

Ms Linley Johnson
Executive Director
National Competition Council
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19 December 2018

Dear Ms Johnson

Submission by Port of Newcastle Operations (PNO) to the National Competition Council (NCC) for a possible recommendation to revoke the declaration of shipping channel service at the Port of Newcastle

Purpose of letter

We refer to our letter dated 27 September 2018 to the NCC, which letter sought documents from the NCC under the Freedom of Information Act 1982 (Cth) (**FOI Act**) and to the NCC's response dated 3 December 2018. The documents sought from the NCC under the FOI Act related to the NCC's interaction with PNO concerning PNO's application to the NCC for revocation that was lodged on 2 July 2018. The NCC's response provided a number of the documents that were sought.

We have therefore now seen the extent of that interaction between the NCC and PNO regarding the revocation application. Having reviewed the documents provided in response to our FOI Act request, we would be grateful to please understand why the NCC, knowing by at least 5 March 2018, that PNO was going to lodge a revocation application, did not advise either Glencore Coal Assets Australia Pty Ltd (**Glencore**) or the High Court judges hearing PNO's special leave application to the High Court that took place on 28 March 2018 of that pending revocation application. The relevance of such an application to the hearing before the High Court was clearly known by the NCC on the face of the documents provided by the NCC under the FOI Act. This question is relevant as the NCC's reasoning for this action creates an apprehension as to the NCC's approach in this matter. This is particularly the case as the NCC, which purported to be the Commonwealth at that High Court hearing, is subject to the Commonwealth's model litigant obligations. To allow you to consider what was said at the hearing, a copy of the transcript of the High Court Special Leave application hearing is available on the NCC website at: <http://ncc.gov.au/application/application-for-declaration-of-shipping-channel-services-at-the-port-of-new/6>

In response to the NCC's letter dated 3 August 2018 saying it is seeking to maintain the "fullest possible transparency in its assessment of PNO's request for a revocation recommendation" we wish to ensure that the documents disclosed to us under the FOI Act by the NCC are available in relation to any review of the NCC's decision making process, recommendation to the Treasurer or review of the Treasurer's decision. Accordingly, all of the documents provided to us as disclosed on the NCC's FOI Information Log (available at http://ncc.gov.au/footer/freedom_of_information) are incorporated by reference in this letter.

Most recent FOI Act application

As you are aware, we raised concerns with the NCC as to the completeness of the NCC's response to our earlier FOI Act application dated 12 July 2018, which covered the same subject matter as our FOI Act application of 27 September 2018. As discussed in our telephone conversation with you at the time, we raised these concerns on the basis that the material provided by the NCC clearly referred to correspondence between the NCC's legal advisers and PNO's legal advisers that was not provided by the NCC and because there appeared to us to be no basis for not providing that correspondence. We note that we were not able to simply seek an internal review by the NCC of its response to that earlier FOI Act application because the NCC President was the decision maker for that application.

Accordingly, rather than experience further delay by applying to the Office of the Australian Information Commissioner (OAIC) for a review of that earlier FOI Act response from the NCC, we made a further FOI Act application dated 27 September 2018. Even though the approach we have taken has meant that we received a response from the NCC during calendar year 2018 (rather than in 2019, as would have been the case with an application for review to the OAIC), there has been a significant risk that we would not have received the information that was revealed through the FOI Act application process during the time the NCC was still considering the revocation. Fortunately for us in this respect the NCC revocation process is ongoing.

Certain documents produced under FOI

We note the following matters in relation to the documents provided to us by the NCC on 3 December 2018.

1. The NCC and PNO's external lawyers corresponded on this matter quite significantly and in our view far more extensively than could be expected in a normal regulatory process. We particularly note the NCC's external lawyers email to the NCC of Friday 23 February 2018 advising the NCC of one such interaction, which stated in part:

"3. I also asked whether the Port intended to notify Glencore and/or the Court of its application for revocation (or email notifying its intention to apply for

revocation). Webb Henderson said they understood why we were asking and said they would seek instructions and come back to us."

Notwithstanding that interaction, on 5 March 2018 by email from PNO's external lawyers to the NCC's external lawyers it was unequivocally stated by Webb Henderson as follows:

"I refer to our email of 1 March 2018 and subsequent correspondence and confirm that Port of Newcastle proposes to make an application to the NCC for revocation of the declaration of Port of Newcastle's service pursuant to s44J of the CCA."

We believe that the NCC as a Commonwealth Government agency, particularly one purporting to actually be the Commonwealth itself in supporting PNO's application to the High Court for Special Leave to appeal the Full Federal Court's decision (that confirmed the Tribunal's determination to declare the channel), was under an obligation having regard to the Commonwealth agencies model litigant rules to have advised Glencore and certainly the High Court judges hearing the special leave application of this likelihood that PNO would lodge an application for revocation. This is because it may have been a factor that affected the Court's views as to the merits of considering the appeal. It is unclear to us whether the NCC considered that it may have negatively affected the prospects of special leave being granted if the High Court judges knew PNO was going to apply to revoke the declaration anyway.

2. We also note that the NCC has now disclosed pursuant to its response to the FOI Act application the cover letter from PNO's lawyers to the NCC dated 17 September 2018 that refers to two further documents submitted on behalf of PNO that have not been published by the NCC on claimed grounds of confidentiality. We again reiterate the procedural and administrative unfairness that has arisen in this matter by the NCC withholding publication of PNO's documents in an application made by PNO itself. We therefore also ask that you reconsider publication of those documents.

Thank you for considering this letter and we look forward to receiving your response to the question we have raised.

Yours sincerely

Dave Poddar
Partner
Clifford Chance

