

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: 06/05/2021 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

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

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION:

SUBMISSIONS IN REPLY: APPLICATION FOR LEAVE TO INTERVENE

Filed pursuant to email from the Australian Competition Tribunal dated 30 April 2021

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A. Introduction and summary

1. These submissions are filed in reply to a number of matters raised in the submissions of Port of Newcastle Operations Pty Ltd (**PNO**) on the Commission's application for leave to intervene in these proceedings. PNO opposes the Commission's application on the basis that:¹
 - 1.1 there is no power in the *Competition and Consumer Act 2010* (Cth) (**CCA**) to permit intervention "by the [Commission] in the present proceeding"; and
 - 1.2 even if the Tribunal reached a contrary conclusion in relation to its power to permit intervention by the Commission, the Tribunal should exercise its discretion not to permit the Commission to intervene in the present case.
2. The Commission maintains that the Tribunal, by virtue of the jurisdiction it has been given under the CCA, must be taken to be given by implication whatever powers are necessary to enable it to act effectively within its jurisdiction. That includes an implied power to allow third parties to intervene where that would assist the Tribunal in determining the issues raised in the proceeding.
3. PNO's position appears not to be that the Tribunal has no power at all to allow *any* third party to intervene in a review under s 44K, which would be an extreme position, but, rather, that the Tribunal does not have that power *with respect to the Commission*. PNO's position should be rejected, for the reasons set out below.
4. In response to PNO's submission that, if the Tribunal does have a power to permit the Commission to intervene, it should exercise its discretion to refuse intervention, the Commission reiterates that it is in a position to make a unique contribution and that the Tribunal will likely be assisted by the Commission's submissions. The concerns raised by PNO in connection with the impact, if any, that the Commission's intervention may have on the time for preparation for the hearing and the hearing itself are unfounded in circumstances where the Commission is not seeking to expand the scope of the information upon which the NCC made its recommendation to the Minister, but rather to make submissions in connection with that information, and where any such concerns can otherwise be readily addressed by minor amendments to the Commission's proposed orders, together with the Commission's role in the proceeding always being subject to the oversight of the Tribunal if leave to intervene is granted.

B. Tribunal's implied power to permit the Commission to intervene

5. The Commission addressed the issue of the Tribunal's implied power to permit a person to intervene at [38] of its submissions (**Commission's primary submissions**). The Commission's primary submissions referred at footnote 34 to a number of authorities which deal with the question of the implied powers of statutory courts and tribunals.

¹ PNO submissions, [2].

6. The Tribunal consists of a President and Deputy Presidents, and other members. Presidential members are Judges of the Federal Court.² For the purposes of hearing and determining proceedings, the Tribunal is constituted by a Division of the Tribunal consisting of a presidential member of the Tribunal and two members who are not presidential members.³ The Tribunal's jurisdiction extends over a range of matters and extends beyond inter partes claims to the enforcement of statutory rights which have the potential to affect significant areas of the Australian economy in terms of both scope and importance.
7. PNO does not appear to submit that the Tribunal does not have *any* implied power to permit a third party to intervene in proceedings before it. Any such submission would need to grapple with the authorities cited in the Commission's primary submissions, which support the proposition that statutory courts and tribunals have implied powers necessary to enable them to act effectively within their jurisdiction, and would need to explain why these implied powers would not extend to allowing third parties to intervene in proceedings where this would assist the Tribunal. It would also need to grapple with the fact that such an extreme position would prohibit intervention by *any* person in *any* Tribunal review under s 44K; for example, it would prohibit intervention by present and potential users of PNO's services in the present case. Notably, PNO does not challenge the Commission's previous submission that it is clear from the terms of at least ss 44K(6B) and 44ZZOAAA(6) that, in the absence of an express power, the Tribunal must have an implied power to make a person a party to a review proceeding under s 44K.⁴
8. Rather, PNO's position appears to be that the Tribunal does not have an implied power to permit the intervention of the *Commission* in the present type of proceeding.⁵ In making that submission, PNO relies upon the terms of s 44K(5) of the CCA and its submissions regarding it.⁶
9. First, PNO submits that the existence of an implied power to permit intervention of the Commission is inconsistent with the confined nature of the task given to the Tribunal, which has the same powers as the Minister, and the confined nature of the task given to the Minister.⁷ However, section 44H⁸ says very little about the Minister's powers—the power is simply described as being that, on receiving a declaration recommendation, the Minister must either declare or decide not to declare the service.⁹ It is that same power that the Tribunal has pursuant to s 44K(5). That power is relevantly circumscribed by reference to certain things that the Minister must have regard to and do which are set out in ss 44H and 44HA, but the statutory provisions do not otherwise expressly prohibit the Minister from having regard to and doing other things.

