

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



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

REGISTRAR

Dated: 5/05/2021 9:15 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 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

**SUBMISSIONS OF PORT OF NEWCASTLE OPERATIONS PTY LTD
RE DIRECTIONS HEARING 7 MAY 2021**

Introduction

1. These submissions by Port of Newcastle Operations Pty Limited (**PNO**) in relation to the Tribunal directions hearing this Friday 7 May 2021 propose a timetable for the preparation of the matter for hearing, and respond to the directions sought by the NSW Minerals Council (**NSWMC**).

PNO's Timetable

2. Accompanying these submissions is PNO's proposed timetable for the preparation of the matter for hearing.
3. Although the Tribunal's directions of 25 November 2020 contemplated that the parties' evidence would be complete by now, this has not transpired, and consequently more time is required for the parties to file evidence. Accordingly, direction 1 vacates the Tribunal's previous directions in relation to reply evidence, and directions 2 and 3 provide for extra time for the NSWMC to file further evidence and PNO to file evidence in reply.
4. Two matters necessitate the extra time for PNO to file its evidence in reply. *First*, the Tribunal's timetable provided for PNO to file its evidence on 15 March, and NSWMC on 29 March. PNO complied with this direction, but NSWMC did not. NSWMC did not file any evidence until last Friday 30 April, when it filed two affidavits from coal producers. We understand the NSWMC seeks to characterise these affidavits as evidence that is in reply in some way rather than evidence in response. We do not understand that characterisation, as there is then no opportunity for PNO to respond. PNO requires an opportunity to respond to the evidence. Further, NSWMC has indicated that it seeks to file additional evidence following the production of documents sought in its Notice. PNO will also need an opportunity to reply to this evidence.
5. *Secondly*, the ACCC has filed and served a detailed expert report from Dr Rhonda Smith. PNO had not anticipated that the ACCC would lead expert evidence of this type in the Tribunal. Such evidence was neither requested by the Tribunal nor foreshadowed by the ACCC, and the timetable, which only allowed a week for PNO to respond to the ACCC's evidence, was not designed for evidence of this type. PNO needs a proper opportunity to respond to this evidence, including by briefing an expert.

6. The balance of the directions (directions 4 to 10) are based on those in recent Tribunal matters, and are designed to prepare the matter for hearing. Subject to the Tribunal's availability, PNO has proposed that the matter be heard in the week commencing 2 August 2021 (direction 11). PNO proposes that the matter be set down for five days. It may be possible to conclude the hearing in less time, but no safe conclusion to that effect could be reached at this stage, especially where evidence has not concluded.

NSWMC's Proposed Directions

7. By letter to the Tribunal dated 22 April 2021, NSWMC sought directions relating to: (i) the protection and disclosure to limited parties of confidential information in PNO's evidence; and (ii) a draft notice which NSWMC requests the Tribunal issue to PNO, seeking material referred to in the affidavit of Mr Simon Byrnes, PNO's Chief Commercial Officer and General Counsel, dated 15 March 2021. The parties have reached agreement as to the first category of directions. The agreed forms of directions accompany these submissions. In relation to the draft notice, PNO consents to some categories, but objects to others. The balance of these submissions address the individual categories in NSWMC's draft notice.

NSWMC's Draft Notice

8. ***Category 1(a)***. PNO opposes this category. The category seeks "PNO's business records" relating to the price review conducted by PNO in 2014, following the privatisation of the Port, which led to the current operators increasing the navigation service charge. There is no explanation as to how this historical material is relevant to the question of whether the Tribunal should affirm, set aside or vary the ACCC's decision to authorise NSWMC to engage in the conduct the subject of its application (described at [5.5] of the ACCC's determination). The only justification offered for this category (and categories 1(b) to 1(j)) is that the documents "are sought as a matter of procedural fairness": Clifford Chance letter of 22 April 2021, [4]. No issue of procedural fairness is identified, or arises.
9. ***Category 1(b)***. PNO opposes this category, which seeks "PNO's records of the total volume of coal exported through the Port". PNO has provided evidence of the total volumes. PNO's exports volumes are also published on PNO's website (<https://www.portofnewcastle.com.au/about-our-port/>). In circumstances where neither NSWMC nor the ACCC has raised any dispute about these figures, there is no basis to

require PNO to produce the primary records evidencing these volumes, which would be extraordinarily voluminous (given that in 2020, for example, 1754 coal ships visited the Port).

