AUSTRALIAN COMPETITION TRIBUNAL

Application by New South Wales Minerals Council (No 2) [2021] ACompT 3

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| Review of: | Decision of the Designated Minister under s 44H of the *Competition and Consumer Act* *2010* (Cth) not to declare services at the Port of Newcastle made on 16 February 2021 |
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| File number: | ACT 1 of 2021 |
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| Tribunal: | **JUSTICE O'Bryan (Deputy President)****DR D Abraham (Member)****Prof K Davis (Member)** |
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| Date of determination: | 16 June 2021  |
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| Date of publication of reasons: | 21 June 2021 |
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| Catchwords: | **TRADE PRACTICES** – application by the New South Wales Minerals Council for the Tribunal to issue a notice under s 44K(6A) or s 44ZZOAAA(5) seeking the production of specified documents – contention that the documents ought to have been produced to the Tribunal by the designated Minister under s 44ZZOAAA(3)(c) – relevance of contention – proper construction of s 44ZZOAAA(3)(c) – principles governing the exercise of the Tribunal’s powers under s 44K(6A) and s 44ZZOAAA(5) – unreasonable delay in making application – application granted in part |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 44CA, 44F, 44GC, 44H, 44HA, 44J, 44K, 44ZZOA, 44ZZOAA*Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)*Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) |
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| Cases cited: | *AB v Western Australia* (2011) 244 CLR 390 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384*Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520*K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309*Kirkman v Minister Administering the Crown Lands Act (No 2)* [2020] NSWSC 1494*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24*Minister for Immigration and Multicultural Affairs v Huynh* (2004) 139 FCR 505*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379*Polaris Coomera Pty Ltd v Minister for the Environment* [2021] FCA 254*Tickner v Bropho* (1993) 40 FCR 183*Tickner v Chapman* (1995) 57 FCR 451*Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 |
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| Date of hearing: | 15 June 2021 |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |
| 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  |

DIRECTIONS

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| TRIBUNAL: | JUSTICE O’BRYAN (Deputy President)DR D ABRAHAM (Member)PROF K DAVIS (Member) |
| DATE: | 16 June 2021  |

1. Pursuant to section 44K(6A) of the *Competition and Consumer Act 2010* (Cth), the Tribunal directs the National Competition Council (**NCC**) to provide the following documents to the Tribunal on or before 17 June 2021:
	1. the following documents located at the hyperlink https://ncc.gov.au/application/application-for-declaration-of-certain-services-in-relation-to-the-port-of-newcastle/1 at footnote 11 of the NCC’s Final Recommendation made on 18 December 2020:
2. Application – Annexure A;
3. Application – Annexure B; and
4. Application – Annexure C,

(**Pro Forma Long Term Pricing Deeds**).

1. Pursuant to section 44ZZOAAA(4) of the *Competition and Consumer Act 2010* (Cth), the Tribunal requests the Port of Newcastle Operations Pty Ltd (**PNO**) to provide to the Tribunal by 12 noon on Friday, 18 June 2021 any document that satisfies the following four criteria:
	1. the document was submitted to the NCC by PNO for the purposes of the NCC’s Final Recommendation made on 18 December 2020; and
	2. the document relates to any of the Pro Forma Long Term Pricing Deeds; and
	3. the document is relevant to an understanding of the operation of the Pro Forma Long Term Pricing Deeds or the extent to which PNO has entered into Pro Forma Long Term Pricing Deeds with Port users; and
	4. PNO wishes to rely on the document in the review.
2. The Tribunal will provide a copy of the documents referred to in directions 1 and 2 to the participants in the review and the NCC.
3. Volumes 4 and 5 of the Hearing Book filed by the New South Wales Minerals Council (**NSWMC**) are not part of the Hearing Book for the review.
4. PNO is to file and serve a supplementary volume of the Hearing Book containing the documents referred to in directions 1 and 2 by 4pm on Friday, 18 June 2021 which is in electronic form and:
	1. is produced in a text-recognised PDF format;
	2. is paginated sequentially throughout; and
	3. contains electronic bookmarks to each document in that volume.
5. NSWMC is to file and serve any revised outline of submissions by noon on Friday, 18 June 2021.
6. Direction 15 of the directions of the Tribunal made on 8 April 2021 be varied to require PNO to file and serve an outline of submissions not exceeding 20 pages by 12 noon on Sunday, 20 June 2021.
7. Direction 16 of the directions of the Tribunal made on 8 April 2021 be varied to require the NCC to file and serve an outline of submissions not exceeding 10 pages as soon as possible on Monday 21 June 2021, but no later than 4pm.

REASONS FOR DETERMINATION

O’BRYAN J:

## Introduction

1. In this proceeding, the New South Wales Minerals Council (**NSWMC**) has applied to the Tribunal under s 44K(2) of the *Competition and Consumer Act 2010* (Cth) (**Act**) for a review of the decision of the designated Minister, the Hon Josh Frydenberg MP, Treasurer of the Commonwealth of Australia (**Treasurer**), made under s 44H(1) of the Act on 16 February 2021 (**Treasurer’s Decision**), not to declare a service at the Port of Newcastle (**Port**) provided by Port of Newcastle Operations Pty Ltd (**PNO**). 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 (which, for convenience, we will refer to as the “**relevant services**”). The Treasurer’s Decision was consistent with the final recommendation of the National Competition Council (**NCC**) made under s 44F(1) of the Act on 18 December 2020 (**NCC’s Recommendation**).
2. On 8 April 2021, following a directions hearing on 7 April 2021, the Tribunal made directions timetabling the proceeding to a hearing commencing on 22 June 2021. Amongst other things, the directions required NSWMC to file a Hearing Book containing the documents to be relied upon at the hearing by 24 May 2021.
3. On 3 June 2021, NSWMC filed a Hearing Book which included all documents that NSWMC contended were before the NCC when it made its Recommendation. At the same time, NSWMC notified the Tribunal that the parties were in dispute as to the contents of the Hearing Book. NSWMC stated that, in light of the dispute, it intended to file an application under s 44K(6) and/or s 44ZZOAAA(5) of the Act for the Tribunal to issue a direction or request for the disputed documents to be provided to the Tribunal and to seek a half-day hearing for the determination of that application.
4. On 7 June 2021, NSWMC made an application for the Tribunal to issue a direction to the NCC under s 44K(6A) of the Act. The proposed direction was narrower than foreshadowed and was limited to provision of the following five documents to the Tribunal:
5. three pro forma deeds currently offered by PNO to Port users being the Port User Pro Forma Long Term Pricing Deed, the Producer Pro Forma Long Term Pricing Deed and the Vessel Agent Pro Forma Long Term Pricing Deed (**Pro Forma Pricing Deeds**);
6. a report by Synergies Economic Consulting dated July 2020 titled “Port of Newcastle Operations ability and incentive to exercise market power and its impact on competition in Newcastle catchment coal tenements market” (**Synergies 2020 Report**); and
7. a report by Synergies Economic Consulting dated 8 August 2018 titled “Port of Newcastle Assessment of revocation application by Port of Newcastle Operations” (**Synergies 2018 Report**).
8. NSWMC also filed written submissions supporting the application and an affidavit of David Poddar (a solicitor representing NSWMC) affirmed the same day.
9. On 11 June 2021, PNO filed written submissions opposing NSWMC’s application and an affidavit of Bruce Lloyd (a solicitor representing PNO) affirmed the same day.
10. On 14 June 2021, NSWMC filed reply submissions and a further affidavit of David Poddar affirmed the same day.
11. The Tribunal heard the application on 15 June 2021. At the hearing, the NCC took no position on NSWMC’s application. However, it made an informal application for the Tribunal to issue a direction under s 44K(6A) of the Act for the NCC to provide to the Tribunal a copy of the NCC’s recommendation dated 22 July 2019 in respect of the revocation of the declaration of the shipping channel services at the Port (**2019 Revocation Recommendation**).
12. On 16 June 2021, PNO filed and served a supplementary submission responding to certain new issues raised by NSWMC in its reply submissions.
13. On 16 June 2021, the Tribunal made directions, allowing NSWMC’s application in part and refusing the NCC’s informal application. The Tribunal determined to:
14. issue a notice pursuant to section 44K(6A) of the Act directing the NCC to provide to the Tribunal the Pro Forma Pricing Deeds; and
15. issue a notice pursuant to section 44ZZOAAA(5) of the Act requesting PNO to provide to the Tribunal any document that satisfies the following four criteria:
	1. the document was submitted to the NCC by PNO for the purposes of the NCC Recommendation; and
	2. the document relates to any of the Pro Forma Pricing Deeds; and
	3. the document is relevant to an understanding of the operation of the Pro Forma Pricing Deeds or the extent to which PNO has entered into Pro Forma Pricing Deeds with Port users; and
	4. PNO wishes to rely on the document in the review.
16. The Tribunal also made timetabling directions to enable the hearing to proceed on 22 June 2021.
17. These are the Tribunal’s reasons for making those determinations.

