Australian Competition Tribunal

Application by New South Wales Minerals Council (No 4) [2021] ACompT 5

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| Review of: | Decision of the Commonwealth Treasurer 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: | 18 November 2021 |
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| Catchwords: | **COSTS** – whether Tribunal is empowered by s 44KB to award costs in a review under s 44K(2) of a decision under s 44H not to declare a service – principles to be applied in considering the making of a costs order – whether application for review was unmeritorious – costs not awarded  **STATUTORY INTERPRETATION** – meaning of s 44KB(1) – meaning of the phrase “proceedings for a review of a declaration under section 44K” – meaning of the phrase “a person who has been made a party to proceedings” – circumstances in which Court justified in construing a provision as if it contained additional words |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 44K, 44KB  *Acts Interpretation Act 1901* (Cth) s 15AA |
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| Cases cited: | *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1  *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27  *Application by Glencore Coal Pty Ltd* [2016] ACompT 6  *Application by New South Wales Mineral Council* [2021] ACompT 2  *Application by New South Wales Minerals Council (No 2)* [2021] ACompT 3  *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4  *Application by New South Wales Minerals Council* [2021] ACompT 2  *Berenguel v Minister for Immigration and Citizenship* [2010] HCA 8; 264 ALR 417  *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139  *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384  *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151  *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503  *Financial Services Council Ltd v Industry Super Australia Pty Ltd* (2014) 222 FCR 455  *Kelly v The Queen* (2004) 218 CLR 216  *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613  *Pilbara Infrastructure v Australian Competition Tribunal* (2012) 246 CLR 379  *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  *Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* (2014) 222 FCR 13  *R v A2* [2019] HCA 35; 373 ALR 214  *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3; ATPR 41-827  *Re Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7; 309 FLR 358  *Riley v Commonwealth* (1985) 159 CLR 1  *Sydney Airport Corporation v Australian Competition Tribunal* (2006) 155 FCR 124  *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362  *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 |
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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 |

DETERMINATION

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| TRIBUNAL: | JUSTICE O’BRYAN (Deputy President)  DR D ABRAHAM (Member)  PROF K DAVIS (Member) |
| DATE: | 18 November 2021 |

THE TRIBUNAL DETERMINES THAT:

1. There be no order as to the costs of the application.

REASONS FOR DETERMINATION

TRIBUNAL:

# A. Introduction

1. In this proceeding, the New South Wales Minerals Council (**NSWMC**) 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, 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 (**shipping channel service**). 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.
2. In its determination dated 4 August 2021 (**Determination**), the Tribunal affirmed the Treasurer’s decision not to declare the shipping channel service and provided its reasons: *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 (***Application by NSWMC (No 3)***).
3. On the assumption that NSWMC would not be successful in its application for review, PNO applied for an order under s 44KB(1) of the Act that NSWMC pay its costs of this proceeding. At the hearing, PNO and NSWMC made submissions as to whether the Tribunal should exercise a discretion to award costs against NSWMC and in favour of PNO. Neither party addressed the question whether s 44KB empowered the Tribunal to award costs in a review of a decision not to declare a service under s 44K(2), as opposed to a review of a declaration under s 44K(1).
4. In its reasons for the Determination, the Tribunal expressed doubt that it has power under s 44KB(1) to make an order for costs in this proceeding, which is a proceeding for review of the Treasurer’s decision not to declare the shipping channel service under s 44K(2) (and not a proceeding for a review of a declaration under s 44K(1)). As neither party had addressed the question of power during the hearing, the Tribunal afforded PNO and NSWMC the opportunity to make further written submissions on the question of power and any supplementary submissions on the exercise of the Tribunal’s discretion (should the Tribunal reach the view that it has power to make an order for costs).
5. Each of PNO and NSWMC filed submissions on the question of the Tribunal’s power to award costs. PNO also filed an affidavit of its solicitor, Mr Bruce Lloyd, who gave evidence that PNO had incurred legal costs of approximately $633,000 plus GST in the proceedings. PNO sought an order that NSWMC pay PNO this amount within 28 days. PNO subsequently also filed submissions in reply to address a further argument raised by NSWMC.
6. The following is the Tribunal’s reasons in respect of its determination as to costs. In accordance with s 42 of the Act, the reasons below concerning the power of the Tribunal to make an order for costs in this proceeding under s 44KB(1) (section B) have been prepared by O’Bryan J as the presiding member, whereas the reasons below concerning the exercise of the Tribunal’s discretion to order costs (section C) have been prepared by the Tribunal as a whole. In section B, the Tribunal has concluded that it has power to award costs against NSWMC in this proceeding under s 44KB of the Act. In section C, the Tribunal has concluded that it is not appropriate to make an order for costs.