10. **Category 1(c).** PNO consents to a request to produce *Scenario Development and Planning* reported prepared by Wood MacKenzie, referred to in Clayton Utz's letter to Clifford Chance of 16 April 2021 (a copy of which is annexed to the affidavit of Mr Dave Poddar, at page 16). NSWMC and PNO have agreed that this material is to be treated as confidential (see Annexure A to proposed confidentiality directions, item 3).
11. **Category 1(d).** PNO consents to a request to produce the working sheets used to produce the graph at paragraph 22 of the Byrnes affidavit, on the condition that it is treated as confidential (item 4 in proposed confidentiality directions). PNO otherwise opposes the category on the basis that it is unnecessary: the coal export price is published on the internet by the World Bank (at the address listed at paragraph 23(c) of the Byrnes affidavit) and the coal export volumes are already in evidence (paragraph 17 of the Byrnes affidavit) (and published on the internet, as described in paragraph 10 above).
12. **Category 1(e).** This category purports to seek all reports provided by Kpler, a subscription service for commodity data market, and all results of the PNO Business Intelligence Department, with no restriction as to date or subject. To the extent that they are in PNO's possession, PNO would consent to a request to produce the Kpler reports for the last six months, which are most relevant to the topic at hand, namely current and future trends in world coal markets. This consent is on the basis that this material is also treated as confidential.
13. **Category 1(f).** This category seeks data used to show the NSC and wharfage charge as a proportion of buyer and seller costs of a tonne of coal exported through the Port. PNO opposes this category. The underlying data sources are already identified at paragraph 26 of the Byrnes affidavit and in the confidential document attached to Clayton Utz's letter to Clifford Chance of 16 April 2021 (a copy of which is annexed to the affidavit of Mr Dave Poddar, at page 22). In these circumstances, the more general category 1(f) is both unnecessary and oppressive, as it would catch any and all documents referring to any of the data in these categories (such as any PNO document recording vessel movements).

14. **Category I(g).** As indicated above, this category is agreed, on the basis that this material is also treated as confidential.
15. **Category I(h).** This report is included in the Kpler reports PNO proposes to produce in response to category 1(e) (dealt with above in paragraph 12).
16. **Category I(i).** In paragraphs 44 and 56 of his affidavit, Mr Byrnes gives evidence, based on his knowledge and memory and his inspection of PNO's business records, that "no other producer" raised certain things. He thus gives evidence of a negative: an absence of communication. NSWMC seeks the production of "PNO's business records" referred to by Mr Byrnes. There are a number of problems with this. First, the production of business records to prove a negative is unqualified in scope, and could extend to a very large class of records: what Mr Byrnes is saying, in effect, is that there are no records of such a communication. Secondly, the production presumably sought so that NSWMC can attack the reliability of Mr Byrnes' account. Thirdly, there is no need for the production in circumstances where, if there were communications with other producers, NSWMC could easily give evidence of that fact by adducing evidence directly from producers (as it has belatedly done from two producers, Yancoal Australia and the Bloomfield Group). There is no justification for the imposition of such an oppressive request.
17. **Category I(j).** This category is unnecessary, as NSWMC has since filed an affidavit from Mr Lewis, Managing Director and CEO of the Bloomfield Group, sworn 30 April 2021, which annexes the email in question (Confidential Annexure "BL-1").
18. **Category I(k).** This category seeks communications with coal producers, notes of such communications, PNO board minutes in relation to such communication and all other reports or materials provided to the PNO board in relation to such discussions. PNO objects to this category.
19. PNO has already put a number of the communications with coal producers into evidence. NSWMC has a ready source of evidence: it can obtain any communications direct from any producer, and to the extent the communications were oral it can obtain evidence about such communications directly from the producer. There is no demonstrated need to seek documents from PNO.

20. To the extent that the category seeks PNO's internal consideration of the discussions with producers (including reports or materials provided to the board), there is no articulated basis for the production of such internal consideration. The thoughts of PNO, or of particular people at PNO, have no obvious or direct bearing on the issues in the proceedings, or relate to why there should be collective bargaining.
21. There is a further vice with seeking of internal considerations. The position of NSWMC and the ACCC in these proceeding is that the Tribunal should affirm the ACCC's decision because it will improve the bargaining power of coal producers and reduce information asymmetry. It is quite unclear how the authorised conduct will deliver such an outcome, but that is an issue for the Tribunal to determine. In the meantime, however, the Tribunal should not permit these proceedings, and specifically, the Tribunal's power to request documents, to be the means by which NSWMC achieves that very end: i.e. obtain internal information from PNO (including PNO's internal thoughts and considerations) that NSWMC would never otherwise be entitled to receive.
22. **Category 1(l)**. This category seeks all board minutes, reports and other materials related to capital expenditure forecasts and forward capital expenditure plans prepared since 1 January 2014. This category is also opposed.
23. NSWMC has not sought to explain the relevance of material going back to 1 January 2014. One of the alleged public benefits of the conduct is that it will put producers in a stronger position to negotiate with the Port in relation to issues such as future capital expenditure. That is a general proposition, not tied to any particular capital expenditure, and still less raising the issue of PNO's internal consideration and plans of any capital expenditure (which would include drafts, proposals, things that never proceeded, and potentially all sorts of very confidential material). The category is obviously too wide.

It also suffers from a similar vice as category 1(k). For example, NSWMC's statement of facts, issues and contentions, states (at [87]) that "The Authorisation Conduct would allow applicants to discuss the CAPEX forecasts provided by PNO which would likely improve information asymmetry and associated inequality in bargaining power, so as to facilitate a more efficient solution". Dr Smith in the report filed by the ACCC identifies a similar benefit (at [73]). It is for the Tribunal to determine whether this is a benefit justifying the conduct, but if the Tribunal accedes to NSWMC's request, the issue will become moot, as coal producers will already have achieved their objective via the notice.

DATED: 5 May 2021

Cameron Moore SC

Declan Roche

Counsel for Port of Newcastle Operations Pty Ltd