## Factual background

1. Shipping channel services at the Port were first declared by a decision of the Tribunal on 16 June 2016.
2. On 26 July 2019, the NCC recommended to the Treasurer that the 2016 declaration should be revoked (referred to earlier as the 2019 Revocation Recommendation). This recommendation followed amendments made to the declaration criteria in Division 2 of Part IIIA of the Act by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth). As the Treasurer did not publish a decision on the 2019 Revocation Recommendation within 60 days of receiving it, he was deemed by s 44J(7) of the Act to have made a decision that the declaration be revoked.
3. On 23 July 2020, NSWMC applied to the NCC under s 44F(1) of the Actasking the NCC to recommend that the relevant service at the Port provided by PNO be declared.
4. On 18 December 2020, the NCC provided its Recommendation to the Treasurer, recommending that the relevant service not be declared on the basis that the criteria in paragraphs 44CA(1)(a) and (d) of the Act had not been satisfied. In accordance with s 44GC, the Recommendation set out the NCC’s reasons for its recommendation. The reasons were substantial, comprising some 96 pages. Appendix A to the Recommendation contained a list titled “List of application materials and submissions”. The list included the application made by NSWMC and its annexures, the submissions made in response to the application and the submissions made in response to the NCC’s draft recommendation. The list also contained a significant number of previous declarations and determinations, reports, texts, Tribunal and court decisions and legislation which, we infer, were considered by the NCC in making the Recommendation. As would be expected, the Recommendation referred to and considered the submissions and information that had been provided to the NCC in connection with its statutory task to make a recommendation to the Minister. In footnotes, the Recommendation contained hyperlink references to the submissions and information that were considered. At the time that the NCC provided its Recommendation to the Treasurer, the NCC also provided a link to a hyperlinked electronic index to Appendix A to the Recommendation. The Tribunal infers that the hyperlinked index would have enabled the Treasurer to consider any of the documents listed in Appendix A if he elected to do so.
5. On 16 February 2021, the Treasurer decided under s 44H(1) of the Act not to declare the relevant service on the same basis, namely that the criteria in paragraphs 44CA(1)(a) and (d) had not been satisfied. In accordance with s 44HA, the Decision set out the Treasurer’s reasons for his decision. The Decision stated that:

In making this decision, I have had regard to:

• the objects of Part IIIA;

• the declaration criteria in section 44CA of the CCA; and

• the NCC's Recommendation provided to me on 18 December 2020.

I have considered the findings and reasoning in the NCC's Recommendation, including the NCC's consideration of the submissions it received, and I accept the conclusions reached by the NCC in the Recommendation. Having considered those conclusions, I have independently decided that I am not satisfied that either paragraph 44CA(l)(a) or (d) are met.

1. On 8 March 2021, NSWMC applied to the Tribunal under s 44K(2) of the Act for a review of the Treasurer’s Decision.
2. A directions hearing before the Presiding Member of the Tribunal was held on 7 April 2021. Following the directions hearing, on 8 April 2021, the Presiding Member gave directions timetabling the proceeding to a hearing to commence on 22 June 2021. Amongst other things, the directions required the following steps to be taken:
3. By 21 April 2021, the Treasurer was directed to provide the Tribunal with a copy of all of the information that he took into account in connection with the making of the Decision in accordance with s 44ZZOAAA(3)(c) of the Act.
4. By 14 May 2021, NSWMC was to serve a draft index for the Hearing Book listing all documents proposed to be relied upon at the hearing. By 19 May 2021, PNO and the NCC were each to serve a list of any additional documents to be included in the Hearing Book. By 24 May 2021, NSWMC was to file and serve a Hearing Book containing the documents proposed by the participants (NSWMC and PNO) and the NCC.
5. The participants and the NCC were to file and serve an outline of submissions by the following dates: NSWMC by 24 May 2021; PNO by 9 June 2021; and the NCC by 16 June 2021.
6. At the directions hearing, PNO proposed that the Tribunal issue a notice under s 44K(6A) of the Act directing the NCC to provide to the Tribunal all of the information and documents that the NCC took into account in connection with making its Recommendation. The Presiding Member indicated that:
7. the Tribunal was not persuaded that it should issue a notice as proposed by PNO having regard to the statutory review task of the Tribunal as explained by the High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (***Pilbara case***), which is to review the Treasurer’s Decision;
8. the Tribunal and the participants would shortly be informed of what the Treasurer took into account in making the Decision when the Treasurer provided that information under s 44ZZOAAA(3)(c), which would be expected to be the NCC Recommendation and may or may not include the information provided to the NCC in connection with its Recommendation;
9. the participants could consider at that time, in light of the Treasurer’s response, whether there was any further information sought to be produced before the Tribunal.
10. Ultimately, PNO did not press any application for such a notice to be issued by the Tribunal and NSWMC confirmed that it was not making an application for such a notice to be issued. The Presiding Member also indicated that the Tribunal would not set a time by which an application for the Tribunal to issue a notice under ss 44K(6A) or 44ZZOAAA(5) must be made, and the Tribunal would not assume that any such application would be made. However, the Presiding Member informed the parties that the later any such applications were made, the more difficulty there would be for the application.
11. On 21 April 2021, the Australian Government Solicitor (**AGS**), on behalf of the Treasurer, provided the Tribunal with a PDF file containing the information that the Treasurer took into account in connection with the making of the Decision together with an index, pursuant to s 44ZZOAAA(3)(c). On 22 April 2021, that information was provided by the Tribunal to the participants and the NCC. That information comprised the NCC Recommendation and various Departmental communications. The information did not include the submissions and information provided to the NCC in connection with its Recommendation (which were listed in Appendix A to the Recommendation).
12. On 17 May 2021, NSWMC (by its solicitors, Clifford Chance) wrote to the AGS asking whether the Treasurer took into account in connection with the making of the Decision the materials listed at Appendix A to the Recommendation and any of the materials referred to within the materials listed at Appendix A. NSWMC’s letter was sent more than 3 ½ weeks after the Minister had provided the Tribunal with a response under s 44ZZOAAA(3)(c) identifying the information that he had taken into account. The only explanation offered by NSWMC for the delay in making that enquiry was that it had expected, from previous reviews of declaration decisions, that the Minister would have taken into account all information that the NCC had considered in making the Recommendation. That is not a satisfactory explanation. The issue of what information was taken into account by the Minister in making the Decision, and any application to supplement that information in order to conduct the review, was the subject of consideration at the directions hearing on 7 April 2021. Further, the Minister’s response on 21 April 2021 made it clear that the Minister had taken into account the NCC’s Recommendation but not the underlying material considered by the NCC. In light of those matters, and having regard to the timetable that was set for the hearing of the review, the Tribunal considers that there was unreasonable delay in NSWMC addressing the issue of the information that it sought to have before the Tribunal on the review. A preferable approach would have been for NSWMC to approach the Tribunal and make the application that was ultimately made. Indeed, acting prudently, such an application could have been made by the end of April 2021, rather than 7 June 2021 (which was the date that the application was finally made). As discussed below, NSWMC’s prosecution of this issue occasioned further unreasonable delay in the resolution of the issues ultimately agitated by NSWMC. One other aspect of NSWMC’s conduct requires comment. When writing to the AGS, the solicitors for NSWMC did not provide a copy of the letter to PNO or the NCC. That was both discourteous and unhelpful in the context of the proceeding.
13. At the same time as writing to the AGS, NSWMC served a draft index for the Hearing Book on PNO and the NCC. A copy of the draft index was not in evidence, but the Tribunal infers from the course of correspondence that the draft index was materially the same as the index to the Hearing Book that was ultimately filed. The index contained a large number of documents that were listed in Appendix A to the Recommendation, as well as other documents.
14. On 19 May 2021, the AGS replied to NSWMC stating that:

