

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: 5/05/2021 4:49 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.



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

Outline of submissions of New South Wales Minerals Council regarding application for notice and confidentiality orders

A. Introduction

1. These submissions are filed pursuant to the Tribunal's request of 27 April 2021 and address:
 - (a) the application by New South Wales Minerals Council (**NSWMC**) made pursuant to the **Notice** filed with the Tribunal on 22 April 2021, for the Tribunal to request the documents identified in the **Schedule** to the Notice, pursuant to ss 102(1) and 90(6)(c) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), and reg 22(1)(a) of the *Competition and Consumer Regulations 2010* (Cth) (**CCR**); and
 - (b) NSWMC's claim for confidentiality in respect of the commercially sensitive and confidential material contained in the shaded parts of the affidavits of Brett Farley Lewis sworn 30 April 2021 (**Lewis Affidavit**) and Michael Ryan Phillip Dodd (**Dodd Affidavit**),¹ pursuant to the Tribunal's Practice Direction.
2. The application for the Notice follows an exchange of correspondence between the parties as annexed to the Affidavit of Dave Poddar affirmed 22 April 2021.
3. NSWMC also filed three separate sets of proposed orders relating to confidentiality, disclosure, and timetable. The first two are now the subject of agreed orders, which have been filed with the Tribunal. The latter is not pressed by NSWMC.

B. The Tribunal's powers

4. This proceeding involves an application for review of an authorisation by the Australian Competition and Consumer Commission (**Commission**) under Division 1 of Part VII of the CCA. The task of the Tribunal is to review, by way of rehearing, the decision of the Commission. It is open to the parties to put material before the Tribunal which was not before the Commission: *Re Queensland Timber Board* (1975) 5 ALR 501.
5. Section 102(1) of the CCA permits the Tribunal, for the purposes of a review of a determination made under Div 1 of Pt VII, to "...perform all the functions and exercise all the powers of the Commission."²
6. Section 90(6)(c) of the CCA empowers the Commission to give a person a written notice requesting the applicant to give particular information relevant to the application within a specified period. The provision does not impose any restrictions on how the Commission may exercise its power to give a written notice.³

¹ The Dodd Affidavit was filed before it was able to be affirmed. NSWMC expects to be in a position to file an affirmed version on 6 May 2021.

² See *Application by Co-operative Bulk Handling Limited (No 3)* [2013] ACompT 3 at [85].

³ Compare, eg, *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [101]-[107], where s 44ZP required the Tribunal to consider specified information.

7. Regulation 22(1)(a) of the CCR also empowers the Tribunal to give directions “...securing... by the production of documents ... all material facts and considerations.”
8. NSWMC submits that the Tribunal has the power to issue the Notice and/or make directions for the provision by PNO of the documents sought in the Schedule.

C. Request for documents

9. On 15 March 2021, PNO filed the affidavit of Simon Byrnes affirmed 15 March 2021 (**Byrnes Affidavit**).
10. Mr Byrnes is the Chief Commercial Officer and General Counsel for PNO.
11. Mr Byrnes gives detailed evidence of the contents of conversations he had on behalf of PNO during bilateral negotiations with representatives of various coal producer members of NSWMC in relation to proposed pricing arrangements for the Navigation Service Charged (**NSC**) and the Wharfage Charge (**WC**) pursuant to the terms of PNO’s Producer Deed.
12. NSWMC seeks production of particular documents, identified in the Schedule to the Notice, referred to by Mr Byrnes in his affidavit or relied on by Mr Byrnes in support of the statements and conclusions he makes.

Relevance of the documents requested

Documents in Schedule 1(a)-(j)

13. The documents specified at paragraphs 1(a)-(j) of the Schedule are documents referred to directly by Mr Byrnes in support of various contentions and conclusions he makes in giving evidence for PNO.
14. The documents include ‘PNO’s business records’, ‘PNO’s records of the total volume of coal exported through the Port’, reports provided by Kpler and other related data.
15. In its Statement of Facts, Issues and Contentions (**SOFIC**) at [59], PNO contends that the authorised conduct is unlikely to enhance the competitiveness of coal exported from the Hunter Valley given that: (a) coal producers in the Hunter Valley sell coal in a global, competitive market for thermal coal; (b) the charge levied by PNO on coal vessels for navigation services represents a very small proportion of the global thermal coal price per MT; (c) without the conduct, coal producers have certainty about the Port’s charges for navigation services; and (d) coal producers face much greater uncertainty from other sources, including, principally, fluctuations in the price of coal.
16. Paragraphs [15]-[24] of the Byrnes Affidavit are relevant to propositions (a) and (d) above. Those propositions are, in turn, directly relevant to PNO’s contentions expressed at SOFIC [58]-[59] that the authorised conduct is not likely to result in any public benefit.
17. Paragraphs [25]-[28] of the Byrnes Affidavit are relevant to proposition (b) above. Again, that proposition is directly relevant to PNO’s contentions in respect of public

benefit. PNO relies on the information and documents referred to at paragraphs [25]-[28] of the Byrnes Affidavit in support of those contentions.

18. Paragraphs [29]-[32] of the Byrnes Affidavit are relevant to propositions (a) and (d) above, for the same reasons. NSWMC seeks production of the documents specified in respect of these paragraphs.