# B. Statutory power to award costs

## The legal framework

1. Division 2 of Part IIIA is titled “Declared services”. As the title implies, it concerns the process for declaring services under Part IIIA.
2. Subdivision B of Div 2 is titled “Declaration by the designated Minister”. Again, as the title implies, it concerns the process by which the designated Minister may declare a service (or decide not to declare a service), as well as reviews of such decisions by the Tribunal.
3. The decision of the Treasurer, which the Tribunal was required to reconsider in this proceeding, was made under s 44H which relevantly provides as follows:

**44H Designated Minister may declare a service**

(1) On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it.

1. Thus, the Treasurer (as designated Minister for the purposes of the decision) was empowered to make one of two decisions, expressed as declaring the service or deciding not to declare the service.
2. The word “declaration” is defined by s 44B for the purpose of Part IIIA as “a declaration made by the designated Minister under Division 2”.
3. Section 44K of the Act provides that a review application may be brought in relation to those two kinds of decision. The relevant sub-sections are as follows:

**44K Review of declaration**

(1) If the designated Minister declares a service, the provider may apply in writing to the Tribunal for review of the declaration.

(2) If the designated Minister decides not to declare a service, an application in writing for review of the designated Minister’s decision may be made by the person who applied for the declaration recommendation.

(3) An application for review must be made within 21 days after publication of the designated Minister’s decision.

(4) The review by the Tribunal is a re‑consideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

1. It can be seen that the language of subss (1) and (2) of s 44K reflects the language of s 44H(1), referring to the alternative decisions able to be made by the Treasurer (as designated Minister) as declaring the service or deciding not to declare the service.
2. The Tribunal’s power to award costs in respect of a review proceeding under s 44K is conferred by s 44KB which relevantly provides as follows (emphasis added):

**44KB Tribunal may order costs be awarded**

(1) If the Tribunal is satisfied that it is appropriate to do so, the Tribunal may order that a person who has been made a party to proceedings for a **review of a declaration under section 44K** pay all or a specified part of the costs of another person who has been made a party to the proceedings.

(2) …

(3) If the Tribunal makes an order under subsection (1), it may make further orders that it considers appropriate in relation to the assessment or taxation of the costs.

(4) The regulations may make provision for and in relation to fees payable for the assessment or taxation of costs ordered by the Tribunal to be paid.

(5) If a party (the first party) is ordered to pay some or all of the costs of another party under subsection (1), the amount of the costs may be recovered in the Federal Court as a debt due by the first party to the other party.

1. On its literal terms, s 44KB(1) refers only to a proceeding for a review of a declaration; it does not refer to a proceeding for a review of a decision not to declare a service. The present proceeding is of the latter kind. There was no declaration and, accordingly, this proceeding does not involve a review of a declaration. Therefore, a literal reading of s 44KB would suggest that the Tribunal is not empowered to make an order for costs in this proceeding.
2. The question that arises for determination is whether s 44KB(1) should be construed such that it empowers the Tribunal to make an order for costs in proceedings for a review of a declaration under s 44K(1) and in proceedings for a review of a decision not to declare a service under s 44K(2). The Tribunal is not otherwise empowered to make an order for costs in respect of a proceeding brought under s 44K.
3. The Tribunal notes that s 44KB was considered by a differently constituted Tribunal in *Re Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7; 309 FLR 358 (***Re Glencore (No 2)***). Like the present proceeding, *Re Glencore (No 2)* concerned a proceeding under s 44K(2) for review of a decision made by the designated Minister (the Acting Federal Treasurer) not to declare the shipping channel service at the Port. Glencore was successful in its application for review and applied for an order of costs against PNO. The Tribunal ultimately declined to order costs but proceeded on the assumption that it was empowered to do so, stating (at [5]):

Clearly s 44KB was inserted to provide the Tribunal with a discretion to order costs in reviews of decisions of the Minister to declare, or not to declare, a service under Pt IIIA of the Act”.