We confirm that the material filed on 21 April 2021 comprised the entirety of the material which the Treasurer took into account in connection with the making of the decision under review.

The Treasurer did not look behind the recommendation of the National Competition Council (NCC), including by considering the materials listed in Appendix A of the NCC’s recommendation, consistently with the High Court’s comments in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [46]-[47].

1. Also on 19 May 2021, PNO (by its solicitors, Clayton Utz) replied to NSWMC stating that it objected to the inclusion of documents 9 to 55 in the draft Hearing Book index on the basis that the Tribunal is not permitted to have regard to those documents. PNO invited NSWMC either to confirm that it did not press the inclusion of the documents or to make an application to the Tribunal to issue a notice under s 44K(6A) or s 44ZZOAAA(5).
2. Despite the responses received from the AGS and PNO which were clear in their terms, NSWMC still did not approach the Tribunal to make the application that was ultimately made. Nor did NSWMC immediately respond to the AGS or PNO. Indeed, NSWMC did not respond to PNO until 30 May 2021 and did not respond to the AGS until 2 June 2021 (seeking to debate the question of what the Minister took into account in making the Decision). The delay in responding was unexplained. Further, NSWMC failed to file its submissions by the due date of 24 May 2021. Perhaps understandably in the circumstances, it did not file a Hearing Book by 24 May 2021.
3. It was not until 30 May 2021 that NSWMC wrote again to PNO and the NCC. NSWMC stated that it disagreed that the documents identified in its draft index for the Hearing Book are not before the Tribunal in the proceeding. It said that, with limited exception, the documents were those identified at Appendix A to the NCC's Recommendation. NSWMC asserted that the documents “plainly form part of the Final Recommendation, which was taken into account by the Treasurer, and are before the Tribunal pursuant to s 44ZZOAAA(3)(c)”. NSWMC stated that it intended to file an application under s 44K(6) and/or s 44ZZOAAA(5) and to seek a half-day hearing for the determination of that application. It also sought agreement on the form of communication with the Tribunal about the dispute.
4. PNO responded the next day, requesting a modest addition to the proposed communication to the Tribunal. There were then some back and forth communications between the parties. The end result was that, on the afternoon of 3 June 2021, NSWMC filed the disputed Hearing Book and notified the Tribunal of the dispute and NSWMC’s intention to make an application under s 44K(6) and/or s 44ZZOAAA(5) in respect of the disputed documents in the Hearing Book.
5. On 2 June 2021, the solicitors for NSWMC sent a further letter to the AGS asserting that the Treasurer’s response to the Tribunal under s 44ZZOAAA(3)(c) “contains a number of irregularities”. The substantive assertion was that footnotes within the NCC’s Recommendation contained hyperlinks to various documents which had not been produced by the Treasurer in his response to the Tribunal. NSWMC asserted that those documents should have been produced because they formed part of the NCC Recommendation.
6. On 4 June 2021, the AGS replied advising that it was taking instructions. On 11 June 2021, the AGS wrote to the solicitors for NSWMC reiterating that the Treasurer took into account the NCC Recommendation, and that the underlying documents did not form part of the specific information taken into account by the Treasurer.
7. On 7 June 2021, NSWMC made its foreshadowed application to the Tribunal. In terms, its application asked the Tribunal to issue a notice under s 44K(6A) (rather than a notice under s 44ZZOAAA(5)). Despite that, the application was argued under both sources of power and nothing turns on that point. More significantly, the scope of the application was greatly reduced from that foreshadowed. NSWMC no longer sought production of documents 9 to 55 in the draft Hearing Book index. It only sought production of five documents referred to earlier, being the Pro Forma Pricing Deeds, the Synergies 2018 Report and the Synergies 2020 Report (**application documents**).
8. NSWMC’s application was heard on 15 June 2021. As noted earlier, towards the end of the hearing, the NCC made an informal application for the Tribunal to exercise its powers under s 44K(6A) to direct the NCC to provide the Tribunal with the 2019 Revocation Recommendation.

## The application and submissions of the participants

### The application documents

1. The application documents comprise the three Pro Forma Pricing Deeds, the Synergies 2018 Report and the Synergies 2020 Report.
2. The three Pro Forma Pricing Deeds contain terms and conditions, including prices, that PNO is willing to offer various categories of Port users for the relevant services on a long term basis (10 years). The deeds were provided to the NCC by NSWMC in connection with its application for the NCC to recommend declaration of the relevant services. In its Recommendation, the NCC summarised certain of the terms of the deeds and the existence, scope and terms of the deeds were a material consideration by the NCC in the Recommendation. The deeds were listed in Appendix A to the NCC Recommendation.
3. The Synergies 2018 Report is a report prepared by Synergies Economic Consulting in August 2018. The report was prepared on behalf of NSWMC and was submitted by NSWMC to the NCC in connection with the NCC’s consideration of whether to make the 2019 Revocation Recommendation. The report was not formally submitted by NSWMC to the NCC in connection with its 2020 application to the NCC for a declaration recommendation. Instead, as referred to below, NSWMC submitted the Synergies 2020 Report. However, in its 2020 application to the NCC (at [9.6]), NSWMC made (slight) reference to the Synergies 2018 Report as follows:

As rightly predicted by Synergies in its report which was submitted to the Council in August 2018 together with Glencore’s submission,49 following revocation of the declaration of the Port in 2019:

• PNO has materially increased access prices at the Port, once again demonstrating its propensity to unilaterally materially increase prices without regard for industry circumstances;

• this will lead to reduced investor confidence and higher cost of capital for new coal mining projects in the Newcastle catchment area; and

• smaller coal producers or producers with relatively high marginal costs in the Newcastle catchment areas have been most affected.