Documents in Schedule 1(k)

19. Pursuant to paragraph 1(k) of the Schedule, NSWMC seeks documents recording the negotiations referred to in the Byrnes Affidavit between PNO and various coal producer representatives in relation to pricing arrangements in PNO's Producer Deed. NSWMC also seeks production of relevant board minutes and certain reports provided to the board of PNO in relation to the negotiations identified in the Byrnes Affidavit.
20. In its SOFIC at [45]-[48], PNO contends that bilateral negotiations between PNO and Port users promote efficient outcomes over and above collective negotiations.
21. In support of this proposition, PNO relies on the content of its negotiations with representatives of various coal producers, including statements purportedly made by those representatives (see, for example, Byrnes Affidavit at [38] (confidential)).
22. PNO has not produced any contemporaneous records of the conversations referred to, or any documents otherwise substantiating Mr Byrnes' recollection and characterisation of these conversations. In many cases, the negotiations referred to by Mr Byrnes took place around 18 months ago.
23. NSWMC also seeks production of relevant board minutes and certain reports provided to the board of PNO in relation to the negotiations identified in the Byrnes Affidavit.
24. The terms and conditions offered to coal producers by PNO pursuant to the Producer Deed and the parties' negotiations in respect of those terms and conditions are matters squarely in issue in this proceeding. The documents sought are directly relevant to these matters.
25. The documents sought (if they exist) will also assist the Tribunal to assess the reliability and veracity of the evidence given by Mr Byrnes, in particular, the extent to which bilateral negotiations between PNO and coal producers have been of any utility.

Documents in Schedule 1(l)

26. At [53] of his affidavit, Mr Byrnes refers to the provision of capital expenditure forecasts to coal producers as part of the negotiations with coal producers.
27. Pursuant to paragraph 1(l) of the Schedule, NSWMC seeks production of PNO's board minutes and the reports and materials provided to the board of PNO in relation to capital expenditure forecasts and forward capital expenditure plans prepared since the Port was privatised.
28. These documents are relevant to assessing PNO's likely future capital expenditure and, critically, the imposition of charges on coal producers to recover such expenditure. The Producer Deed relevantly contains a number of price 're-openers' which allow PNO at

its sole discretion to adjust its pricing terms including in respect of capital expenditure. It is also limited to a 10-year period, with renewal potentially on different terms. Mr Byrnes' evidence relates to current port charges but does not address the substantial future costs contemplated in the development of the Port over the next 10 years and beyond.

Production of the documents is not burdensome

29. Requiring PNO to produce the documents sought in the Schedule to the Notice should not be burdensome.
30. As noted above, each of the documents NSWMC seeks are referred to or relied on by Mr Byrnes in his affidavit. The documents therefore should be readily available as part of PNO's business records. Mr Byrnes, on behalf of PNO, expressly refers to having inspected PNO's business records and having reviewed the Kpler reports and analyses of the PNO Business Intelligence department. The evidence was affirmed recently, and the documents ought to be readily identifiable and easily to hand.
31. The scope of the documents sought has been identified with particularity based on the contents of Mr Byrnes' affidavit.

D. Confidentiality

32. NSWMC seeks confidentiality orders in respect of the Lewis Affidavit and the Dodd Affidavit, in the form filed by NSWMC together with these submissions on 5 May 2021.
33. The terms of the proposed confidentiality orders allow PNO's external legal counsel to view the confidential versions of the Lewis and Dodd Affidavits.

Lewis and Dodd Affidavits

34. Mr Lewis is the Managing Director and Chief Executive Officer of Bloomfield Collieries Pty Ltd (**Bloomfield**), a member of NSWMC. Mr Lewis has had discussions with representatives from PNO in relation to PNO's port charges.
35. Mr Dodd is the General Manager of Infrastructure at Yancoal Australia Ltd (**Yancoal**), a member of NSWMC. Mr Dodd has also had discussions with representatives from PNO in relation to PNO's port charges.

Reasons for confidentiality orders

36. 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.⁴
37. It can readily be inferred that the Lewis and Dodd Affidavits contain highly sensitive commercial information which would be of significant value to PNO and/or coal producer trade rivals, such that any disclosure would be prejudicial to Bloomfield and

⁴ *Clark v Digital Wallet Pty Ltd* [2020] FCA 877 at [21], citing *Hogan* at [38]-[39]; *Rinehart v Welker* [2011] NSWCA 403 at [37].

Yancoal.⁵ PNO's representatives, as the other side of the commercial negotiations in respect of the Producer Deed, should not be able to access their customers' internal deliberations and positions in respect of that deed.

38. In the case of documents containing information relating to trade rivalry, including as regards upstream or downstream markets and the market in issue, litigation ought not to become a forum for sharing trade-sensitive documents.⁶ Doing otherwise would not be in the interests of the administration of justice.
39. Further, there is a risk that disclosure of the confidential aspects of the Lewis and Dodd Affidavits will jeopardise the fabric of their ongoing commercial dealings with PNO.
40. Moreover, the Byrnes Affidavit (at [38] to [79]) demonstrates that PNO has a far more complete understanding and record of coal producer negotiations than NSWMC.
41. NSWMC requests the Tribunal to make the confidentiality orders proposed.

Dated: 5 May 2021

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⁵ *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].

⁶ *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.