

Application for declaration of the shipping channel service at the Port of Newcastle – Designated Minister

I refer to the email message from the Council advising of the application for declaration of the shipping channel service at the Port of Newcastle.

In that message the Council advised that an issue arises in relation to this application as to which Minister is the designated Minister.

As we noted, the identity of the designated Minister depends on the application of s44D and the definition of “provider” in s44B of the Competition and Consumer Act 2010 (CCA).

- Section 44D provides that the designated Minister will be the Commonwealth Minister unless the *provider* of the service for which declaration is sought is a state body, in which case the designated Minister is the Premier of, in this case, New South Wales .
- The *provider* is defined in s 44B as the owner or operator of the facility used to provide the service.

In its application Glencore focused on the operation of the facility, leading it to the position that the “provider” was Port of Newcastle Operations Pty Ltd (PNO) and the designated Minister was the Commonwealth Minister (see Application paragraphs 6.1 and 6.2). Glencore’s application is available on the Council’s website.

In a submission on this issue, PNO focused on the ownership of the facility, concluding that the owner was a State body and the designated Minister was the Premier of NSW. A copy of PNO’s submission is available on the Council’s website.

The Council considers that the operator of the facility is the privately owned PNO and that the ultimate owner of the facility is a NSW State body. In these respects the Council agrees with both the applicant and PNO, however, those conclusions do not answer the critical issue as to which Minister is the designated Minister where operation and ownership of a facility used to provide a service are split between a private and a state body.

The Council sought the advice of senior counsel (Peter Hanks QC) as to the proper application of ss44D and 44B in these circumstances. Counsel’s opinion is available on the Council’s website.

The advice of counsel is that “the provider is the entity which makes the relevant decisions in respect of the service/facility, including who will be allowed access to the facility and what, if anything, the entity allowed access will have to pay for that access.” On this basis the provider is PNO. As PNO is not a State or Territory Body, the designated Minister is the therefore the Commonwealth Minister.

The Council has considered this advice and has reached a preliminary view that the designated Minister in relation to this application is the Commonwealth Minister. The Council has been advised that in this eventuality the Commonwealth Minister is the Hon Bruce Billson.

Before it reaches a final view the Council wishes to provide interested parties (including the Applicant and PNO) with an opportunity to make further submissions on this issue.

Any submissions on this issue should be provided to the Council by 5pm on **Tuesday 30 June 2015**. The Council expects to reach a final view on this issue at the time it releases its draft determination on the application.

Parties are reminded that general submissions on the application are due by Thursday 18 June 2015. To the extent the designated Minister issue is addressed in general submissions the Council will consider these in reaching a final view. Parties who wish to supplement their submissions in light of the Council's preliminary view should do so by 30 June as above.