

Mr Richard Home
Executive Director
National Competition Council
Level 17, Casselden
2 Lonsdale Street
Melbourne VIC 3000

Our ref: 21-40689910
Direct Dial: +61 2 8922 8033
E-mail: dave.poddar@cliffordchance.com

3 August 2018

Dear Mr Home

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

We refer to your letter dated 3 August 2018.

We reserve our client's rights in relation to the decision of the NCC not to grant to our client an extension of time for submissions on a possible recommendation by the NCC to revoke declaration of the shipping channel service at the Port of Newcastle.

In this regard, we do not accept the reasoning of the NCC that this decision has been made on the basis that it is appropriate, under section 44J of the *Competition & Consumer Act 2010 (Cth)* (CCA), to adopt the same processes as apply to the NCC's determinations under section 44F of the CCA. Strict time limits are imposed on the NCC in making its recommendations under section 44F of the CCA (see section 44GA of the CCA). There are clear reasons for time limits to be imposed in relation to section 44F, given the commercial need for access to a declared service to be provided as soon as practicable if a declaration is made. There are no similar commercial ramifications that apply in the case of recommendations under section 44J of the CCA, a point clearly acknowledged by the legislature, given that there are no corresponding time limits imposed on recommendations of the NCC under section 44J.

The decision not to grant an extension of time is clearly prejudicial to our client, which is a fact known to the NCC as the NCC is aware of the current arbitration process being conducted by the Australian Competition & Consumer Commission (ACCC) for access to the declared service. Yet our client was not given an opportunity to make further representations to the NCC before the decision not to grant an extension of time was made. This is despite the fact that, as acknowledged in the third paragraph of your letter, that the NCC determined to follow a similar process to the legislatively required section 44F process (thereby meaning that the NCC would not grant an extension of time) in response to a submission from PNO.

We also disagree with the NCC's view that the motivation of PNO and the fact that an arbitration before the ACCC is currently in process are not relevant matters to be considered in determining whether or not to grant an extension of time. We have referred to this in our letter dated 30 July 2018

We note the statement in your letter that the NCC intends to "maintain the fullest possible transparency" in its assessment of PNO's request for revocation recommendation and therefore wishes to publish our letter dated 30 July 2018. We applaud that approach. As that is the approach that the NCC proposes to take, it would be appropriate for the NCC to also publish all the correspondence between the NCC and PNO in relation to the request made by PNO for the revocation of the declaration of the shipping channel service. As you are aware, we have already requested that the NCC do so and the response from the NCC to our freedom of information request is attached to this letter.

Furthermore, in the interests of full transparency, it would be appropriate for relevant material in the arbitration process being conducted by the ACCC between PNO and Glencore relating to the terms and conditions of access (including the time period for those terms) to the shipping channel service be similarly published. At PNO's request the ACCC has not permitted that publication. We hope the NCC will join with our client in urging the ACCC to publish that material, in the interests of full transparency.

You are welcome to publish our letter of 30 July 2018, your response of today's date and this letter (including attachments).

Yours sincerely

Dave Poddar
Partner
Clifford Chance

National Competition Council

Level 17 Casselden, 2 Lonsdale Street Melbourne 3000 Australia

GPO Box 250 Melbourne 3001 Australia

Telephone 1800 099 470

Website: www.ncc.gov.au



Our ref: #1003029
Your ref: 21-40689910
Contact officer: Richard Home
Contact phone: 03 9290 6960

24 July 2018

Mr Dave Poddar
Partner
Clifford Chance
Level 16
No. 1 O'Connell Street
SYDNEY NSW 2000

Via email to: dave.poddar@cliffordchance.com

Dear Mr Poddar

Charges for processing your freedom of information request

I refer to your email dated 12 July 2018 in which you request access, under the *Freedom of Information Act 1982* (Cth), to the following:

'All communications (whether by email, letter or in any other form) between the National Competition Council (NCC) or any officer or member of the NCC (including any officer of the Australian Competition and Consumer Commission acting for or on behalf of the NCC) and Port of Newcastle Operations Pty Ltd (PNO) or any of its employees, officers, agents, contractors or advisors, relating in any way to or otherwise concerning:

- 1. PNO's submission to the NCC dated 2 July 2018 seeking revocation of the shipping channel service at the Port of Newcastle (**Submission**);*
- 2. the merits of PNO making the Submission or the possible outcome of the Submission; and/or*
- 3. any proposed revocation application by PNO relating to the shipping channel at the Port of Newcastle.'*

In accordance with s.29 of the Act, I have decided that you are liable to pay a charge in respect of the processing of your request. My preliminary assessment of that charge is **\$814.17**.

Please note that this charge is for the processing of your FOI request. Unless waived, charges imposed are payable irrespective of whether the documents are released.

