

**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 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: 22/04/2021 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 SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE**

**Filed pursuant to paragraph 4 of the directions of Justice O'Bryan dated 8 April 2021**

**A. Introduction and summary**

1. These submissions are filed in support of the Australian Competition and Consumer Commission's (**Commission**) application for leave to intervene in the application for review lodged by the New South Wales Minerals Council (**NSWMC**) of the decision of the Treasurer not to declare the "Service" at the Port of Newcastle.
2. The Service comprises the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct.
3. The Commission's application for leave to intervene is made under section 109(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), alternatively section 44K(5) of the CCA, or

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pursuant to the Australian Competition Tribunal's (**Tribunal**) implied powers in respect of matters of procedure in proceedings before the Tribunal.

4. The Commission seeks 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.
5. The Commission has a unique contribution to make to the Tribunal's re-consideration of the matter. The Commission is a specialist competition regulator. The Commission is the repository of many of the powers and responsibilities conferred by Part IIIA of the CCA, as identified in the affidavit of Sarah Maryjean Proudfoot, affirmed on 21 April 2021 (**Proudfoot affidavit**), at [7].
6. The Commission has significant experience, knowledge and expertise regarding the access regime in Part IIIA, together with the telecommunications access regime in Part XIC of the CCA, and competition issues more generally. The Commission's special interest, knowledge and experience is addressed in the Proudfoot affidavit in detail at [15]–[23]. Given the Commission's involvement as a decision maker in matters relating to Part IIIA and Part XIC of the CCA, the resolution of issues of construction and application of the declaration criteria will impact on the Commission's discharge of its statutory functions and the exercise of its statutory powers.
7. The Commission made submissions to the National Competition Council (**NCC**) as to the correct construction and application of criteria (a) and (d) in connection with the NCC's recommendation to the Treasurer not to declare the Service provided at the Port of Newcastle. The NCC did not agree with the Commission's approach to the construction and application of criterion (a), and to the application of criterion (d).
8. The proper construction and application of the declaration criteria raise significant legal and public policy issues that are of relevance to infrastructure service providers more generally and the users of infrastructure services, as well as to the Australian economy more broadly. To this end it is important that the Commission, as the national competition regulator, is able to make submissions as to the correct application of the declaration criteria so that the Tribunal can consider them as part of its reconsideration of whether the service should be declared.
9. Together with these submissions in support of its application for leave to intervene, the Commission relies upon the Proudfoot affidavit.

## **B. NCC's declaration recommendation and Commission submissions**

10. In July 2020, the NSWMC made an application to the NCC asking the NCC to recommend that the Service be declared. The Service is provided at the Port of Newcastle by Port of Newcastle Operations Pty Ltd (**PNO**).
11. On 26 August 2020, the Commission made a submission to the NCC in connection with the NCC's consideration of whether to recommend that the Treasurer declare the Service.<sup>1</sup>
12. The Commission's submission addressed the reasons why the NCC recommended, in July 2019, that declaration of a similarly described service provided at the Port of Newcastle should be revoked. In particular, the Commission's submission addressed the NCC's assessment of criteria (a) and (d):
  - 12.1 Criterion (a) provides: "that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service".
  - 12.2 In relation to criterion (a), the Commission submitted that the NCC should not disregard the inefficiencies, and the resulting costs to the community, caused by PNO's ability and incentive to earn monopoly profits, together with the effect these inefficiencies will have on competition in related markets. The Commission submitted that the focus of the criterion (a) assessment should be on whether declaration would promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, *thereby* promoting a material increase in competition, rather than simply an assessment of the NCC's 'second limb' of whether a scenario without declaration materially affects competition in a dependent market.<sup>2</sup>
  - 12.3 The Commission submitted that when the detriment caused by monopoly pricing is taken into consideration, criterion (a) is satisfied.<sup>3</sup>
  - 12.4 Criterion (d) provides: "that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest". Section 44CA(3) of the CCA provides that, in considering whether criterion (d) is satisfied, regard must be had to: (a) the effect that declaring the service would have on investment in infrastructure services and markets that depend on access

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<sup>1</sup> Proudfoot affidavit, [25] and annexure 'SMP2'.

<sup>2</sup> Australian Competition and Consumer Commission, *Submission to NCC re NSW Minerals Council Application for Declaration at the Port of Newcastle*, 26 August 2020, pp 3-4.