1. Footnote 49 of NSWMC’s application, referred to in the above passage, contained a hyperlink to the Synergies 2018 Report.
2. In its Recommendation, the NCC did not refer to the Synergies 2018 Report. Nor was the report listed in Appendix A to the Recommendation. We infer that the NCC did not take the document into account in making its decision. NSWMC noted that the NCC Recommendation, in a footnote, contained a hyperlink to that part of the NCC’s website that contained the 2019 Revocation Recommendation and submissions made to the NCC in connection with that recommendation, including the Synergies 2018 Report. NSWMC submitted that, through that hyperlink, the Synergies 2018 Report formed part of the NCC Recommendation. We reject that submission. Read in context, it is apparent that the footnote hyperlink was merely referencing the 2019 Revocation Recommendation, not the underlying submissions made in connection with that recommendation.
3. The Synergies 2020 Report is a report prepared by Synergies Economic Consulting in July 2020. The report was prepared on behalf of NSWMC and was submitted by NSWMC to the NCC in connection with the NCC’s consideration of the application to recommend declaration of the relevant service. In its Recommendation, the NCC summarised the economic arguments advanced in the Synergies 2020 Report. The report was listed in Appendix A to the NCC Recommendation.
4. The 2018 and 2020 reports were different in nature and content. The 2018 report was a lengthy document, of some 100 pages, which contained substantial factual information in support of economic arguments that were advanced. In contrast, the 2020 report was a relatively brief report of 16 pages. While it contained some factual assertions, it contained no substantial factual information. The report principally advanced a number of economic arguments.

### NSWMC submissions

1. The primary submission advanced by NSWMC was that, properly construed, the application documents were within s 44ZZOAAA(3)(c) and the Treasurer should have given the documents to the Tribunal in accordance with that section. The Tribunal would then have been permitted (indeed required) to take the documents into account (by force of ss 44K(4) and 44ZZOAA). As that had not occurred, NSWMC submitted that the Tribunal should issue a notice to the NCC under s 44K(6A) to provide the relevant documents to enable the Tribunal to take them into account.
2. NSWMC submitted that, in s 44ZZOAAA(3)(c), the information that the designated Minister “took into account” means the information that was “before” the Minister in making the decision. It argued that this construction is compelled by the High Court’s decision in the *Pilbara case* and is also supported by relevant extrinsic material and principles of administrative law.
3. In respect of the *Pilbara case*, NSWMC submitted that the High Court repeatedly characterised the review required by s 44K as concerning the material before the Minister (referring to the reasons of the plurality at [60], [65] and [73] and Heydon J at [130], [131], [152] and [153]). NSWMC also submitted that the approach stated in the *Pilbara case* was followed by the Tribunal in *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 (***Glencore Coal***) at [32].
4. In respect of extrinsic material, NSWMC noted that s 44K(4) was amended, and ss 44ZZOAAA and 44ZZOAA were introduced, by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) (**2010 Amendment Act**). It noted that the Explanatory Memorandum to the *Trade Practices Amendment (Infrastructure Access) Bill 2009* identifies the purpose of those amendments as follows (at [1.107] and [1.126]):

1.107 Under limited merits review…the Tribunal may only consider information *before* the original decision-maker. The Tribunal may make a written request that a person provide information within a specified time period for the purpose of clarifying the information before the original decision-maker” (emphasis added).

…

1.126 In reviews of decisions under Part IIIA the Tribunal will be limited to the information that was *before* the original decision-maker. The Tribunal may only seek additional information in two circumstances: for the purposes of clarifying information that was before the original decision-maker; and from the ACCC or NCC in their role of assisting the Tribunal (emphasis added).

1. NSWMC submitted that its construction of s 44ZZOAAA(3)(c) is also supported by principles of administrative law which form part of the context in which the section must be construed (relying on *AB v Western Australia* (2011) 244 CLR 390 at [10]; *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at [20]). The “principles” of administrative law identified by NSWMC were:
2. First, a decision maker such as the Minister is entitled to rely on a departmental summary to reach his or her decision (relying on *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***) at 30-31 (Gibbs CJ)). However, if a summary fails to bring to the Minister’s attention a material fact which he or she is bound to consider, the decision will not have been made according to law (relying on *Peko-Wallsend* at 31).
3. Secondly, a decision maker such as the Minister is taken to have constructive knowledge of information contained on a departmental file (relying on *Peko-Wallsend* at 31 (Gibbs CJ) and 45 (Mason J) and *Minister for Immigration and Multicultural Affairs v Huynh* (2004) 139 FCR 505 at [80] (Kiefel and Bennett JJ)). Material in the possession of the department is treated as being in the possession of the Minister. Even if the department in fact withholds information from the Minister, that material remains before the Minister (relying on *Peko-Wallsend* at 31 and *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 (***Videto***) at 179).
4. Thirdly, a reference to a hyperlinked document is sufficient for that document to be considered to be in the possession of the Minister. This includes a document hyperlinked in a primary document and also a hyperlinked document within the hyperlinked document (relying on *Kirkman v Minister Administering the Crown Lands Act (No 2)* [2020] NSWSC 1494 (at [42]) and *Polaris Coomera Pty Ltd v Minister for the Environment* [2021] FCA 254 at [88] and [117]).
5. NSWMC submitted that s 44ZZOAAA(3)(c) does not (on a proper construction) contemplate a factual enquiry about what information the Minister in fact took into account in making the decision. It argued that such a construction would be contrary to the afore-mentioned “principles” of administrative law and would also lead to unworkable and impractical outcomes as illustrated by this case where there is no evidence before the Tribunal as to what material the Minister in fact took into account. NSWMC argued that in order for the Tribunal to make any finding as to these matters, the Tribunal would need to receive evidence from the Minister and it would be possible that any such evidence would be challenged under cross-examination. NSWMC contended that Parliament would not have intended such an unworkable or impractical result.
6. In the present case, NSWMC submitted that the Treasurer had constructive knowledge of the application documents and they were “before” him. As such, they were part of the information that the Minister “took into account” on a proper construction of s 44ZZOAAA(3)(c).
7. In relation to the relevance of the documents to the Tribunal’s review, NSWMC advanced the following submissions.
8. In respect of the Pro Forma Pricing Deeds, NSWMC submitted that they formed an important part of the Minister's analysis. It argued that the Deeds were summarised in the NCC's Final Recommendation but the summary was not comprehensive. NSWMC wished to refer to the full terms and effect of the documents in order to gainsay the Minister's analysis. In that regard, NSWMC submitted that the Deeds contain unreasonable terms and conditions, particularly the dispute resolution terms and the purported application of the 'pricing principles'. NSWMC disputes the NCC's finding 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" and "non-discriminatory pricing provisions". NSWMC also disputes the NCC's characterisation of the arrangements as an “open access” regime.
9. In respect of the Synergies 2018 Report, NSWMC submitted that the report provided important market facts and economic analysis as to competition in the tenements market. It argued that the Treasurer’s competition analysis in that regard was entirely theoretical and ignored the facts. NSWMC further argued that the NCC Recommendation failed to grapple with any of the analysis in the report about the extent of competition in the tenements market.
10. In respect of the Synergies 2020 Report, NSWMC acknowledged in argument that it “builds” on the 2018 Report but does not itself contain factual information. Rather, the report advances economic argument. While NSWMC submitted that the report contained important economic analysis of competition in the tenements market, it acknowledged that the arguments advanced in the 2020 Report had been fairly summarised by the NCC in its Recommendation.

