

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: 07/06/2021 1:15 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)

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

**SUBMISSIONS OF NEW SOUTH WALES MINERALS COUNCIL IN RELATION
TO PROPOSED NOTICE**

A. INTRODUCTION

1. The applicant, New South Wales Minerals Council (**NSWMC**), makes an application for the issue of a notice pursuant to s 44K(6A) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) directing the National Competition Council (**NCC**) to provide five documents to the Tribunal (**relevant documents**).¹
2. This application arises in unusual circumstances. As explained below, the relevant documents were before the Minister but the Minister's solicitors have advised that the Minister did not take them into account in making his decision.
3. The relevant documents fall into two categories.
 - (a) *First*, the Deeds and 'open access arrangements' offered by PNO. These documents formed an important part of the Minister's analysis.² The documents are summarised in the NCC's Final Recommendation.³ However, the summary is not comprehensive. NSWMC wishes to refer to the full terms and effect of the documents in order to gainsay the Minister's analysis.⁴
 - (b) *Secondly*, two reports written by Synergies dated 8 August 2018 and July 2020. The first report contains facts and economic analysis as to competition in the tenements market.⁵ These matters were ignored by the Minister. The second report builds on the first report and contains further economic analysis.⁶
4. Notwithstanding that they were before the Minister, the relevant documents are not contained in the information provided by the Minister to the Tribunal and the parties in response to paragraph 1 of the Tribunal's Directions of 8 April 2021 (**Decision Information**). NSWMC submits they should be – otherwise, the Minister has failed to take into account relevant information in making his decision not to declare the Service.

¹ The relevant documents are listed in the proposed notice.

² Minister's Decision, page 4. NCC's Final Recommendation at [1.14], [1.15], [1.26], [7.81] and [7.87].

³ NCC's Final Recommendation at [5.23]-[5.26].

⁴ NSWMC's Submissions dated 2 June 2021 at [108]-[110].

⁵ NSWMC's Submissions dated 2 June 2021 at [59]-[60]. See also at [69], [72], [73], [89], [91] and [114].

⁶ NSWMC's Submissions dated 2 June 2021 at [63], [64], [81], [84] and [95].

5. However, in order to ensure that is no doubt that the Tribunal can have regard to them in accordance with s 44K(4) (see s 44ZZOAA(a)(iv)), and for the reasons outlined below, NSWMC requests the Tribunal issue a notice to the NCC under s 44(6A) to provide the relevant documents.

B. BACKGROUND

6. Paragraph 1 of the Tribunal’s Directions of 8 April 2021 required the Minister to provide the Tribunal with the Decision Information being a copy of “all of the information that he took into account in connection with the making of the decision that is the subject of this application by 21 April 2021”.
7. The Minister’s solicitors provided material and an accompanying index to the Tribunal, which was subsequently provided to the parties on 22 April 2021.
8. The material provided by the Minister’s solicitors did not contain a number of documents which were apparently before the Minister.
9. The NSMC sought clarity in this regard from both the Minister’s solicitors and the NCC.⁷
10. The NCC’s position in regard to the provision of information to the Minister is stated in its August 2013 policy “Council recommendations under the Competition and Consumer Act and the National Gas Law: Provision of information to decision-making Ministers”:⁸

Approach to provision of Information to the Tribunal

...

[1.16] The constraints on the parties’ ability to introduce new material into Tribunal proceedings, particularly in Part IIIA matters, raises the prospect of disputes arising as to what was and was not considered by the Minister or Council and therefore what can be considered by the Tribunal on review

*[1.17] In the Council’s view it is important that the Tribunal is able to consider the same range of material the Council did in making its recommendation to the Minister, as well as other material considered by the Minister. The Council therefore **intends on all occasions** [our emphasis] to provide decision-making Ministers with the submissions it has considered in making a recommendation at the time it provides its final recommendation on applications made under Part IIIA...The Council also considers that the Tribunal ought to be provided with any references and information obtained by Council secretariat staff, where material to the recommendation. These will be appended to the Council’s recommendation or provided these [sic] to the relevant Minister along with the submissions, as appropriate. The intention is to put Ministers in a position to be able to provide all the material necessary to enable the Tribunal to make an informed decision on review.*

11. In response to a letter from NSWMC’s solicitors, on 4 June 2021, the NCC said that:⁹

⁷ Poddar Affidavit at [4], [6] and [7] (Annexures DP-1, DP-3 and DP-4).