<sup>3</sup> Australian Competition and Consumer Commission, *Submission to NCC re NSW Minerals Council Application for Declaration at the Port of Newcastle*, 26 August 2020, p 1.

to the service; and (b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

- 12.5 In relation to criterion (d), the Commission submitted that the increased investment and efficiency benefits realised from declaration are likely to outweigh any positive longer-term marginal administrative and compliance costs. Therefore, the Commission submitted that declaration of the Service would be in the public interest and criterion (d) is satisfied.<sup>4</sup>
13. In its draft recommendation, the NCC considered that criteria (b) and (c) were satisfied, but that criteria (a) and (d) were not:<sup>5</sup>
- 13.1 In assessing criterion (a), the NCC that said it assessed a future in which the Service is declared and access is through declaration on reasonable terms and conditions (the “factual”) and compared this to a future in which the Service is not declared and terms and conditions of access are set in an alternative way (the “counterfactual”).<sup>6</sup>
- 13.2 The NCC approached criterion (a) by asking: first, would the provider have the ability and incentive to deny access to the relevant service or restrict output and charge monopoly prices; and secondly, if so, would any resulting conduct be likely to materially affect competition in a dependent market?<sup>7</sup> The NCC noted that the Commission disagreed with this approach.<sup>8</sup>
- 13.3 In assessing criterion (d), the NCC considered that declaration: is unlikely to significantly affect investment in the infrastructure necessary to provide the Service; has the potential to improve efficient levels of investment in dependent markets, but that is unlikely to weigh heavily in the assessment process; and may result in comparatively greater administrative and compliance costs.<sup>9</sup>
14. On 23 November 2020, the Commission made a submission in response to the NCC’s draft recommendation:<sup>10</sup>
- 14.1 In relation to criterion (a), the Commission submitted that the declaration criteria should be interpreted in a manner which is consistent with the objects of Part IIIA and, as such, an assessment of criterion (a) should give due weight to the increase in competition

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<sup>4</sup> Australian Competition and Consumer Commission, *Submission to NCC re NSW Minerals Council Application for Declaration at the Port of Newcastle*, 26 August 2020, p 1.

<sup>5</sup> National Competition Council, *Application for Declaration of Certain Services at the Port of Newcastle: Draft Recommendation*, 30 October 2020 (**NCC Draft Recommendation**), [1.5].

<sup>6</sup> *NCC Draft Recommendation*, [7.2].

<sup>7</sup> *NCC Draft Recommendation*, [7.3], [7.7].

<sup>8</sup> *NCC Draft Recommendation*, [7.5].

<sup>9</sup> *NCC Draft Recommendation*, [10.63].

<sup>10</sup> Proudfoot affidavit, [26] and annexure ‘SMP3’.

that economic efficiency in the pricing of access to services provided by monopoly infrastructure can promote.<sup>11</sup>

- 14.2 In relation to criterion (d), the Commission submitted that the NCC was placing too much weight on the impact of regulation on PNO's future investment decisions and not enough weight on the benefits of regulation, such as the promotion of efficient investment. The Commission also submitted that the NCC should consider a broad range of possible outcomes regarding future agreements between PNO and its users, as access disputes can be avoided altogether through genuine negotiation that takes into consideration the likely arbitrated outcome.<sup>12</sup>
15. The NCC published its final recommendation on 18 December 2020.<sup>13</sup> The NCC's conclusions were unchanged from its draft recommendation — it remained of the view that criteria (b) and (c) were satisfied, but criteria (a) and (d) were not. As such, the NCC concluded that it could not recommend that the Treasurer declare the Service:<sup>14</sup>
- 15.1 In relation to criterion (a), the NCC adopted a similar approach to that in its draft recommendation, asking first, what is the extent of the provider's ability and incentive to deny access to the relevant service, or set terms and conditions less favourable than those expected in competitive markets, and second, if the provider has such ability and incentive, would any resulting conduct be likely to materially affect competition in a dependent market?<sup>15</sup> The NCC considered that its approach was consistent with the language of section 44CA(1)(a) and provided an appropriate framework for assessing constraints affecting the conduct of PNO absent declaration.<sup>16</sup>
- 15.2 In relation to criterion (d), the NCC's assessment varied somewhat from the draft recommendation, as the NCC considered that access to the Service, on reasonable terms and conditions, as a result of declaration: is unlikely to significantly affect investment in the infrastructure necessary to provide the Service; is unlikely to significantly affect investment in dependent markets; and that administrative and compliance costs are unlikely to be materially different in a future with and without declaration of the Service.<sup>17</sup>

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<sup>11</sup> Australian Competition and Consumer Commission, *Submission to NCC's Draft Recommendation not to Declare Services at the Port of Newcastle*, 23 November 2020, pp 1–2.