### PNO submissions

1. PNO advanced the following primary submissions.
2. First, PNO submitted that the Tribunal was required by s 44K(4) to review the Treasurer’s Decision based on the information, reports and things referred to in s 44ZZOAA. In turn, s 44ZZOAA relevantly required the Tribunal to have regard to:
3. information that was given to the Tribunal under s 44ZZOAAA(3)(c);
4. any information given to the Tribunal in accordance with a notice given under s 44ZZOAAA(5);
5. any thing done as mentioned in s 44K(6); and
6. any information or report given to the Tribunal in relation to the review under s 44K(6A).
7. PNO observed that the first category is fixed by reference to the information that was given to the Tribunal under subs 44ZZOAAA(3)(c) (not, we interpolate, by the Tribunal’s assessment of, or enquiry into, what was taken into account by the Treasurer).
8. Second, PNO submitted that NSWMC’s proposed construction of s 44ZZOAAA(3)(c) was not correct and was inconsistent with the statutory scheme as explained in the *Pilbara case*. In that respect, PNO relied on the observations of the plurality at [46] and [47]. PNO argued that, within the statutory scheme, the Treasurer was entitled to rely on the NCC’s Recommendation and was not required to take into account all of the submissions and information given to the NCC. Further, in relation to the “principles” of administrative law relied on by NSWMC in aid of its construction of s 44ZZOAAA(3)(c), PNO submitted that the authorities referred to by NSWMC turn on their particular factual and statutory contexts and do not identify general principles of administrative law. While the modern approach to statutory interpretation uses ‘context’ in its widest sense to include such things as the existing state of the law, that is not a reference to the sorts of specific administrative law principles NSWMC seeks to invoke.
9. Third, even if it were relevant to consider whether the application documents were “before” the Treasurer, it is tenuous to suggest that the Synergies 2018 Report was before the Treasurer.
10. Fourth, in relation to the relevance of the documents to the Tribunal’s review, PNO submitted that it was unnecessary for the documents to be before the Tribunal. It argued that the NCC Recommendation had considered the Pro Forma Pricing Deeds and the Synergies 2020 Report and NSWMC had not demonstrated that the NCC’s consideration of those documents was deficient. The NCC had not considered the Synergies 2018 Report because that document was not before it.
11. Finally, PNO submitted that there had been unreasonable delay in NSWMC making the application. The production of additional documents would require PNO to make an application for production of other material that was before the NCC that was responsive to or contextualised the application documents. That outcome was likely to necessitate an adjournment of the commencement of the hearing which had been scheduled since 8 April 2021.

### NCC submissions

1. The NCC took no position on NSWMC’s application. However, during the hearing, the NCC advanced the submission that the Tribunal should issue a notice under s 44K(6A) directing the NCC to provide the 2019 Revocation Recommendation to the Tribunal. In support of that application, the NCC referred to criticism that had been made in the course of argument as to whether the NCC Recommendation contained detailed analysis. The NCC submitted that the NCC Recommendation referred to the 2019 Revocation Recommendation at [7.146] and thereby incorporated it by reference, and the 2019 Revocation Recommendation was listed in Appendix A.
2. Neither PNO nor NSWMC supported the NCC’s informal application.

## Consideration

### The Tribunal’s review power

1. The Tribunal is empowered by s 44K to review a decision of the “designated Minister” to declare or not to declare a service under s 44H. By s 44K(4), the review is defined as, and limited to, a “re‑consideration of the matter based on the information, reports and things referred to in section 44ZZOAA”. Four aspects of s 44K(4) should be noted.
2. First, the “matter” to be reviewed by the Tribunal is the Minister’s decision to declare or not to declare the service, not the NCC’s recommendation to the Minister. In the *Pilbara case*, the plurality stated (at [37]):

The “matter” referred to in s 44K(4) was identified in s 44K(1) and (2). In a case where the Minister has declared a service, the “matter” is “the declaration” made by the Minister. In a case where the Minister decided not to declare a service, the matter is “the designated Minister’s decision” not to make a declaration. In both cases, the hinge about which the identification of the “matter” turns is what the Minister has done, not what the NCC did when it made its declaration recommendation. The requirement of s 44K(4) – that the Tribunal review the matter and that the review be “a re-consideration of the matter” – necessitates identification of the Minister’s task. It is that task, and the result of its performance, which is to be subject to “re-consideration” by the Tribunal.

1. Second, the Minister’s decision, which is the subject of review by the Tribunal, is defined by s 44H(1). Upon receiving a recommendation from the NCC, the Minister is required to “either declare the service or decide not to declare it”. In that respect, the plurality in the *Pilbara case* described the Minister’s decision-making task as follows (at [45]-[47]):

45 The Minister had only a short time to decide how to respond to a declaration recommendation. While the NCC could extend (s 44GA) the time for making its recommendation about an application for a declaration, the Minister was given sixty days after receiving the NCC’s declaration recommendation to decide whether to declare the service. Section 44H(9) provided that, if the Minister did not publish his or her decision on the declaration recommendation within sixty days after receiving it, the Minister was taken, at the end of that period, to have decided not to declare the service and to have published that decision. In such a case, the Minister would publish no reasons for decision but the NCC’s reasons for recommending a declaration would be published pursuant to s 44GC. If the Minister made a decision, the Act obliged (s 44HA(1)) the Minister to publish that decision and the reasons for it.

46 There is one other aspect of the Act’s treatment of the Minister’s task to which attention should be drawn. The Minister, unlike the Tribunal (s 44K(6)), was given no express power to request any further information, assistance or report from the NCC. The statutory supposition appears to have been that the Minister could and would make a decision on the NCC’s recommendation without any need for further information from the NCC.

47 The content of those provisions of Pt IIIA to which reference has been made suggests that it was expected that, armed with a recommendation from an expert and non-partisan body (the NCC), the Minister would make a decision quickly and would do so according to not only the Minister’s view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Minister had to be satisfied before a declaration could be made. And it is the Minister’s decision, not the NCC’s recommendation, that was the matter that was to be reviewed by the Tribunal.

1. Third, a review which is a “re-consideration” is a more limited form of review than a “re-hearing” (as might be conducted by the Tribunal under Part IX of the Act). The plurality in the *Pilbara case* contrasted the two forms of review as follows (at [60] and [65]):

60 When s 101(2) of the Act used “re-hearing” to describe the task of the Tribunal reviewing a determination of the Commission, it was using “re-hearing” in a context wholly divorced from the exercise of judicial power. And when s 44K(4) referred to “re-consideration”, it too used that word in a context divorced from the exercise of judicial power. Nonetheless, some different meaning must presumably be intended by the use of the different words in identifying the review to be undertaken by the Tribunal. The contrast is best understood as being between a “re-hearing” which requires deciding an issue afresh on whatever material is placed before the new decision maker and a “re-consideration” which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44K(6)).