⁸ Poddar Affidavit at [7(a)] (Annexure DP-5).

⁹ Poddar Affidavit at [9] (Annexure DP-7).

On Friday 18 December 2020, the National Competition Council (NCC) provided by email to Treasury staff, including the Treasury Department Liaison Officer for the Commonwealth Treasurer, the Hon Josh Frydenberg:

- an electronic copy of the NCC President’s letter to the Treasurer dated 18 December 2020
- the NCC’s Recommendation of the same date, and
- a link to the hyperlinked electronic index to Appendix A.

12. As such, it is apparent that the relevant documents were before the Minister. In respect of the contractual documents and the Synergies report dated July 2020, they were sent via the hyperlink electronic index in the email from the NCC on 18 December 2020. In addition, those documents were contained in the hyperlink in footnote 11 of the NCC Final Recommendation. The Synergies report dated 8 August 2018 was contained in the hyperlink in footnote 44 of the NCC’s Final Recommendation.
13. In response to a letter from NSWMC’s solicitors, the Minister’s solicitors advised that the information considered by the Ministers is contained in the documents provided on 22 April 2021.¹⁰ However, that material does not include the relevant documents.

C. NOTICE

14. Section 44K(6) of the CCA empowers the presiding member of the Tribunal to “require the Council to give assistance for the purposes of the review...”. The provision confers an “express power to request any further information, assistance or report from the NCC”.¹¹ Section 44K(6A) states that sub-s (6) includes “by written notice, requir[ing] the Council to give information ... of a kind specified in the notice”.
15. In *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, the High Court has emphasised that what is required of the Tribunal under s 44K(4) is “reviewing what the original decision maker decided and doing that by reference to *the material that was placed before the original decision maker*”.¹² The Tribunal’s task is “to review the Minister’s decision by reconsidering those decisions on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the tribunal by the NCC in response to a request made under s 44K(6)”.¹³
16. In addition, it was stated by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ:

*65. As has already been noted, the Tribunal treated its task as being to decide afresh on the new body of evidence and material placed before it whether the services should be declared. That was not its task. Its task was to review the Minister's decisions by reconsidering those decisions **on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the NCC in response to a request made under s 44K(6).** The Tribunal*

¹⁰ Poddar Affidavit at [5] (Annexure DP-2).

¹¹ *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* at [46]; *Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* [2013] ACompT 2 at [45], [127] (*Pilbara Tribunal Remitter*).

¹² *Pilbara* at [60] (emphasis added).

¹³ *Pilbara* at [65].

not having performed the task required by the Act, the Federal Court should have granted Fortescue's applications for certiorari to quash the Tribunal's decision.
(emphasis added)

17. On this basis, the Tribunal has acknowledged that its review is based on “in the first place be that *before* the Minister [which] may be added to by the proper use of s 44K(6)”.¹⁴ The power under s 44K(6) “extends so far as is necessary to facilitate a proper re-consideration of the Minister’s decision”.¹⁵