1. As noted by this Tribunal in *Application by NSWMC (No 3)*, it appears that no party in *Re Glencore (No 2)* questioned the power of the Tribunal to make an order for costs under s 44KB(1) in a proceeding for review of a decision not to declare a service. For that reason, *Re Glencore (No 2)* does not provide guidance on the question to be determined.

## The parties’ submissions on the question of power

### PNO’s submissions

1. PNO submitted that once regard is had to statutory context and purpose, as is required, it becomes clear that the phrase “review of a declaration under section 44K” in s 44KB(1) refers to both a review of a decision to declare a service and a review of a decision not to declare a service. In this regard PNO submitted that four key pieces of context must be considered.
2. First, PNO submitted that the Tribunal should have regard to the explanatory memorandum to the amendment which introduced s 44KB. PNO argued that the explanatory memorandum shows that the intended purpose of s 44KB was to empower the Tribunal to deal with the costs of any review proceeding conducted by the Tribunal under s 44K.
3. Second, PNO submitted that the Tribunal should have regard to the immediate context provided by s 44K, including its heading, “Review of declaration”. PNO submitted that this heading relates to a section that prescribes two kinds of review applications that can be brought – a review of the Minister’s decision to declare a service, and a review of the Minister’s decision not to declare a service – and therefore contemplates that both kinds of review fall within the notion of a “Review of declaration”. PNO argued that this indicates that references to the phrase “review of a declaration” in other parts of the legislation – without more – should not necessarily be construed as being limited to reviews of decisions to declare a service.
4. Third, PNO submitted that there are other textual indicators that support a broader construction of the phrase “review of a declaration” throughout Part IIIA of the Act. PNO argued that, in contrast to s 44KB(1) which refers to a review of a declaration “under section 44K”, three other provisions in Part IIIA refer to a review of a declaration “under subsection 44K(1)”, namely ss 44KA(1), 44W(4A), and 44ZZCBA(1) and (2). PNO argued that if the phrase “review of a declaration” referred only to reviews of decisions to declare a service, the words “under subsection 44K(1)” in these provisions would be unnecessary. PNO submitted that the more expansive reference to s 44K in s 44KB(1) indicates an opposite intention, namely that it is meant to apply to any review of a declaration decision brought under s 44K.
5. Fourth, PNO submitted that Part IIIA uses shorthand expressions of a kind similar to “review of a declaration” elsewhere throughout the Part. PNO pointed to ss 44H and 44HA, which use the phrase “declaration recommendation” in relation to any recommendation provided by the NCC to the designated Minister – whether that be to declare, or not to declare, the relevant service. PNO submitted that this reflects an approach in Part IIIA more generally of using shorthand expressions that refer to more than the ordinary meaning of the expression.