…

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)…

1. As noted earlier, NSWMC placed emphasis on the plurality’s statements that the Tribunal’s task was to review the Minister’s decision “on the material before the Minister”. The emphasis was misplaced. That aspect of the plurality’s decision was affected by amendments to the Act made by the 2010 Amendment Act, in particular the amendment to s 44K(4), as will now be discussed.
2. The fourth aspect of s 44K(4) to be noted is the requirement, introduced by the 2010 Amendment Act, that the re-consideration of the Minister’s decision is to be based on the information, reports and things referred to in s 44ZZOAA. That section (which was also introduced by the 2010 Amendment Act) relevantly provides as follows:

**44ZZOAA Tribunal only to consider particular material**

For the purposes of a review under this Part, the Tribunal:

(a) subject to paragraph (b), must have regard to:

(i) information that was given to the Tribunal under subsection 44ZZOAAA(3); and

(ii) any information given to the Tribunal in accordance with a notice given under subsection 44ZZOAAA(5); and

(iii) any thing done as mentioned in subsection 44K(6) …; and

(iv) any information or report given to the Tribunal in relation to the review under subsection 44K(6A) … within the specified period; and

 (b) may disregard:

(i) any information given to the Tribunal in response to a notice given under subsection 44ZZOAAA(5) after the period specified in the notice has ended; and

(ii) any information or report of the kind specified in a notice under subsection 44K(6A) … that is given to the Tribunal after the specified period has ended.

1. In the context of a review under s 44K, the effect of s 44ZZOAA, in conjunction with subs 44K(4), is that the Tribunal may only have regard to the information given to the Tribunal under subs 44ZZOAAA(3), together with any thing done as mentioned in subs 44K(6) and any information obtained by the Tribunal in response to a notice given under subs 44K(6A) and/or subs 44ZZOAAA(5).
2. It is convenient to consider subs 44ZZOAAA(3) before considering ss 44K(6A) and 44ZZOAAA(5).

### Section 44ZZOAAA(3)

1. Section 44ZZOAAA is titled “Information to be given to the Tribunal”. Subsection (3) obligates the “decision-maker” to give certain defined information to the Tribunal within the period specified by the Tribunal. In the context of a decision under s 44H, the “decision-maker” is the designated Minister that made the decision (in this case, the Treasurer) (see subsection (9)).
2. Relevantly, and again in the context of a decision under s 44H, s 44ZZOAAA(3) addresses the means by which a decision is taken to have been made by the Minister under s 44H: the first is by publication of the Minister’s decision and reasons for decision under s 44HA; the second is by not publishing a decision under s 44HA, in which case the Minister is taken to have made a decision in accordance with the NCC’s recommendation and to have published that decision under s 44HA (see s 44H(9)). If the Minister publishes a decision under s 44HA, s 44ZZOAAA(3)(c) requires the Minister to give the Tribunal “all of the information that the [Minister] took into account in connection with the making of the decision to which the review relates”. If the Minister does not publish a decision under s 44HA, s 44ZZOAAA(3)(a) requires the Minister to give the Tribunal “all of the information that the [NCC] took into account in connection with making the recommendation to which the decision under review relates”.
3. In the present case, the Treasurer published a decision under s 44HA and, accordingly, s 44ZZOAAA(3)(c) applied. As noted earlier, the Tribunal specified the date of 21 April 2021 for the Treasurer to give the required information to the Tribunal. The Treasurer did so.
4. The focus of NSWMC’s submissions concerned the meaning and effect of the words in s 44ZZOAAA(3)(c) “all of the information that the [Minister] took into account”. NSWMC submitted that those words mean all of the information that was “before” the Minister when the Minister made the relevant decision. NSWMC argued that, in the present case, that meant all of the information provided to the Treasurer by the NCC when the NCC gave the Recommendation to the Minister (including, particularly, the documents listed in Appendix A to the Recommendation which the Minister was able to access through a hyperlinked electronic index provided by the NCC).
5. In the Tribunal’s view, the proper construction of s 44ZZOAAA(3)(c) is not relevant to the determination of NSWMC’s application. The Tribunal’s review task is defined and limited by s 44K(4). The Tribunal is to re-consider the Treasurer’s Decision based on the information, reports and things referred to in s 44ZZOAA. That section defines the information, reports and things to which the Tribunal is to have regard in objective terms. The section does not require the Tribunal to undertake any evaluative exercise in order to identify the information, reports and things. Relevantly, subparagraph 44ZZOAA(a)(i) requires the Tribunal to have regard to “information that was given to the Tribunal under subsection 44ZZOAAA(3)”. The focus of that subparagraph is the information that was given to the Tribunal. The subparagraph does not import the language of s 44ZZOAAA(3)(c) into s 44ZZOAA(a)(i) and require the Tribunal to have regard to “all of the information that the [Minister] took into account”.
6. It follows that the legislative framework does not require the Tribunal to determine what was the information that the Treasurer took into account. The determination of that issue is a matter for the Treasurer. Indeed, within the legislative framework, there is no scope for the Tribunal to review the Treasurer’s determination of the information that was taken into account in making the relevant decision.
7. Although it is unnecessary to decide the point of construction raised by NSWMC, in case it becomes relevant we record that the Tribunal does not accept the construction advanced by NSWMC. We will state our reasons briefly.
8. First, the ordinary meaning of the phrase “took into account” in an administrative decision-making context is “considered”. The phrase refers to the information with which the decision-maker engaged intellectually (or brought their mind to bear upon) in making the relevant decision: see for example *Tickner v Chapman* (1995) 57 FCR 451 at 462 (Black CJ), 476-477 (Burchett J) and 495-496 (Kiefel J).
9. Second, the fact that information is available to (or “before”) a decision-maker is not synonymous with a conclusion that the information was taken into account by the decision-maker. Indeed, the authorities relied on by NSWMC, such as *Peko-Wallsend* and *Videto*, stand for the opposite conclusion. Information may be available to a decision-maker (including by being in possession of the Minister’s Department, in respect of which the Minister may have constructive knowledge) and may be of a kind that the decision-maker is obliged to take into account, but the decision-maker may erroneously fail to take the information into account: see for example *Peko-Wallsend* at 30-31 (Gibbs CJ), 45 (Mason J) and *Videto* at 179; see also *Tickner v Bropho* (1993) 40 FCR 183. For that reason, the so-called “principles” of administrative law identified by NSWMC are of no assistance to the proper construction of the phrase “took into account”. In any event, it is doubtful that the propositions can be described as “principles” of administrative law; they are factual conclusions on the question whether information was available to the relevant decision-maker, the fact being relevant to the issue whether the decision-maker failed to take into account a mandatory relevant consideration.
10. Third, and as observed earlier, the plurality’s description of the Tribunal’s review task in the *Pilbara case*, being to review the Minister’s decision “on the material before the Minister”, must now be read in light of the statutory amendments made to s 44K(4) by the 2010 Amendment Act. The review task is to be based on the information, reports and things referred to in s 44ZZOAA. While the Tribunal in *Glencore Coal* referred to the Tribunal’s task under s 44K(4) (as amended) as being “a reconsideration based on the material before the Minister” (at [32]), the reference was descriptive only and no issue as to the meaning of s 44ZZOAAA(3)(c) arose in that matter.
11. Fourth, the passages from the Explanatory Memorandum to the *Trade Practices Amendment (Infrastructure Access) Bill 2009* relied on by NSWMC do not assist. The statutory text in s 44ZZOAAA(3)(c) is clear and unambiguous and there is no warrant to substitute the language of the Explanatory Memorandum for the statutory text.
12. Fifth, the ordinary meaning of the phrase “took into account” is consistent with the apparent purpose of the provision, which is to require the Minister to identify and provide to the Tribunal the information that was actually taken into account by the Minister. If a person affected by the Minister’s decision considers that the Minister failed to take into account certain information as a mandatory relevant consideration, such person may seek a remedy from the Court. Otherwise, the Tribunal’s statutory task is to re-consider the Minister’s decision based on the information that the Minister identifies and gives to the Tribunal.
13. Finally, it should be observed that the Treasurer’s approach in the present case to take into account only the NCC’s Recommendation, and not to have regard to the underlying material that had been given to the NCC for the purposes of its Recommendation, is consistent with the plurality’s description of the Treasurer’s task in the *Pilbara case*. As the plurality observed (at [46] and [47]), the statutory supposition appears to be that the Treasurer could and would make a decision on the NCC’s Recommendation without any need for further information from the NCC and that it was expected that, armed with the NCC Recommendation, the Treasurer would make a decision quickly and would do so according to not only the Treasurer’s view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Treasurer had to be satisfied before a declaration could be made.

### Section 44K(6A)

1. The central question that arises on this application is whether the Tribunal should exercise its power under s 44K(6A) to give a written notice requiring the NCC to give to the Tribunal the application documents. If the Tribunal exercises that power, the information provided by the NCC becomes information that the Tribunal must have regard to under s 44ZZOAA, and information upon which the Tribunal’s reconsideration of the Treasurer’s Decision is to be based (by operation of s 44K(4)).
2. As already noted, NSWMC primarily based its application on the proposition that it is appropriate for the Tribunal to issue such a notice to overcome a deficiency in the Treasurer’s compliance with s 44ZZOAAA(3)(c). For the reasons explained above, the Tribunal rejects the contention that any asserted deficiency is relevant to the Tribunal’s functions or that there was any such deficiency.
3. Nevertheless, it is necessary to consider whether NSWMC has established a proper basis for the Tribunal to exercise its power under s 44K(6A) to require production of the application documents. To date, there has been little examination of the power in s 44K(6A) and the principles that should guide its exercise.
4. Two aspects of the power are immediately obvious. First, the exercise of the power is at the discretion of the Tribunal. Second, the discretion is subject to an express statutory requirement that the Tribunal may only exercise the power “for the purposes of the review”. In the *Pilbara case*, the plurality referred to the same expression that appears in s 44K(5) (which gives the Tribunal the same powers as the Minister) and observed that the phrase requires consideration of the nature of the Tribunal’s review task under s 44K (at [63], and to similar effect at [131] per Heydon J). As set out earlier, the review task is to reconsider the Minister’s decision based on the information taken into account by the Minister. The power under s 44K(6A) is to be exercised for the purpose of the Tribunal undertaking that review. It may be that the statutory limitation that the power in s 44K(6A) be exercised “for the purposes of the review” is synonymous with the usual statutory implication that a discretionary power is to be exercised having regard to the nature, scope and purpose of the power.
5. It follows that the primary consideration for the Tribunal in exercising its discretion under s 44K(6A) is whether the information to be obtained from the NCC would be relevant to, and likely to assist the Tribunal in performing, the task of reconsidering the Treasurer’s Decision. It is unwise to attempt to define the circumstances in which the Tribunal might exercise the power given by s 44K(6A). No doubt, principles and guidance will emerge on a case by case basis. However, the circumstances of the present case highlight three considerations relevant to the exercise of the Tribunal’s discretion.
6. First, and perhaps at one end of the spectrum, the Tribunal considers that there is likely to be a proper basis for requiring the NCC to produce information if:
7. the information was before the NCC when making its recommendation;
8. a contention is proposed to be advanced, with some basis, that the information was either not referred to, or was not fairly summarised or considered, by the NCC in its recommendation; and
9. the information is material to the Minister’s decision (in the sense that the decision might have been different if the Minister was aware of the information).
10. Essentially, that is the basis on which NSWMC seeks production of the Pro Forma Pricing Deeds.
11. Second, and perhaps at the other end of the spectrum, the Tribunal considers that there will not be a proper basis for requiring the NCC to produce information if the information could have been, but was not, put to the NCC before it made its recommendation. In such circumstances, the Tribunal considers that it would be inconsistent with its statutory review task, as explained in the *Pilbara case*, to undertake a re-consideration of the Minister’s decision on the basis of information that was neither before the NCC nor, through the NCC’s recommendation, the Minister when the relevant decision was made, but which could have been put to the NCC.
12. Third, the Tribunal considers it relevant to take into account the procedural implications of any exercise of power under s 44K(6A), particularly any adverse impact upon the efficient and fair conduct of the proceeding. Such considerations are made relevant by the express requirement that the power is to be exercised for the purposes of the review and by the requirement that the Tribunal conduct the review and make its decision within the 180-day timeframe specified by s 44ZZOA. While the Tribunal is permitted to “stop the clock” under s 44ZZOA if a notice is given under s 44K(6A), stopping the clock may not necessarily overcome inefficiency and unfairness in the conduct of a review.