² CCA, s 31(1).

³ CCA, s 37.

⁴ Commission primary submissions, [27] and [38].

⁵ PNO submissions, [12].

⁶ PNO submissions, [12], referring to [9]-[11].

⁷ PNO submissions, [12], and see also [9]-[10].

⁸ Relied upon in PNO submissions, [9].

⁹ CCA, s 44H(1).

10. Second, PNO says that an implied power to permit intervention of the Commission is inconsistent with the reasoning of the High Court in *Pilbara v Australian Competition Tribunal* (2012) 246 CLR 379 (*Pilbara*), which concluded that the scope of the Tribunal's review was limited by the express terms of the provisions setting out the task of the Minister and the Tribunal.¹⁰ However, the joint judgment in the High Court in *Pilbara* at [63] left open the question of whether or to what extent the Minister has an incidental or implied power to obtain additional information beyond the NCC's recommendation.¹¹ In any case, the Commission is not seeking to expand the scope of the information upon which the NCC made its recommendation to the Minister, but rather to make submissions in connection with that information. This is entirely consistent with the nature of the review by the Tribunal being a re-consideration of the matter based on the information, reports and things referred to in s 44ZZOAA.¹²
11. Third, PNO says that it is inconsistent with the express and limited statutory scheme for obtaining assistance from the NCC for there to be an "unconfined" implied power to permit a general intervention by a different Commonwealth entity, being the Commission.¹³ However, the fact that s 44K(6) makes express provision for the NCC to provide the Tribunal with assistance does not preclude a power to permit intervention by the Commission. The Tribunal's power to require the NCC to give assistance recognises that the NCC, as the body making the recommendation to the Minister, assumes a particular importance in review proceedings under s 44K, but the existence of that explicit power to direct the NCC to provide assistance is not in any way inconsistent with the existence of an implied power to permit the Commission to intervene in proceedings where the Tribunal considers that would be of assistance to it in the exercise of its jurisdiction.

C. Exercise of the Tribunal's discretion to grant leave for the Commission to intervene

12. The Commission has sought leave to intervene because, in making its determination, the Tribunal will be required to address the proper construction and application of the declaration criteria in Part IIIA of the CCA, in particular, criteria (a) and (d). These criteria, relating to promotion of competition and the public interest, were amended in 2017 and have not yet been the subject of detailed consideration by the Tribunal or the Court in their present form.
13. As a public authority with a wide range of functions and powers under the CCA,¹⁴ the Commission is well-placed to make a unique contribution¹⁵ in this proceeding. So much is recognised by the submissions of NSWMC,¹⁶ which support the Commission's application for leave to intervene.

¹⁰ PNO submissions, [12], see also [10].

¹¹ In addition, Heydon J, having observed that the CCA contained no express grant of power to the Minister to seek submissions from interested persons, the public or anyone else, went on to say that it is true that there was no express prohibition on the Minister adopting this course: [135].

¹² CCA, s 44K(4).

¹³ PNO submissions, [12], and see also [11].

¹⁴ Proudfoot affidavit, [6]–[7].

¹⁵ Cf. PNO submissions, [14].

¹⁶ NSWMC submissions, [3].

14. It is incorrect to assert, as PNO does, that the Commission does not have a role under the CCA in relation to declaration.¹⁷ The Commission has that role with respect to telecommunications services in Division 2 of Part XIC of the CCA. The relevant criterion, the long-term interests of end-users,¹⁸ is expressed in different terms to the Part IIIA declaration criteria, but engages with similar economic concepts to those in the declaration criteria in Part IIIA and the objects of Part IIIA. These include whether declaration is likely to result in achieving the objective of promoting competition and encouraging the economically efficient use of, and investment in, infrastructure.¹⁹
15. As to PNO's submission that it is not apparent how the Commission's intervention will assist the Tribunal,²⁰ the Commission wishes to advance an alternative construction of criterion (a) to that adopted by the NCC.²¹ In the review proceedings, the Tribunal will need to consider how criterion (a) should be construed and applied. The Tribunal is not bound to adopt the construction propounded by any party; it must determine what it considers to be the correct construction. In so doing, the Tribunal will likely be assisted by the Commission's submissions. It is incorrect to say that the Commission is effectively seeking to become a second (de facto) applicant.²² Rather, the Commission wishes to ensure that whatever decision the Tribunal comes to upon the proper construction of the relevant statutory provisions, that position has been informed by the submissions of the Commission in its role as a specialist competition regulator.
16. Although the Commission does not have an interest in the proceedings as a business participant in the economy, this is no barrier to leave being granted.²³ For example a court may grant leave to intervene where a regulator or administrative decision maker has a particular interest in the construction of the legislative framework that they administer or pursuant to which they operate.²⁴ It was on this basis that the Commission has been granted leave to intervene in a number of cases under the CCA, including *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 (concerning the application of section 46 of the CCA) and *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Limited* [2010] FCA 521 (relating to a strike out application in connection with an alleged price-fixing cartel). In addition, the Commission was given leave to intervene in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115 (concerning the Full Federal Court's review of the Tribunal's 2016 decision to declare the service provided by PNO at the Port of Newcastle).
17. PNO's submission that the intervention of the Commission would jeopardise the Commission's independence in executing its role in arbitrating disputes under Part IIIA is misplaced.²⁵ As PNO notes, declaration of a service and the arbitration of disputes in respect of such services under

