

## 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: Submissions

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



REGISTRAR

Dated: 3/3/2021 4:03 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.

## **ACT 2 of 2020: NSWMC submissions on confidentiality orders**

1. Port Authority of New South Wales (**Port Authority**) seeks confidentiality orders "in respect of the entirety of" two documents: Port Services Agreement dated 17 December 2013; and Harbour Management System Access Agreement dated 17 December 2013 (**Port Authority Agreements**).
2. The terms of Port Authority's proposed confidentiality orders are such that the Authorisation Applicant – New South Wales Minerals Council (**NSWMC**) – would not be entitled to view the documents, except by their external counsel.
3. Port Authority's proposed confidentiality orders would cause prejudice to NSWMC. The Tribunal should make orders as outlined at Annexure 1, permitting two senior officers of NSWMC access to the Port Authority Agreements subject to a confidentiality undertaking.

### **Background**

4. On 25 February 2021, Port Authority filed, as an interested third party, non-confidential submissions and an accompanying cover letter in which it stated its "[wish] to make a claim of confidentiality in respect of the entirety of" the Port Authority Agreements. Port Authority requested that the Tribunal make confidentiality orders to the effect that the Port Authority Agreements are "otherwise to be disclosed only to the external legal advisors and experts retained by NSWMC".<sup>1</sup>
5. Port Authority identified four bases in its letter in support of its proposed confidentiality but did not support those with evidence. For the reasons outlined below, none of those bases justify a position where NSWMC is unable to view the Port Authority Agreements.

### **Port Authority has not adequately proven the confidentiality of the Port Authority Agreements or apparent prejudice it would suffer if they were disclosed to NSWMC**

6. Confidentiality is not, of itself, a sufficient reason to deny inspection. This is because a party inspecting the documents, and their legal advisers, impliedly undertake that the documents will be used only for the purpose of the litigation. This ordinarily provides sufficient protection to the party producing the confidential document.<sup>2</sup>
7. Port Authority bears the onus of proving the existence and degree of confidentiality of the Port Authority Agreements and that it warrants protection additional to that afforded by the implied undertaking.<sup>3</sup> Port Authority has not, however, provided direct evidence of this, nor can it be inferred from the documents.<sup>4</sup> To the contrary, there is nothing in the record before the Tribunal or in Port Authority's submissions that suggests NSWMC is unable or unwilling to comply with the usual implied undertaking.

### **NSWMC has a general right to view documents relevant to issues**

8. It is well-established that a party is generally entitled to inspect its opponent's documents. This is a 'prima facie right' and is important to the proper conduct of matters.<sup>5</sup> The right is

---

<sup>1</sup> Port Authority does not object to the Port Authority Agreements being provided immediately to the Tribunal, ACCC, and PNO.

<sup>2</sup> *UON Pty Ltd v Hoascar* [2020] WASC 271 at [20] ('*UON*'), citing *Civic Video Pty Ltd v Paterson* [2013] WASC 107 at [26] ('*Civic Video*').

<sup>3</sup> *Lampson (Australia) Pty Ltd v Fortescue Metals Group Pty Ltd (No 2)* [2010] WASC 217 at [57] ('*Lampson*'). See *Alcoa of Australia Ltd v Apache Energy Ltd (No 4)* [2013] WASC 377 at [8] and [21].

<sup>4</sup> *UON* at [23].

<sup>5</sup> See generally *UON* at [19], citing *Lampson* at [56].

particularly acute where – as in this case – the documents are being relied upon to advance interests inconsistent with those of another party.

9. A party 'should only rarely be excluded from knowledge of relevant information. This is because decisions such as whether to continue or abandon litigation should be made by the party personally on advice, rather than by their advisors'.<sup>6</sup> Equally, a party's inability to give instructions that take into account case management considerations if inspection is denied can also establish a need to inspect the documents.<sup>7</sup> As Brereton J observed:<sup>8</sup>

*Imposing restrictions on the ability of lawyers to speak to their clients and disclose to their clients information produced to them is undesirable. It places those lawyers in a position of difficulty vis-à-vis their client and even in the conduct of the litigation.*

10. NSWMC, as a party to the proceeding, has a prima facie right to access and inspect the documents relevant to the contested issues. The effect of Port Authority's proposed confidentiality orders would be to preclude NSWMC from properly understanding, interrogating, giving instructions regarding, and making submissions in respect of, Port Authority's submissions as they relate to the Port Authority Agreements. If denied access to the Port Authority Agreements, NSWMC will be unable to give instructions or receive advice in respect of a critical element of the proceedings; namely, the regulatory constraints (or, lack thereof) imposed by the State on PNO.

#### **Port Authority's submissions rely on the Port Authority Agreements**

11. Numerous clauses of the Port Authority Agreements are referred to in Port Authority's submissions,<sup>9</sup> but the clauses are neither reproduced in their entirety nor included together with any clauses that constitute their surrounding context. Port Authority summarily and selectively refers to the apparent effect of the Port Authority Agreements, but NSWMC is deprived of any opportunity to consider or test the correctness of those submissions.

#### **NSWMC is willing to provide a confidentiality undertaking**

12. The courts have expressly recognised that an alternate "option" to restricting disclosure to a party's legal advisors "might be to permit only a particular officer or officers of the party to inspect the documents, on an express undertaking of confidentiality".<sup>10</sup>
13. NSWMC's proposed orders would only disclose the Port Authority Agreements to two named individuals, both of whom are senior officers of NSWMC. They would, in addition to their implied undertaking, provide a confidentiality undertaking to the Tribunal not to use or disclose the relevant documents other than in connection with these proceedings. The confidentiality undertaking 'strike[s] a fair balance between the legitimate concerns of the party [providing] the documents and the needs of the other party to the litigation'.<sup>11</sup>

#### **Conclusion**

14. Orders should be made in the terms outlined at Annexure 1.

**CLIFFORD CHANCE, solicitors for NSWMC**

---

<sup>6</sup> UON at [25], citing *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd (No 2)* [2014] WASC 38 at [8].