### Application of the principles

1. In the present case, on 8 April 2021 the Tribunal set the proceeding down for hearing on 22 June 2021 and, at the same time, informed the participants that the Tribunal would determine any application under s 44K(6A) when it was made, but the later the application the more difficult it would be for the applicant. As stated earlier, the Tribunal considers that NSWMC engaged in unreasonable delay in making the present application causing considerable inconvenience close to the hearing. The Tribunal considers that NSWMC’s conduct is relevant to the exercise of the Tribunal’s discretion. In the circumstances, the Tribunal is disinclined to issue a notice under s 44K(6A) that would disrupt the hearing scheduled to commence on 22 June 2021 where that consequence will have been caused by unreasonable delay on the part of NSWMC.
2. Despite the delay in making the application, the Tribunal is persuaded that there is a proper basis to issue a notice under s 44K(6A) requiring the NCC to produce the Pro Forma Pricing Deeds. In substance, NSWMC has advanced an argument that the NCC Recommendation misstated the effect of the Deeds and that the effect of the Deeds, and the NCC’s summary of them, were material to the Treasurer’s Decision. Without expressing any view on the merits of the arguments NSWMC wishes to advance, the Tribunal considers that there is a sufficient basis to the contention to require the NCC to produce the Deeds. Further, the Tribunal is satisfied that the late production of the Deeds will not cause the scheduled hearing to be vacated or otherwise cause prejudice to PNO. As discussed below, to avoid prejudice to PNO, the Tribunal will also issue a notice to PNO under s 44ZZOAAA(5) requesting PNO to produce to the Tribunal any responsive material that it wishes to rely upon.
3. The Tribunal is not persuaded that there is a proper basis to issue a notice under s 44K(6A) requiring the NCC to produce the Synergies 2018 Report. The report was in existence prior to the NCC’s Recommendation, but NSWMC did not provide the report to the NCC in connection with its application to the NCC to recommend declaration. The Tribunal does not accept NSWMC’s submission that it provided the report to the NCC when it made reference to the report in its application at [9.6]. While the NSWMC made reference to the Synergies 2018 Report, the reference was not to any factual material in that report but was only to a prediction made in the report. The prediction was that, if declaration were revoked, PNO would increase its prices, investor confidence in new coal mining projects would reduce and smaller coal miners with high marginal costs would be most affected. The substance of the submission by NSWMC was that, after the declaration was revoked in 2019, those events had eventuated. Accordingly, the focus of NSWMC’s submissions was the assertion that those events had occurred, not the earlier prediction in the Synergies 2018 Report. By definition, NSWMC’s assertion that those events had occurred could not be supported by the Synergies 2018 Report because that report pre-dated the asserted events. In those circumstances, the Tribunal does not accept that the Synergies 2018 Report was put to the NCC for the purposes of its decision whether to recommend declaration. The Tribunal does not consider it appropriate to re-consider the Treasurer’s Decision on the basis of a report that was not put to the NCC and formed no part of the NCC’s Recommendation.
4. Nor is the Tribunal persuaded that there is a proper basis to issue a notice under s 44K(6A) requiring the NCC to produce the Synergies 2020 Report. That report was put to the NCC by NSWMC and was referred to by the NCC in its Recommendation. However, as discussed earlier, NSWMC acknowledged that the Synergies 2020 Report does not contain factual information but advances economic argument. NSWMC also acknowledged that the arguments advanced in the Synergies 2020 Report had been fairly summarised by the NCC in its Recommendation. In those circumstances, and having regard to the unreasonable delay by NSWMC in making the application, the Tribunal does not consider that it is necessary or appropriate in conducting the review to require production of that report.
5. Finally, the Tribunal is not persuaded that there is a proper basis to issue a notice under s 44K(6A) requiring the NCC to produce the 2019 Revocation Recommendation. In its Recommendation, the NCC made many references to the 2019 Revocation Recommendation. The fact that an earlier declaration of shipping channel services at the Port had been revoked was relevant background information to the NCC’s Recommendation. However, the Tribunal does not accept the contention advanced by the NCC that, in its Recommendation, it incorporated by reference parts of the competition analysis contained in the 2019 Revocation Recommendation. Rather, the Tribunal considers that, in the Recommendation, the NCC expressly summarised, or reproduced, matters stated in the 2019 Revocation Recommendation that the NCC considered were relevant to the Recommendation. For that reason, there is no proper basis, for the purposes of the present review, to take account of the earlier 2019 Revocation Recommendation.

### Subsections 44ZZOAAA(4) to (7)

1. At the hearing of this application, NSWMC referred to s 44ZZOAAA(5) as an alternative basis for its application. The Tribunal does not consider that any different conclusion should be reached under that power. However, it is appropriate to address some general observations to subss 44ZZOAAA(4) to (7), not least because the Tribunal has determined to issue a notice to PNO under s 44ZZOAAA(5) to ensure procedural fairness in the conduct of the review.
2. As noted earlier, s 44ZZOAAA is titled “Information to be given to the Tribunal”. Subsections (4) to (7) provide as follows:

*Tribunal may request further information*

 (4) The Tribunal may request such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review under this Part.

(5) A request under subsection (4) must be made by written notice given to a person specifying the information requested and the period within which the information must be given to the Tribunal.

(6) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O — the Council; and

(iii) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF — the Commission; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

 (b) publish, by electronic or other means, the notice.

(7) Without limiting the information that may be given in accordance with the notice, information may include information that could not have reasonably been made available to the decision maker at the time the decision under review was made.

1. The following aspects of those subsections can be noted.
2. First, subsection (4) empowers the Tribunal to “request such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review under this Part”. The Explanatory Memorandum to the *Trade Practices Amendment (Infrastructure Access) Bill 2009* indicates that the word “request” takes its ordinary meaning and a recipient of a request is not obligated to comply with it. At [1.109], the Explanatory Memorandum stated:

A request for information under a written notice does not mandate the provision of information. Persons may refuse to provide information in response to a request from the Tribunal.

1. It should be noted that the clauses of the *Trade Practices Amendment (Infrastructure Access) Bill 2009* were in a slightly different form to the provisions ultimately enacted by the 2010 Amendment Act. In particular, ss 44ZZOAAA and 44ZZOAA as ultimately enacted were combined into the single clause 44ZZOAA in the Bill. However, that does not affect the above discussion of the word “request”.
2. Second, the Tribunal’s power in subsection (4) is confined by the requirement that the Tribunal must consider the request to be “reasonable and appropriate for the purposes of making its decision” on the review. That criteria is similar in nature to the criteria governing s 44K(6A), but it is presently unnecessary to explore whether there is any material difference.
3. Third, subsections (5) and (6) govern the manner in which the Tribunal is to make a request under subsection (4), which is by written notice to a specified person and copied to the participants in the review and the NCC.
4. Fourth, subsection (7) provides that the information requested may include information that could not have reasonably been made available to the decision maker at the time the decision under review was made. The subsection makes plain that the information requested may go beyond information that was put to the NCC for the purposes of the Recommendation, at least in circumstances where the information could not have reasonably been made available to the NCC at the time of its decision. However, subsection (7) must be read in conjunction with subsection (4), which requires any request to be reasonable and appropriate for the purposes of the review.
5. As foreshadowed above, having determined to issue a notice under s 44K(6A) requiring the NCC to provide to the Tribunal the Pro Forma Pricing Deeds, the Tribunal formed the view that it is reasonable and appropriate to issue a notice under s 44ZZZOAAA(5) requesting PNO to give the Tribunal documents that were submitted by PNO to the NCC for the purposes of its Recommendation and which were relevant to an understanding of the operation of the Pro Forma Pricing Deeds or the extent to which PNO had entered into Pro Forma Pricing Deeds with Port users. The Tribunal considers that, in circumstances where NSWMC wishes to rely on the Deeds to contend that the NCC had misstated their effect or extent, procedural fairness requires that PNO be afforded an opportunity to rely on information that was before the NCC and which addressed those matters. Accordingly, the Tribunal determined that it was reasonable and appropriate to issue a notice to PNO requesting it to produce any document that satisfies the following four criteria:
6. the document was submitted to the NCC by PNO for the purposes of the NCC’s Recommendation;
7. the document relates to any of the Pro Forma Pricing Deeds;
8. the document is relevant to an understanding of the operation of the Pro Forma Pricing Deeds or the extent to which PNO has entered into Pro Forma Pricing Deeds with Port users; and
9. PNO wishes to rely on the document in the review.
10. The Tribunal considers that the production of such documents is fair to both PNO and NSWMC (in circumstances where the participants will have seen the documents in the course of the application to the NCC) and would not cause the hearing to be adjourned.

## Conclusion

1. In conclusion, for the reasons given above, the Tribunal has allowed NSWMC’s application in part and determined to issue a notice to the NCC under s 44K(6A) requiring it to give the Tribunal the Pro Forma Pricing Deeds. To ensure procedural fairness, the Tribunal also determined to issue a notice to PNO under s 44ZZOAAA(5) requesting it to give the Tribunal documents that were submitted by PNO to the NCC for the purposes of its Recommendation and which were relevant to an understanding of the operation of the Pro Forma Pricing Deeds or the extent to which PNO had entered into Pro Forma Pricing Deeds with Port users. The Tribunal refused the NCC’s informal application. The Tribunal also gave consequential directions.

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| I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice O'Bryan, Dr D Abraham and Prof K Davis. |

Associate:

Dated: 21 June 2021