

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



REGISTRAR

Dated: 01/07/2021 9:30 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.



Application by Port of Newcastle Operations Pty Limited – ACT 2 of 2020

Submissions of New South Wales Minerals Council regarding application for confidentiality orders

Introduction

1. These submissions are filed pursuant to the Tribunal's Practice Direction and address NSWMC's claim for confidentiality in respect of the commercially sensitive and confidential material contained in the shaded parts of the affidavits of Keiron Rochester (**Rochester Affidavit**).
2. The proposed confidentiality orders allow PNO's external legal counsel and the ACCC to view the confidential version of the Rochester Affidavit. The proposed orders are in substantially the same terms as those made by the Tribunal on 7 May 2021 in respect of the affidavits of Mr Dodd and Mr Lewis, and are sought on substantially the same basis.
3. Mr Rochester is the General Manager of **Whitehaven** Coal Mining Limited, a member of NSWMC. Mr Rochester has had discussions with representatives from PNO in relation to PNO's Producer Deed.

Reasons for confidentiality orders

4. It can readily be inferred that the Rochester Affidavit contains highly sensitive commercial information which would be of significant value to PNO and disclosure of which would damage the competitive position of Whitehaven.¹ See, for example, paragraph [12], which contains Whitehaven's internal deliberations and positions in respect of the Producer Deed.
5. In this respect, it is well-established that the existence of commercial-in-confidence or commercially sensitive information is a sufficient basis for the grant of a confidentiality order.² A further basis for making confidentiality orders is where litigation might become a forum for sharing trade-sensitive documents.³
6. Both these bases are met in the present case, and it would not be in the interests of the administration of justice for (i) Whitehaven's internal deliberations with respect to the Producer Deed to be made known to PNO (especially in light of the current position, which is that Whitehaven seeks to collectively bargain the terms of the Producer Deed in the future), or (ii) Whitehaven's confidential communications with PNO to be made known to the public (which would include trade rivals).
7. Further, there is a risk that disclosure of the confidential aspects of the Rochester Affidavit will jeopardise the fabric of its ongoing commercial dealings with PNO.

¹ *Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 at [9], citing *Australian Competition and Consumer Commission v Origin Energy Electricity Ltd* [2015] FCA 278 at [148]. See also *Yara Australia Pty Ltd v Burrup Holdings Limited (No 2)* [2010] FCA 1304 at [25].

² *Clark v Digital Wallet Pty Ltd* [2020] FCA 877 at [21], citing *Hogan* at [38]-[39]; *Rinehart v Welker* [2011] NSWCA 403 at [37].

³ *Australian Competition and Consumer Commission v Cement Australia Pty Ltd (No 2)* [2010] FCA 1082 at [13], citing *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

8. NSWMC therefore requests the Tribunal to make the confidentiality orders proposed.

Dated: 29 June 2021

Clifford Chance LLP