<sup>7</sup> UON at [35]-[36].

<sup>8</sup> *NAK Australia Pty Ltd v Starkey Consulting Pty Ltd* [2008] NSWSC 1136 at [9].

<sup>9</sup> Clauses 1.1, 11.2, 12.1(a), 12.1(b), 12.3, and 35.1 of the Port Services Agreement; and cl 27.1 of, and cl 3.2(b) of Schedule 1 to, the Harbour Management System Access Agreement.

<sup>10</sup> UON at [26] citing *Lampson* at [59].

<sup>11</sup> *Civic Video* at [28].

## ANNEXURE 1

### 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

#### DIRECTIONS

TRIBUNAL: Justice O'Bryan (Deputy President)

DATE OF ORDER:  March 2021

WHERE MADE: Melbourne

#### THE TRIBUNAL DIRECTS THAT:

1. The Port Services Agreement dated 17 December 2013 and Harbour Management System Access Agreement dated 17 December 2013 (**Port Authority Agreements**), as provided by the Port Authority of New South Wales (**Port Authority**) to the Tribunal and representatives of Port of Newcastle Operations Pty Limited (**PNO**), must not without prior leave of the Tribunal be disclosed to any person except:
  - (a) PNO (including its external legal advisors, engaged experts and any person performing administrative functions to assist those persons);
  - (b) the Australian Competition and Consumer Commission (**ACCC**) (including its external legal advisors, engaged experts and any person performing administrative functions to assist those persons);

- (c) any external representative of (including external legal advisors), or experts engaged by (or persons performing administrative functions to assist those persons), New South Wales Minerals Council (**NSWMC**); and
  - (d) the Chief Executive Officer of NSWMC (Stephen Galilee) and the Policy Director of NSWMC (Andrew Abbey), subject to signing a Confidentiality Undertaking (**Annexure A**).
- 2. If the Tribunal intends to have (or already has had) regard to the Port Authority Agreements in making its decision in these proceedings, direction [3] below applies.
- 3. In the event that the Tribunal gives an indication in accordance with direction [2] as to the Port Authority Agreements:
  - (a) Port Authority has 7 days to apply for directions preventing or restricting disclosure of any of the Port Authority Agreements, with a copy of such application to be provided to NSWMC, PNO and the ACCC at the same time as the application to the Tribunal;
  - (b) if such an application is made, the application must not be disclosed to any person except those identified at [1(a)] – [1(d)], without leave of the Tribunal, until any such application has been determined;
  - (c) if such an application is not made, any restrictions applying to the dissemination of the Port Authority Agreements cease to apply.
- 4. Nothing in these directions imposes an obligation on the ACCC in respect of a document or information which has been obtained by it otherwise than in the course of these Tribunal proceedings, or on PNO or NSWMC in respect of a document or

information which has been obtained by it otherwise than in the course of these  
Tribunal proceedings or the preceding application for authorisation before the ACCC.

Date entered:

REGISTRAR  
Australian Competition Tribunal

## ANNEXURE A

### CONFIDENTIALITY UNDERTAKING

I, **[Stephen Galilee / Andrew Abbey]** of New South Wales Minerals Council

**HEREBY UNDERTAKE TO THE TRIBUNAL** in relation to Confidential Document 1 and Confidential Document 2 identified by the Port Authority of New South Wales in its submissions dated 25 February 2021 to the Tribunal in proceedings ACT 2 of 2020 (**Confidential Documents**) as follows:

1. I will not use the Confidential Documents or any part of them except for the purpose of these proceedings.
2. I will not disclose, without the leave of the Tribunal, the contents of the Confidential Documents in any way to any person other than **[Stephen Galilee OR Andrew Abbey]** of NSWMC and the external legal advisers and experts retained by NSWMC in accordance with the Tribunal's directions dated **[X]** March 2021.
3. I undertake not to make any copies of the Confidential Documents or any part of them or otherwise to make any record of their contents including by way of taking notes, photographs or screenshots.
4. I undertake to ensure that, when viewing the Confidential Documents, I do so in circumstances where they cannot be viewed by others (other than those described at paragraph 2 above).
5. If I become aware of any unauthorised use or disclosure of the Confidential Documents I will, as soon as practicable, inform the Port Authority of New South Wales' legal advisers.
6. At the conclusion of these proceedings, I will confirm in writing to the Port Authority of New South Wales' legal advisers, by giving notice in writing to the New South Wales Minerals Council's legal advisers, I do not have any copies of the Confidential Documents or any part of them, or any communications containing the Confidential Documents or any part of them.
7. The terms of the Undertaking may be varied by consent from the Port Authority of New South Wales' and the New South Wales Minerals Council's legal advisers, or by directions of the Tribunal.
8. The provision of this Undertaking does not constitute any acknowledgement in relation to the question of whether the Confidential Documents do in fact contain information of a nature that warrants their inspection in this proceeding to be limited.
9. This Undertaking does not apply to any part of the Confidential Documents which is made public at any time.
10. I give this Undertaking subject to the extent that I am required to disclose the Confidential Documents or any part of them required by law, statutory body, or court.

Dated: