

National Competition Council

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31 January 2019

Mr Dave Poddar

Partner

Clifford Chance

Level 18 No.1 O'Connell St

SYDNEY NSW 2000

Via email to:

Dear Mr Poddar

Port of Newcastle Operations (PNO) - declaration of shipping channel service

I refer to your letter of 19 December 2018.

Your letter raises two matters. First, you ask why representatives of the National Competition Council (NCC) (on behalf of the Commonwealth) did not disclose to the High Court during the course of a special leave application that PNO were likely to seek to have the declaration of shipping channel services at the Port of Newcastle revoked. Second, you have asked the NCC to reconsider publication of two documents that were not published on the NCC's website as part of PNO's submissions dated 17 September 2018 in relation to its application for the revocation of the declared shipping channel service.

Raising of the foreshadowed revocation application

The NCC did not raise the foreshadowed application to have the declaration of shipping channel services at the Port of Newcastle revoked because it was satisfied that it was not under any obligation to do so.

As you are aware, the NCC's interest in the matter was focused on the proper construction of section 44H of the *Competition and Consumer Act 2010* (the CCA). The importance of having that issue determined was not linked to any particular practical outcome. This was made clear in submissions filed on behalf of the Commonwealth in the Federal Court (at [7]):

The Commonwealth's interest in the review is to advance a construction of ss 44H(4)(a) and 44H(4)(f) of the CCA that is consistent with the context and legislative purpose of the national access regime in Part IIIA of the CCA and apt to achieve the objects of that regime as specified in s 44AA. The Commonwealth seeks neither to defend the decision of, or otherwise participate on behalf of, the Acting Treasurer, or the Tribunal, nor to advocate for the outcome sought by either PNO or Glencore Coal Pty Ltd.

In those circumstances the NCC was and remains satisfied that it was not appropriate or necessary to raise with the Court that PNO had indicated an intention to seek revocation of the declaration.

Withheld documents

The NCC has considered whether it should publish the two PNO documents that were withheld on the grounds of confidentiality. The documents relate to the proposed new container terminal at the Port. The NCC accepts that those documents contain highly confidential and commercially sensitive information about PNO's business strategy.

The NCC has considered whether procedural fairness might require the release of the two confidential PNO documents to your client. PNO separately supplied the NCC with relevant information about the proposed container terminal which could be made public in its submissions and expert reports. These are available on the NCC's website. The confidential documents were not used in the preparation of the NCC's Statement of Preliminary Views. The Statement of Preliminary Views sets out the relevant information concerning the proposed container terminal so that parties are appropriately able to make submissions to the NCC in a procedurally fair manner. The NCC considers that it is not appropriate to release the confidential material.

The NCC intends to publish your letter of 19 December 2018 and this letter on the NCC's website for *Consideration of possible recommendation to revoke declaration of service at the Port of Newcastle*.

Yours sincerely

Linley Johnson
Executive Director
National Competition Council