### NSWMC’s submissions

1. NSWMC submitted that the statutory text in s 44KB(1) read in context of ss 44H and 44K is clear. The Tribunal’s power to award costs is expressly limited to “proceedings for a review of a declaration”. The word “declaration” in s 44KB(1) is clearly used in the statutory sense of Part IIIA. NSWMC argued that s 44KB(1) therefore does not confer power on the Tribunal to order costs in this proceeding for review of the Minister’s decision not to declare a service under s 44K(2), which does not involve a “declaration” at all.
2. NSWMC submitted that whilst historical considerations and extrinsic materials are relevant to the process of statutory construction, they cannot be relied on to displace the clear meaning of the statutory text. In the circumstances, NSWMC submitted that there is no room in the statutory text for the contrary argument advanced by PNO.
3. In response to PNO’s construction of s 44KB(1), NSWMC made four key points:
4. The heading in s 44K cannot be used to defeat the clear meaning of the statutory provisions. While headings may be taken into account in the process of statutory construction, the High Court has recognised that headings are “not always reliable and do not form part of a statute, and so may not govern what follows in the provision”: *R v A2* [2019] HCA 35; 373 ALR 214 (***R v A2***) at [40].
5. In respect of PNO’s argument that there are other provisions in Part IIIA which refer to subs 44K(1) expressly in relation to a review of a declaration, NSWMC submitted that none of the provisions relied on use the same language as s 44KB(1) – each refer to “an application to review a declaration under s 44K(1)”. NSWMC further submitted that, if the legislature had intended s 44KB(1) to apply to both types of proceedings under s 44K, the section could easily have referred to “proceedings for a review under s 44K” or expressly to both types of proceedings.
6. In respect of PNO's reliance on other shorthand expressions used in Part IIIA such as the words “declaration recommendation” in s 44H, NSWMC submitted that PNO has overlooked the fact that “declaration recommendation” is a defined term in s 44B meaning “a recommendation made by the [National Competition] Council under s 44F”.
7. In respect of PNO’s reliance on statements made in the explanatory memorandum, NSWMC submitted that these statements cannot displace the clear language in the statute. Further, NSWMC argued that the passages relied on by PNO do not support PNO’s argument and that, whilst not strictly necessary, it is possible to discern a reason why Parliament chose to limit the power in s 44KB(1) to proceedings for a review of a declaration and not to proceedings for a review of a decision not to declare a service. NSWMC argued that imposing a potential liability on an applicant for declaration (access seeker) for payment of the service provider’s costs would disincentivise applications for review of decisions not to declare a service which runs contrary to Part IIIA involving “very significant economic decisions where the costs of making a wrong decision are likely to be high” (Competition Policy Review, Final Report (March 2015), p 74).
8. NSWMC advanced a further submission that if, contrary to NSWMC’s submissions, the Tribunal finds that s 44KB(1) applies to this proceeding, the power in s 44KB(1) is expressly confined to costs orders against “a person who has *been made* a party to proceedings” (emphasis added). NSWMC argued that the power does not extend to NSWMC, as the applicant. NSWMC argued that this conclusion is supported by the text and context. As to text, the notion that the applicant makes itself a party to the proceedings by commencing the proceedings is not readily embraced in the ordinary meaning of the words “who has been made a party to the proceeding”. As to context, s 44K(6B)(a)(iv) relevantly provides that notice of any assistance requested by the Tribunal of the Council should be given to “any other person who has been made a party to the proceedings for review”. NSWMC submitted that this section draws the distinction between, on the one hand, an applicant and, on the other hand, “a person who has been made a party to proceedings”.

### PNO’s submissions in reply

1. In reply to NSWMC’s argument concerning the meaning of the phrase “a person who has been made a party to proceedings”, PNO submitted that, by commencing proceedings for review under s 44K, an applicant is made a party to the proceedings. PNO argued that NSWMC’s construction of s 44KB(1) is contrary to the text and context of the provision and inconsistent with the object of the provision, as revealed by the relevant legislative materials. On NSWMC’s construction, the Tribunal would be unable to order costs against an unsuccessful applicant for review, and instead would be confined to ordering costs against a person who has been given leave to participate in the review, but who is likely to have played a lesser role than the applicant.

## Applicable principles of statutory interpretation

1. The applicable principles of statutory interpretation are well known. The task of statutory construction must begin with the text of the provision in question, considered in its context (including legislative history and extrinsic materials) and with regard to its purpose: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 (***SZTAL***) at [14]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 (***Commissioner of Taxation***) at [39]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 (***CIC Insurance***) at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71].
2. In *Commissioner of Taxation*, the High Court said at [39] (quoting *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27):

‘This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text.’ So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

1. More recently, the majority of the High Court in *SZTAL* (Kiefel CJ, Nettle and Gordon JJ) stated as follows (at [14], citations omitted):

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

1. Context in its widest sense includes consideration of the mischief which the statute was intended to remedy. As was stated by Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance* (at 408):

… if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

1. This approach is also required by s 15AA of the *Acts Interpretation Act 1901* (Cth) (**AIA**), which states that “the interpretation that would best achieve the purpose or object of the Act … is to be preferred to each other interpretation”.
2. The permissible extent to which a court may depart from the statutory text, including by reading a statutory provision as if it contained additional words or omitted words, was considered by the High Court majority (French CJ, Crennan and Bell JJ) in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 (***Taylor***) at [38]-[40] (citations omitted):

The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills “gaps disclosed in legislation” or makes an insertion which is “too big, or too much at variance with the language in fact used by the legislature”.