¹⁷ PNO submissions, [15].

¹⁸ CCA, s 152AL(3)(d).

¹⁹ CCA, ss 152AB(2)(c) and (e) and 152AL(3)(d).

²⁰ PNO submissions, [16].

²¹ See the Commission's primary submissions, [12.2], [12.3], [13.1], [13.2], [14.1], [15.1], [35].

²² PNO submissions, [16].

²³ Cf. PNO submissions, [17].

²⁴ See, for example, *Sym Choon & Co Ltd v Cordon Choon Nuts Ltd* (1949) 80 CLR 65, 81.

²⁵ PNO submissions, [19].

Part IIIA are separate tasks. Submissions by the Commission as to what it considers to be the proper construction of the declaration criteria will either be accepted or rejected by the Tribunal. In the event the Commission is called upon to arbitrate a dispute, this will necessarily be by reference to the matters in s 44X of the CCA and not the declaration criteria.

18. Finally, PNO's submission with respect to the Commission's participation in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 is incomplete. The Court did hold that the proceedings brought by the Commission should not have been commenced. However, the Court held that the proper role for the Commission was to make submissions on Glencore's application (to which it was named as a respondent) as to the proper construction of the relevant provisions and to provide such assistance as the Court may need in dealing with applicable economic principles. If the Commission had not been named as a respondent, the Court said that the "appropriate step would have been to seek leave to intervene under s 87CA" as opposed to instituting or continuing separate proceedings.²⁶

D. Conclusion and orders sought

19. For the reasons set out above, the Commission submits that the Tribunal has power to permit the Commission to intervene, and respectfully requests that the Tribunal exercise its discretion to grant leave to the Commission to do so.
20. PNO says that the intervention of the Commission is likely to "unnecessarily lengthen the preparation and hearing time for the matter".²⁷ Any such concerns are unfounded, but, in any event, are readily addressed by the revisions to the proposed orders marked in Annexure A to these submissions.

DATED: 5 May 2021

S H PARMENTER

C DERMODY

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Solicitors for the Australian Competition
and Consumer Commission

²⁶ *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 382 ALR 331, [314].

²⁷ PNO submissions, [18].

ANNEXURE A

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

PROPOSED DIRECTIONS

TRIBUNAL: Justice O'Bryan (Deputy President)

DATE:

WHERE MADE: Melbourne

THE TRIBUNAL DIRECTS THAT:

- 1 [Subject to any further direction by the Tribunal](#), the Australian Competition and Consumer Commission (**ACCC**) is given leave to intervene in this proceeding, including leave:
 - (a) to file and serve an outline of submissions [not exceeding 10 pages by 4.00pm on Wednesday 2 June 2021](#) ~~pursuant to paragraph 15 of the Tribunal's Directions of 8 April 2021 (8 April Directions)~~; and
 - (b) to appear at the hearing of the application for review and make oral submissions, and is joined as the fourth respondent to this proceeding.
- 2 The Tribunal is to provide a copy of the Decision Information described in paragraph 1 of the [Tribunal's Directions of 8 April 2021 \(8 April Directions\)](#) to the ACCC as soon as practicable.
- 3 The ACCC is to serve a list of any additional documents to be included in the Hearing Book on or before Wednesday, 19 May 2021.
- 4 Direction 19 of the 8 April Directions be varied to provide that disclosure of Confidential Material be restricted to:
 - (a) the NCC and its external legal advisers and engaged experts (and their direct staff);
 - (b) the external legal advisers and experts (and their direct staff) engaged by PNO;

(c) the external legal advisers and experts (and their direct staff) engaged by NSWMC; and

(d) the ACCC and its external legal advisers and experts (and their direct staff).

5 Direction 25 of the 8 April Directions be varied to provide that nothing in in these directions imposes an obligation on the NCC 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, NSWMC or 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 the preceding application for declaration before the NCC.