<sup>12</sup> Australian Competition and Consumer Commission, *Submission to NCC's Draft Recommendation not to Declare Services at the Port of Newcastle*, 23 November 2020, pp 7–8.

<sup>13</sup> National Competition Council, *Application for Declaration of Certain Services at the Port of Newcastle: Recommendation*, 18 December 2020 (**NCC Recommendation**).

<sup>14</sup> *NCC Recommendation*, [1.5].

<sup>15</sup> *NCC Recommendation*, [7.3].

<sup>16</sup> *NCC Recommendation*, [7.7].

<sup>17</sup> *NCC Recommendation*, [10.63].

### C. Treasurer's decision not to declare the Service

16. On 16 February 2021, the Treasurer decided not to declare the Service.<sup>18</sup>
17. Importantly, in making that decision the Treasurer adopted the approach taken by the NCC to criterion (a), and otherwise accepted the matters identified in the NCC's recommendation as relevant to the NCC's conclusion that criterion (a) was not satisfied.<sup>19</sup>
18. Similarly, with respect to criterion (d), the Treasurer adopted the NCC's approach to the assessment of that criterion and adopted the NCC's findings and reasoning relevant to the NCC's conclusion that criterion (d) was not satisfied.<sup>20</sup>

### D. Commission's application to intervene

19. Section 109(2) of the CCA provides: "The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal".
20. In *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28 (**Fortescue Metals**), at [22], Goldberg J held that section 109(2) of the CCA provides a basis for an application by a party to intervene in or participate in the hearing of a review under section 44K of the CCA. In considering the position of Rio Tinto that section 109(2) did not apply to all proceedings before the Tribunal, but was limited to proceedings in which the Tribunal reviews an authorisation or a notification decision by the Commission, Goldberg J noted at [19]–[20] that:
  - 20.1 such a position failed to pay sufficient attention to the heading to Division 2 of Part IX, "Procedure and Evidence";
  - 20.2 section 103 and the succeeding sections in Division 2 deal generally with the procedures of the Tribunal;
  - 20.3 Division 2 was part of the CCA from its inception, and Goldberg J considered that the intention of the legislature at the time was that Division 2 of Part IX would apply to all proceedings before the Tribunal brought under the provisions of the CCA from time to time;
  - 20.4 there is nothing in Part IIIA of the CCA, which was introduced into the CCA in 1995, which suggests that reviews by the Tribunal under provisions such as section 44K

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<sup>18</sup> Josh Frydenberg (Treasurer), *Decision and Statement of Reasons Concerning New South Wales Minerals Council's Application for Declaration of Certain Services at the Port of Newcastle*, 16 February 2021.

<sup>19</sup> Josh Frydenberg (Treasurer), *Decision and Statement of Reasons Concerning New South Wales Minerals Council's Application for Declaration of Certain Services at the Port of Newcastle*, 16 February 2021, pp 3–6.

<sup>20</sup> Josh Frydenberg (Treasurer), *Decision and Statement of Reasons Concerning New South Wales Minerals Council's Application for Declaration of Certain Services at the Port of Newcastle*, 16 February 2021, pp 6–7.

were not to be undertaken in accordance with procedures and evidence determined in accordance with Division 2 of Part IX.

21. However, in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (***Pilbara v Australian Competition Tribunal***), at [48]–[56], the High Court expressed significant doubt as to the applicability of Division 2 of Part IX of the CCA (which includes section 109) to section 44K reviews. It was submitted in that case that the use of the general term “proceedings” in Division 2 of Part IX embraced any and every formal process by which a matter is determined by the Tribunal and therefore included reviews undertaken pursuant to section 44K. In connection with that submission, the High Court observed that if that were correct, it would not have been necessary to include paragraphs (a) and (b) in the definition of “proceedings” in section 102A (now repealed<sup>21</sup>).<sup>22</sup> That definition of “proceedings” specifically identified applications made to the Tribunal under Subdivision C of Division 3 of Part VII (relating to authorisations for mergers) and applications made to the Tribunal under section 111 (relating to review of Commission determinations on merger clearances) as being included as “proceedings”. The majority said that the definition in section 102A was of “greatest significance” to the argument made in that case.<sup>23</sup>
22. The decision of the majority in *Pilbara v Australian Competition Tribunal* did not consider Goldberg J’s decision in *Fortescue Metals*. The decision of the majority, although making more general observations as to the applicability of the provisions of Division 2 of Part IX to section 44K reviews, was concerned with the interaction of section 44K, and the concept of what constituted a “re-consideration” of a matter, and section 101(2), and what constituted a “re-hearing” of a matter. That is, it was not concerned with the construction and application of section 109 of the CCA. The majority High Court decision appears to be inconsistent with Goldberg J’s decision in *Fortescue Metals*, but it does not say that the decision was not correct.<sup>24</sup>
23. For the reasons set out below, the Commission submits that the better view is that section 109(2) and the provisions of Division 2 of Part IX of the CCA apply to proceedings before the Tribunal generally, and subject to any other provisions in the CCA that deal more