Lord Diplock’s three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution*) accord with the statements of principle in *Cooper Brookes* and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock’s three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that “the modified construction is reasonably open having regard to the statutory scheme” because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour’s further observation, “[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances”.

Lord Diplock’s speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock’s conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament: the alteration to the language of the provision in such a case may be “too far-reaching”. In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the *Constitution*.

## Consideration

1. Two questions are raised for determination. The first is whether s 44KB(1) should be construed as applicable only to proceedings for review of declarations (which are made under s 44K(1)), or whether s 44KB(1) should be construed as applying to proceedings for review of decisions not to declare a service (which are made under s 44K(2)). If the answer to the first question is that s 44KB(1) is only applicable to proceedings for review of declarations (which are made under s 44K(1)), the section has no application to the present proceeding and it is unnecessary to consider the second question. If the answer to the first question is that s 44KB(1) is also applicable to proceedings for review of decisions not to declare a service (which are made under s 44K(2)), it is then necessary to determine the second question which is whether an applicant for review, in this case NSWMC, is a person who has been made a party to the proceeding.
2. In relation to the first question, and as observed by the Tribunal in *Application by NSWMC (No 3)* (at [272]), on its literal terms s 44KB(1) refers only to a proceeding for a review of a declaration; it does not refer to a proceeding for a review of a decision not to declare a service. The language of s 44KB(1) mirrors the language of s 44K(1).
3. As the authorities referred to above affirm, however, the process of assigning meaning to a legislative provision is not confined to an examination of the literal or grammatical meaning of the statutory text. An examination of the statutory purpose, in so far as it can be discerned from the statute and relevant extrinsic materials, and an examination of the statutory context in which the provision appears, may demonstrate that the provision was intended to have a different meaning to its literal or grammatical meaning. Further, a statutory definition (in this case, the definition of the word “declaration”) is only an aid to construction of the statute, and is not to be used if the purpose and context of the statute requires otherwise: *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 at [649] (Jacobson, Gilmour and Gordon JJ): citing *Kelly v The Queen* (2004) 218 CLR 216 (***Kelly***) at [84] and [103] (McHugh J); *Financial Services Council Ltd v Industry Super Australia Pty Ltd* (2014) 222 FCR 455 at [34] citing *Kelly*; *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613 at 621.

### Purpose of s 44KB

1. In considering the purpose of s 44KB(1), a primary consideration is whether the legislature may have had a reason to confine the power to award costs to proceedings for review of declarations (made under s 44K(1)) and to exclude from the scope of the power proceedings for review of decisions not to declare a service (made under s 44K(2)).
2. In that regard, it can be observed that proceedings for review of declarations (made under s 44K(1)) are proceedings initiated by the putative service provider seeking to overturn a decision to declare the service. Conversely, proceedings for review of decisions not to declare a service (made under s 44K(2)) are proceedings initiated by the original applicant for declaration (typically the access seeker, while recognising that, under s 44F, the original applicant can also include the designated Minister) seeking to overturn a decision not to declare the service. It is relevant to consider whether that difference in the two forms of proceeding might inform a legislative intention to confine the power to award costs to proceedings of the former kind.
3. Section 44KB was introduced by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth), together with s 44KA which empowers the Tribunal to stay the operation of a declaration in its discretion. The Explanatory Memorandum to the *Trade Practices Amendment (Infrastructure Access) Bill 2009* (Cth) (**Explanatory Memorandum**) described the mischief both provisions were intended to remedy as follows (at [5.7]-[5.8], emphasis added):

5.7 Currently, any decision to declare a service is automatically stayed by an appeal to the Tribunal. This creates a strong incentive for service providers to commence appeals and then delay their completion, creating undue delay. To address this concern, it has been recommended by the NCC in its Annual Report 2007-08 that the Tribunal be empowered to determine whether a stay is appropriate.