What you are required to do

Within 30 days of receipt of this notice, you are required to either:

- (a) agree to pay the charge and forward the deposit; or
- (b) contend that the charge -
 - (i) has been wrongly assessed, or
 - (ii) should be reduced, or
 - (iii) should not be imposed, or both; or
- (c) withdraw your request.

Option 1: Pay the charge

As the charge exceeds \$25, a deposit of 25 percent of the estimate is required in order for your request to proceed. If you agree to pay the charge as assessed above, you should forward the deposit of **\$203.54**.

You can pay the deposit by cheque, electronically or online.

To pay by cheque, please forward the cheque to:

The FOI Team
National Competition Council
GPO Box 250
Melbourne VIC 3001

To pay electronically, please use the following information:

Account Name:	ACCC Official Departmental
BSB:	032 730
Account:	146593
Reference:	#1003029

To pay online, please go to www.accc.gov.au/payments. In the payment type please select **Freedom of Information request**. In the payment description please include #1003029.

Option 2: Ask us to reduce or not impose the charge

You may request that we reduce or not impose the charge, but you will need to provide information to support that claim. Usually we will only reduce or not impose a charge on financial hardship or public interest grounds. We are also able to take into account other matters if they are relevant.

Financial Hardship

If you would like the NCC to consider a **waiver/reduction** based on financial hardship, please provide further details of your financial situation, such as:

- your income, debts and assets
- confirmation that you are in receipt of a pension or income support payment
- confirmation that you are the recipient of a Health Care Card
- any other supporting evidence showing your financial situation.

Public Interest

If you consider **reducing or waiving** the charges would be in the public interest, you will need to make clear submissions as to:

- why you believe the release of the material is in the public interest
- how the information would come to the attention of the public
- how the information would inform public debate on the subject

You should also advise whether there is any commercial benefit to you associated with the release of the documents.

Option 3: Contend the charges

If you believe the charges have been wrongly assessed you need to explain the basis for your belief.

Option 4: Withdraw your request

Please notify us if you wish to withdraw your request.

If you do not pay the deposit or ask to reduce or not impose the charges within 30 days of receipt of this letter, we will assume that you have withdrawn your request.

Calculation of charges

We calculated the estimate of the charge as required in the *Freedom of Information (Charges) Regulations 1982*. You can only be required to pay a higher charge if more work is involved than we anticipated and we give full access to all of the documents sought. If the final charge is less than the estimate, you will only have to pay the lesser amount. **Please note you will have to pay the balance of the charge regardless of the decision made in relation to the documents.**

The above estimate includes approximately 7 hours finding the documents covered by your request. It also includes 39 hours examining the documents and making a decision. There are approximately 60 documents within the scope of your request.

Timeframes

Under s.31 of the Act, the statutory timeframe for processing your request is on hold until there is an agreed outcome on any charges. This means that the 30 day limit for processing your request is on hold from the day that you receive this notice and begins again on either:

- the day you pay the deposit sought; or
- if applicable, the day on which the NCC makes a decision not to impose a charge.

Please advise whether you are agreeable to the NCC notifying third parties of your identity, as that question is frequently asked of the NCC when consulting.

You can find further details on the FOI Act publication requirements at foi.accc.gov.au.

If you would like to make comment in relation to the possible publication of your information (including your identity as the FOI applicant), or have any further questions, please contact Richard Home on (03) 9290 6960.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'Julie-Anne Schafer', enclosed in a faint circular outline.

Julie-Anne Schafer
President
National Competition Council

Sent by email 24/07/2018

ATTACHMENT

INFORMATION ON RIGHTS OF REVIEW OF COST ESTIMATE

1. Contention of Estimate

This cost estimate is only a preliminary assessment of expected charges at this time. Please note that the Australian Competition and Consumer Commission (ACCC) will only charge you for the time actually spent processing your application. This estimate works as a cap of these charges.

If you do not agree with the cost estimate provided to you, please contact the ACCC within 30 days of receipt of this letter. You may claim that we have wrongly assessed the charge, or that we should reduce or not impose the charge (i.e. waiver of charge due to financial hardship or public interest in access). You will need to provide information to support your claim.

Please send any correspondence to:

FOI Coordinator

Australian Competition & Consumer Commission

GPO Box 3131

Canberra ACT 2601

2. Complaint to the Information Commissioner

You may complain to the Information Commissioner regarding the ACCC's actions in connection with the cost estimate prepared in relation to your FOI request.

You must lodge your complaint in writing and do so in one of the following ways:

Online: www.oaic.gov.au

Post: GPO Box 5218, Sydney NSW 2001

Fax: +61 2 9284 9666

Email: enquiries@oaic.gov.au