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<sup>21</sup> Section 102A was repealed by Schedule 9, Part 2, item 129 of the *Competition and Consumer Amendment (Competition Policy Review) Act 2017*. The Explanatory Memorandum does not assist in identifying the purpose behind the repeal of section 102A beyond identifying it as one of a number of “consequential amendments throughout the Act to update references in the Act to new, amended or repealed provisions of Part VII”. See: Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017, [9.144] (79).

<sup>22</sup> *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also the reasons of Heydon J at [140]–[143].

<sup>23</sup> *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>24</sup> Cf: *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [143] (Heydon J), where Heydon J dealt explicitly with the decision of Goldberg J in *Fortescue Metals* and stated that the decision was not correct.

specifically with practices and procedures to be adopted in any particular type of review proceeding.

24. The Tribunal is established under Part III of the CCA. Part III deals with matters such as the constitution of the Tribunal, the appointment of members to the Tribunal and their removal and resignation, the determination of questions of law and staffing. Part III does not deal with matters of practice and procedure generally, other than in section 39, which provides that the President may give directions as to the arrangement of the business of the Tribunal and the constitution of Divisions of the Tribunal, and may also give directions to the Deputy Presidents in relation to the exercise by them of powers with respect to matters of procedure in proceedings before the Tribunal.
25. The note to section 39 provides: “Subsection 103(2) provides that any presidential member may exercise powers with respect to matters of procedure in proceedings before the Tribunal”. This note tends to indicate that the provisions in Division 2 of Part IX of the CCA, which include section 103(2), are applicable to proceedings before the Tribunal generally, and are not confined to reviews by the Tribunal of Commission determinations. It is permissible to make use of the note to section 39 for interpretation purposes.<sup>25</sup>
26. Further, section 44ZQ, which is in Division 3 of Part IIIA, provides that sections 103 to 110 (inclusive) of the CCA do not apply in relation to a review by the Tribunal of a final determination made by the Commission on an access arbitration. This also tends to indicate that those sections apply more generally (i.e. other than to Division 3 of Part IIIA), including to proceedings of the Tribunal under Division 2 of Part IIIA. Goldberg J stated that it was “telling” that there was no similar exclusion of Division 2 of Part IX with respect to reviews under section 44K,<sup>26</sup> but Heydon J’s conclusion was to the contrary.<sup>27</sup>
27. In addition, and importantly, the Tribunal’s power to permit other persons to become a party to review proceedings is confirmed by the terms of section 44K(6B). This section provides that where the Tribunal has, by written notice, required the NCC to give information, and to make reports, the Tribunal must give a copy of the notice to the person who applied for review, the provider of the service, the person who applied for the declaration recommendation, and “any other person who has been made a party to the proceedings for review by the Tribunal”. A similar reference is also found in section 44ZZOAAA(6), which applies to applications for review under section 44K. Those references to “any other person who has been made a party” would

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<sup>25</sup> The note forms part of the Act: *Acts Interpretation Act 1901* (Cth), section 13(1). On the use of notes in statutory construction see, for example: *Parker v Minister for Sustainability, Environment, Water, Population and Communities* (2012) 205 FCR 415, [66].

<sup>26</sup> *Re Fortescue Metals Group Limited* (2006) 203 FLR 28, [21] (Goldberg J).

<sup>27</sup> *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [148] (Heydon J).

be otiose if there were no power to permit the addition of parties and intervention in proceedings for review under Section 44K.