D. SUBMISSIONS

18. NSWMC submits that provision of the relevant documents by the NCC pursuant to a notice from the Tribunal under s 44K(6A) is necessary to facilitate a proper re-consideration of the Minister’s decision in this matter.
19. *First*, as a matter of process, it will overcome the apparent uncertainty as to whether the Tribunal can have regard to the relevant documents, even though they were before the Minister in respect of the decision.
20. Whilst the Tribunal’s re-consideration of the matter is based on the material that was *before* the Minister, see s 44ZZOAA(a)(i), the Tribunal can only have regard to the information that the Minister *took into account* in connection with the making of the decision: see s 44ZZOAAA(3)(c).
21. That statutory language presumably reflects an assumption that the designated Minister will *take into account* all of the information *before* him or her in making the decision, consistently with administrative law principles.¹⁶
22. However, in the unusual circumstance of this case, based on what has been said by the Minister’s solicitors, there is a difference between what was before the Minister and what was taken into account. It is a proper exercise of the power in s 44K(6A) to overcome that uncertainty and complete the record before the Tribunal of the material before the designated Minister.
23. *Secondly*, the proposed notice is limited to the relevant documents. The documents before the Minister also extended to NSWMC’s application and various submissions from parties to the NCC, which could also be obtained to complete the record. However, as a practical matter, NSWMC has confined this application to the relevant documents which contain important probative information rather than mere submission.
24. *Thirdly*, and relatedly, NSWMC submits that the relevant documents contain important information as to the Tribunal’s re-consideration of the matter: see s 44K(4). In this

¹⁴ *Pilbara Tribunal Remitter* at [84] (emphasis added).

¹⁵ *Pilbara Tribunal Remitter* at [99], where the Tribunal also noted s 44K(6) should not be used “beyond obtaining the Minister’s Material”. See also *Pilbara* at [153], where Heydon J suggested that the power might be exercised to complete “the record”.

¹⁶ See, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(2)(b).

regard, NSWMC refers to its submissions dated 2 June 2021.¹⁷ In short, relevantly for present purposes, NSWMC submits as follows.

25. The Synergies reports provide important market facts and economic analysis as to competition in the tenements market. The Minister's competition analysis in this regard was entirely theoretical and ignored the facts.¹⁸ That is because the Minister took the approach that, if declaration would not promote a material increase in competition in the coal export market, declaration would be unlikely to promote a material increase in the tenements market.¹⁹ This approach is not justified by criterion (a) or the facts.²⁰
26. Further, the Minister asserted that "*the broader coal tenements market is and is likely to remain effectively competitive without and without declaration*".²¹ The Minister based this finding on the NCC's view at [7.157]. But that does not withstand scrutiny. The NCC relied on the number of licence holders and the NSW government reforms commenced in 2014. However, those matters do not make good the point. They fail to grapple with any of the Synergies analysis about the extent of competition in the tenements market.²²
27. As Synergies explain in the relevant documents, there are concerns about the extent of competition in the tenements market – that is, despite the number of licence holders, and the NSW reforms brought about those concerns, the extent of competition in the tenements market (evidenced by investment) has substantially declined.²³
28. The Deeds and 'open access arrangements' offered by PNO contain unreasonable terms and conditions. In particular, relevantly for present purposes, the dispute resolution terms and the purported application of the 'pricing principles'.²⁴ In this respect, NSWMC dispute the NCC's assertion that the documents "include elements consistent with those the ACCC must take into account when making an arbitration determination under Part IIIA of the CCA"²⁵ and "non-discriminatory pricing provisions".²⁶
29. NSWMC also disputes the NCC's characterisation of the arrangements as an 'open access' regime.²⁷
30. The analysis of those matters cannot properly occur without reference to the documents.

Dated: 7 June 2021

**N.P. De Young QC | D. Tynan
Counsel for the Applicant**

¹⁷ NSWMC's Submissions dated 2 June 2021 at [51], [58]-[60], [63], [72], [95] and [104]-[110].

¹⁸ NSWMC's Submissions dated 2 June 2021 at [51].

¹⁹ Treasurer's Decision, pages 5-6.

²⁰ NSWMC's Submissions dated 2 June 2021 at [59].

²¹ Treasurer's Decision, page 6.

²² NSWMC's Submissions dated 2 June 2021 at [67].

²³ Synergies Report dated 8 August 2018, page 63-64.

²⁴ NSWMC's Submissions dated 2 June 2021 at [104], [108]-[109].

²⁵ NCC Final Recommendation at [5.24(g)].

²⁶ NCC Final Recommendation at [5.26].

²⁷ NSWMC's Submissions dated 2 June 2021 at [110].