphs 70, 74 and 88-89;
 - (c) Mr Byrnes has given direct and admissible evidence of his participation in and the terms of his negotiations with coal producer representatives which he identifies with precision, including, in non-confidential paragraphs of his affidavit of 15 March 2021:
 - (i) the period of those negotiations (at [35]);
 - (ii) the companies with whom those negotiations were held (at [35]);
 - (iii) the nature of the discussions (namely in-person presentations to representatives from each producer in around November 2019 on the terms of the Pro-forma Producer Deed proposed by PNO, followed by subsequent telephone discussions and email correspondence with those representatives) (at [37]); and
 - (iv) relevant events after 2 April 2020 (at [80]),

such that there can be, from the time the Byrnes Affidavit was served on 15 March 2021, no lack of ability for you to obtain an account from the representatives of

those companies of their communications with Mr Byrnes, should you wish to do so; and

- (d) in circumstances where your firm acts for NSWMC, an association of competitors, it would be inappropriate for representatives of other members of your client to receive confidential and competitively sensitive information about a member's commercial negotiating positions as to the terms of supply by PNO of services at the Port at a point in time prior to the grant of interim authorisation.
6. Notwithstanding the above, in answer to paragraph 4(d) of your First Letter, an example of the email which Mr Byrnes describes sending at [66] to a number of coal producer representatives in substantially the same form appears at **Attachment 2** to this letter.

Extant timetable and procedural fairness

7. In our letter of 9 April 2021, we raised with you the fact that under Direction 14, your client was required to file and serve any evidence in this proceeding on or before 29 March 2021. That timetable afforded your client procedural fairness.
8. Your letter of 9 April 2021 states that the appropriate time for your client to finalise its position as to what evidence it will file is once it is in possession of our client's full responses to your two letters dated 7 April 2021. We do not agree. Your letters of 7 April 2021 were sent to us over a week after your client's evidence was due to be filed and served, and over three weeks after service of Mr Byrnes' affidavit. Further, our client served you, as external legal advisors to NSWMC, with the confidential Form I in this proceeding on 30 November 2020, and our client's confidential SOFIC on 14 December 2020. We also note that the Directions permitting access to PNO Highly Confidential Information only to the external legal advisors and experts retained by NSWMC were made by consent.
9. As we have explained above, in circumstances where you have had over four months' notice of the relevant confidential matters in this proceeding, we do not accept that the form of Mr Byrnes' evidence has prevented or in any way adversely affected your client from filing its evidence.
10. We once again invite you to confirm, by **4pm on 19 April 2021**, whether your client intends to seek a variation to the existing Directions and specify when it will be in a position to file any evidence.

Confidentiality

11. You refer in your Second Letter to Direction 20 in this proceeding, which provides that:

*Subject to direction 24, the information identified as being confidential to PNO contained at paragraph 3(a)(ii) of the confidential version of the Form I application under s 101 of the Competition and Consumer Act 2010 (Cth) filed by PNO on 17 September 2020, and paragraphs 29, 29(b) (including footnote 5 contained therein), 29(c), 29(d), 29(e), 29(f) and 60 of the Attachment to Form I (together, **PNO Highly Confidential Information**), is to be disclosed to the external legal advisors and experts retained by NSWMC by 27 November 2020.*

12. By Direction 21:

Subject to direction 24, the information identified as PNO Highly Confidential Information must not be disclosed, without leave of the Tribunal, to any person other than the external legal advisors or experts retained by NSWMC.

13. As noted above, the Directions, including the confidentiality regime contained therein, were made by the Tribunal with the consent of your client.
14. We acknowledge your confirmation that the shaded information in the affidavit of Gabriella Sainsbury affirmed 15 March 2021 in this proceeding (**Sainsbury Affidavit**) is PNO Highly Confidential Information, to which Direction 21 applies.
15. You assert, however, that "*it is not clear why it is you claim that the shaded information in the Byrnes Affidavit falls within the definition of PNO Highly Confidential Information*" in the Directions.
16. We do not understand your assertion:
 - (a) paragraphs 38 to 79 of the Byrnes Affidavit describe certain bilateral negotiations between PNO and individual coal producers prior to the grant of interim authorisation by the Australian Competition and Consumer Commission in this matter on 2 April 2020;
 - (b) that information is described at confidential paragraph 60 of the Attachment to PNO's Form I application of 17 September 2020; and
 - (c) it is therefore PNO Highly Confidential Information under Direction 20, to which Direction 21 applies.
17. In relation to the shaded information in the Byrnes Affidavit other than at paragraphs 38 to 79, we are instructed that:
 - (a) PNO does not press for confidentiality over the shaded information at paragraphs 17, 24, 26(a), 26(c), 27-28 and 30-32 of the Byrnes Affidavit; and
 - (b) the working sheets underpinning the graph at [22] of the Byrnes Affidavit are subject to contractual obligations of confidentiality owed by PNO, as Mr Byrnes states at paragraph 3 of the Byrnes Affidavit:

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.

18. We also note that, as a matter of procedure, the proposed evidence of any party has not been read. At the time it is sought to be read, our client will seek directions from the Tribunal protecting the confidential and commercially sensitive information of our client be restricted - including during the hearing of the matter and in the Tribunal's reasons for determination.

Proposed variation of confidentiality directions

19. As explained above, the documents described at paragraphs 4(a)(ii), 4(b) and 17(b) above are subject to contractual obligations of confidentiality owed by PNO.
20. Our client is prepared to apply pursuant to direction 8 of the directions of 12 April 2021 in this proceeding (**Confidentiality Directions**) to include the relevant paragraphs of the Byrnes

Mr Dave Poddar and Mr Philip Arnold, Clifford Chance

16 April 2021

Affidavit and the Sainsbury Affidavit, and the documents described at paragraphs 4(a)(ii), 4(b) and 17(b) above, as Confidential Information within the meaning of the Confidentiality Directions.

21. Please confirm **by 4pm on 19 April 2021** whether your client would be prepared to consent to such a variation to the Confidentiality Directions.
22. Our client fully reserves its rights in relation to these matters.

Yours sincerely

Bruce Lloyd, Partner
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blloyd@claytonutz.com

Our ref: 219/20838/80207163

From: Simon Byrnes
Sent: Wednesday, 19 February 2020 9:01 AM
To: Keiron Rochester
Cc: Gabriella Sainsbury; Craig Carmody
Subject: Port of Newcastle re Revised Bilateral Deeds - Commercial in Confidence
Attachments: Position paper - PON respons to Producer Feedback 19 February 2020.docx; Final Whitehaven deed.DOCX

Dear Kieron,

Attached are:

1. a position paper setting out PON's position on the key principles; and
2. a revised bilateral deed setting out our amendments to address those principles.

Once you have had a chance to review, let's discuss the best way to finalise. We hope that one more session will be sufficient.

As discussed, we will be progressing discussions separately with each producer.

Regards,

Simon

Simon Byrnes

Chief Commercial Officer



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