28. If, contrary to the submissions above, the provisions in Division 2 of Part IX of the CCA do not apply to proceedings of the Tribunal other than in connection with specified determinations made by the Commission, this would leave a gap in the ability of the Tribunal practically and efficiently to manage review proceedings under Division 2 of Part IIIA, particularly in circumstances where regulations have not been made pursuant to section 44ZZP of the CCA dealing with all of the types of matters dealt with in Division 2 of Part IX. These matters include the Tribunal's powers with respect to matters of procedure (section 103) (which would appear to include such matters as making directions for the filing of submissions), private hearings and restrictions upon the publication of evidence and of matters contained in documents (section 106),<sup>28</sup> determining the participants to a proceeding (section 109) and the representation of persons in proceedings (section 110).
29. The Regulations do not deal with participation in a review under section 44K of a decision not to declare a service other than in respect of the service provider and the person who applied for the declaration recommendation.<sup>29</sup> The Commission submits that the Tribunal's power to permit other persons to participate in the review as interveners is found in section 109(2).
30. Finally in relation to section 109(2), it is respectfully submitted that, from the terms of the directions made by the Tribunal on 8 April 2021, it appears that the Tribunal and the parties are proceeding upon the basis that the provisions in Division 2 of Part IX of the CCA apply, at least insofar as reference is made in paragraph 23 of those directions to the power of the Tribunal to direct that part of the hearing take place in private pursuant to section 106(2) of the CCA.

#### *Commission's interest in the application for review*

31. In *Fortescue Metals*, Goldberg J stated that, before leave is granted, the applicant should demonstrate some connection with the subject matter of the application for review.<sup>30</sup> Goldberg J did not consider that it was necessary for an applicant for intervention to "go as far as to show that it may be affected in some way", but that it is necessary to "show that some interest touching and concerning it can be demonstrated".<sup>31</sup>
32. The Commission should be permitted to intervene in the review proceedings because it has a unique contribution to make to the review. It is the repository of many of the powers and responsibilities conferred by the legislative scheme under the general access regime in Part IIIA

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<sup>28</sup> See also *Competition and Consumer Regulations 2010* (Cth), regulation 24(2).

<sup>29</sup> *Competition and Consumer Regulations 2010* (Cth), regulation 22B(2) provides that in a review under section 44K of the Act of a decision not to declare a service, the person who applied for the declaration recommendation may participate in the review, in addition to the provider.

<sup>30</sup> *Re Fortescue Metals Group Limited* (2006) 203 FLR 28, [43] (Goldberg J).

<sup>31</sup> *Re by Fortescue Metals Group Limited* (2006) 203 FLR 28, [43] (Goldberg J).

and the telecommunications access regime in Part XIC. As a consequence of its statutory role, the Commission has significant experience, knowledge and expertise not possessed by any party appearing in the review proceeding. The Proudfoot affidavit at [17]–[18] deposes that elements of criteria (a) and (d) are relevant to the matters which the ACCC is required to take into account in making arbitration determinations and decisions on access contracts and undertakings under Part IIIA.

33. The Commission recognises that the Tribunal is a specialist body, with members of the Tribunal appointed pursuant to section 31(2) of the CCA by virtue of their knowledge of, or experience in, relevant fields. It is within this framework that the Commission submits that it can assist those members by making submissions by reference to considerations that are relevant to the Tribunal's decision, but which the parties to the review proceeding might not fully address. This is particularly so in relation to broader considerations such as those contained in the objects of Part IIIA appearing in section 44AA, and in relation to the public interest criterion.
34. The concerns of Part IIIA of the CCA include the concepts of competition, markets, efficiency and, relatedly, the public interest. In making its decision whether to affirm the Treasurer's decision, or to set aside the Treasurer's decision and declare the Service, the Tribunal's focus will ultimately be upon the declaration criteria in light of the broader objects of Part IIIA. The Commission is well placed to make submissions regarding the public interest. The objects of Part IIIA also include to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry and the Commission is well placed in relation to this issue.
35. As is evident from the submissions made by the Commission to the NCC described above, the Commission has a contribution to make in respect of issues of the proper construction and application of criteria (a) and (d). The Commission seeks to make submissions regarding the matters the subject of its previous submissions to the NCC, without duplicating the submissions of the existing parties to this proceeding.<sup>32</sup>

#### *Alternative bases for intervening*

36. Against the possibility that the Tribunal determines that section 109(2) does not apply to review proceedings under section 44K, the Commission alternatively makes its application to intervene pursuant to section 44K(5). Section 44K(5) provides: "For the purposes of the review, the Tribunal has the same powers as the designated Minister". In *Fortescue Metals*, Goldberg J at [23]–[26] described this alternative basis in the following way:

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<sup>32</sup> Proudfoot affidavit, [32].

