

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



A handwritten signature in blue ink, appearing to be "R. Y.", is written below the seal.

REGISTRAR

Dated: 22/09/2021 3:38 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 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

REPLY SUBMISSIONS OF PORT OF NEWCASTLE OPERATIONS PTY LTD
ON THE QUESTION OF POWER UNDER SECTION 44KB(1)

1. These reply submissions by PNO address the argument by NSWMC that the Tribunal lacks the power to order costs against NSWMC because the Tribunal's power under s 44KB(1) of the *Competition and Consumer Act 2010* (Cth) is expressly confined to costs orders against "a person who has been made a party to proceedings" (NSWMC submissions (NS) [31]; emphasis in original). NSWMC submits that this power does not extend to NSWMC, as the applicant. The Tribunal should reject this argument for the following reasons.
2. Section 44KB(1) refers to a person who has been made a party to proceedings. NSWMC does not appear to dispute that an applicant is a party, but says they have not been made a party. This is a distinction without a difference. By commencing proceedings for review under s 44K, an applicant is made a party to the proceedings. In this respect, the position is similar to other types of proceedings: by commencing proceedings, a person makes themselves a party (whether as a plaintiff or an applicant). NSWMC appears to contend that the Tribunal's costs power is reserved for cases where the Tribunal has made someone a party, but s 44KB(1) does not refer to a party who has been made a party to proceedings by the Tribunal. Whether Parliament could have adopted a simpler expression to achieve the same meaning is beside the point: cf NS [33].
3. Legislative context also supports the conclusion that the applicant is a person who has been made a party to the proceedings: cf NS [32]. NSWMC refers to s 44K(6B)(a), which states that "the Tribunal must give a copy of the notice to: (i) the person who applied for review; and (ii) the provider of the service; and (iii) the person who applied for the declaration recommendation; and (iv) any other person who has been made a party to the proceedings for review by the Tribunal". NSWMC says that this section draws a distinction between an applicant on the one hand, and, on the other, a person who has been made a party to the proceedings for review by the Tribunal (NS [32]). However, the more natural construction of this provision is that each of the persons listed at (i) to (iv) has been made a party to the proceedings. The applicant for review, the provider of the service, and the person who applied for the declaration are made parties by virtue of having commenced the proceedings, or their direct interest in the subject matter of the proceedings. Sub-section (iv) reflects the Tribunal's power to make another person, other than the persons at (i) to (iii), a party to the proceedings: *Application by New South Wales Mineral Council* [2021] ACompT 2, [30].

4. NSWMC's construction of s 44KB(1) is not only contrary to the text and context of the provision, it is also inconsistent with the object of the provision, as revealed by the relevant legislative materials. As explained in PNO's costs submissions in chief (at [15]), s 44KB was enacted with applicants in mind. As the Explanatory Memorandum to the *Trade Practices Amendment (Infrastructure Access) Bill 2009* stated (at [5.8]): "Requiring unsuccessful applicants to pay costs should reduce incentives for delaying tactics, frivolous review applications or other inappropriate behaviour" (emphasis added). On NSWMC's construction, however, the Tribunal would be unable to order costs against an applicant for review, and instead would be confined to ordering costs against a person who has been given leave to participate in the review, but who is likely to have played a lesser role than the applicant. There is no apparent rationale for confining the Tribunal's power in this way. Furthermore, NSWMC's construction of the phrase 'a person who has been made a party to the proceedings' would also confine the range of people able to recover their costs, again without any apparent rationale. These restrictions find no support in the legislative materials; on the contrary, the table at pages 73-74 of the Explanatory Memorandum, entitled "Comparison of key features of new law and current law", confirms the legislature's intention that s 44KB "allows the Tribunal to order that a party to the proceedings of a review of a declaration decision under section 44K pay all or part of the costs of another party to the review" (emphasis added).
5. NSWMC's construction of "person who has been made a party" not only renders s 44KB(1) ineffective, it is also problematic when applied to other provisions that use the same statutory wording. For example, s 44KA(2) confers power on the Tribunal to stay the operation of a declaration "on application by a person who has been made a party to the proceedings". On NSWMC's interpretation of this phrase, a stay of a declaration decision could not be sought by the service provider (the person most directly affected by the declaration of a service) and would instead be confined to intervenors in the review proceedings. This is a further indication that the phrase "a person who has been made a party to the proceedings" should not be interpreted in the manner for which NSWMC contends.
6. For the reasons set out above, the Tribunal should construe s 44KB(1) as conferring power to order costs against NSWMC as the applicant. If, however, the Tribunal accepts NSWMC's construction, PNO would seek an order making NSWMC a party to the proceedings for the purposes of ordering costs against it.

DATED: 22 September 2021

Declan Roche
Peter Strickland

Counsel for Port of Newcastle Operations Pty Ltd