The re-consideration of the matter by the Tribunal, possessing the same powers as the designated Minister, is a re-consideration of the decision, having received a declaration recommendation from the Council, whether to declare or not to declare the service.

When the Minister received the declaration recommendation from the Council and pursuant to s 44H(1) he had to decide, in the light of that recommendation, whether to declare the service or not to declare the service, the Minister was obliged to consider whose rights or interests might be affected by his decision one way or the other and then to give a person whose rights or interests might be so affected the opportunity to make submissions to him. He was also entitled to consider whether there was any person who may be able to provide assistance to the Minister in respect of his decision and, in particular in respect of the matters specified in s 44H(1).

There is considerable learning on the issues of procedural fairness and the obligation of an administrative decision-maker to give a person who may be affected by the decision a right to be heard...the Minister had to turn his mind to a consideration of whose interests might be affected by his ...decision and who may be able to assist him in respect of his decision-making process.

The Tribunal has to give consideration to the same issues as are addressed by the Minister as well as exercising the same powers as the Minister. The Tribunal must therefore ask whose rights or interests may be affected by its decision and who may be able to assist it in its decision-making process. If a person whose rights or interests may be affected by the Tribunal's decision wishes to make submissions to the Tribunal, ordinarily he should be allowed to do so, so long as he can demonstrate a right or interest which may be affected.

37. Since that decision, the particular material to be considered in the review process has been expressly confined by the introduction of section 44ZZOAA. Nonetheless, the Tribunal's review remains a reconsideration of the matter and, although there are limits on the information to which the Tribunal may have regard, there remains the capacity for the Tribunal to be assisted by submissions in connection with that information as well as the ability for the Tribunal to request information that it considers reasonable and appropriate for the purposes of making its decision.<sup>33</sup> The Commission therefore submits that, if necessary, section 44K(5) provides an alternative basis for permitting intervention.
38. Alternatively, if the Tribunal does not consider that either section 109(2) or section 44K(5) provides a basis for intervention, then the Commission submits that the Tribunal has an implied power to permit the Commission to intervene, as part of its implied powers in respect of matters of procedure in proceedings before the Tribunal. The Tribunal has the powers which are necessary to enable it to act effectively within its jurisdiction, and those powers are derived by implication from the statutory provisions which confer jurisdiction upon it.<sup>34</sup> To the extent that the Tribunal may not have express powers in relation to various necessary matters of procedure, such as those referred to in paragraph 28 above, then it must have implied powers, or otherwise there would be a vacuum. It is clear from the terms of at least section 44K(6B) and section 44ZZOAAA(6), both referred to earlier,<sup>35</sup> that, in the absence of an express power, the

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<sup>33</sup> CCA, section 44ZZOAAA(4).

<sup>34</sup> See *John Fairfax & Sons Ltd v. Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476 per McHugh JA; *NSW TAFE Commission v. Fines* (1993) 32 NSWLR 385 at 394-5 per Handley JA; see also *Grassby v. The Queen* (1989) 168 CLR 1 at 16-7 per Dawson J; *Pelechowski v. Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [50]-[51] per Gaudron, Gummow and Callinan JJ; *Webb v. Port Stephens Council* [2020] NSWCATAP 152 at [65]; *The Sands Gold Coast Pty Ltd v. The Body Corporate for the Sands* [2020] QCATA 105 at [25].

<sup>35</sup> See paragraph 27 above.

Tribunal must have an implied power to make a person a party to a review proceeding under section 44K.

**E. Conclusion and orders sought**

39. For the reasons set out above, the Commission seeks orders that it is permitted to intervene in the proceedings, with such intervention principally comprising the Commission:

39.1 filing and serving an outline of submissions pursuant to paragraph 15 of the Tribunal's directions of 8 April 2021; and

39.2 appearing at the hearing of the application for review and making oral submissions in support of its written submissions.

40. A copy of the orders sought by the Commission is attached as Annexure A to these submissions.

DATED: 21 April 2021

**S H PARMENTER**

**C DERMODY**

**DLA PIPER AUSTRALIA**  
Solicitors for the Australian Competition  
and Consumer Commission

## 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 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 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 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.