5.8 Unlike most court proceedings, and unlike matters arising in the Tribunal in relation to the regulation of gas pipelines, there are no provisions for costs to be paid or awarded with respect to applications to the Tribunal for **review of a decision-maker’s decision in relation to a declaration application**. Requiring unsuccessful applicants to pay costs should reduce incentives for delaying tactics, frivolous review applications or other inappropriate behaviour. This amendment was proposed by the NCC in its Annual Report 2007-08 as a means to reduce the substantial costs and delays currently experienced during review proceedings.

1. The concern expressed at [5.7] is that, if a service is declared, service providers have an incentive to delay the commencement of the declaration by commencing a proceeding to review the declaration, causing undue delay. Parliament sought to address that concern by conferring a discretion on the Tribunal whether to stay the declaration pending the outcome of the review proceedings.
2. The concern expressed at [5.8] is that, unlike court proceedings, the Tribunal had no power to award costs which might otherwise “reduce incentives for delaying tactics, frivolous review applications or other inappropriate behaviour”. Two aspects of [5.8] should be noted. First, the Explanatory Memorandum observed that the Act contained no provisions for costs to be paid or awarded with respect to applications to the Tribunal for review of a decision-maker’s decision *in relation to a declaration application*. That language clearly covers both kinds of review referred to in s 44K (reviews of a declaration and reviews of a decision not to declare). Second, the Explanatory Memorandum focussed on the effect of requiring *unsuccessful applicants* to pay costs, observing that it should reduce incentives for delaying tactics, frivolous review applications or other inappropriate behaviour and that this amendment was proposed by the NCC in its Annual Report 2007-2008 as a means to reduce the substantial costs and delays currently experienced during review proceedings. The focus of the proposed amendment appeared to be the award of costs against unsuccessful applicants (as opposed to unsuccessful respondents to an application) with the aim of reducing incentives for delaying tactics, frivolous review applications or other inappropriate behaviour.
3. The Explanatory Memorandum summarised the effect of ss 44KA and 44KB as follows (at [5.13]-[5.14], emphasis added):

5.13 The Tribunal has a discretion to decide whether a decision to declare a service should be stayed upon an application for review of that decision under section 44K.

5.14 The Tribunal has a discretion to order that a party pays all or part of the costs of another party in a **review of a declaration decision under section 44K**.

1. It can be observed that at [5.8] and [5.14] the Explanatory Memorandum described the power to award costs in proposed s 44KB in two ways, both of which differed from the statutory language: [5.8] referred to a review of a decision-maker’s decision “in relation to a declaration application” while [5.14] referred to a review of a “declaration decision under section 44K”. Both expressions are apt to include decisions not to declare a service under s 44K(2). Other references in the Explanatory Memorandum to the power to award costs in proposed s 44KB also use the description of a “declaration decision” (see the table under [5.14] and [5.49]).
2. The NCC Annual Report 2007-2008 that informed the Explanatory Memorandum contemplated the need for reform of the process for reviewing declaration decisions, noting that the provisions in force at the time “limit[ed] the scope for the Tribunal to progress matters when **one or more party** to a review has an incentive to delay” (p19, emphasis added). The Report went on to observe that:

Unlike most court proceedings and some other matters arising in the Tribunal, there are no provisions for costs to be paid or awarded **in relation to a review of a declaration decision by the Tribunal**. (By contrast the NGL contains provisions for the Tribunal to award costs in a review.) Costs provisions similar to those in the NGL could usefully be applied for reviews of declaration decisions. This would discourage conduct designed to waste time and provide an additional incentive to ensure parties comply with Tribunal directions. The Council notes that under the NGL the Tribunal must not make an order requiring the original decision maker (including the Council and the relevant Minister) to pay costs unless they cause delays or otherwise act inappropriately.

1. As far as can be discerned from the Explanatory Memorandum, the purpose of the power to award costs in s 44KB is to reduce incentives for delaying tactics, frivolous review applications or other inappropriate behaviour in review proceedings. There is more than a suggestion in the Explanatory Memorandum that the proposed amendment was largely motivated by the behaviour of service providers who may have commenced review proceedings with the aim of delaying the effect of a declaration. It might be thought that service providers, facing the statutory consequences of declaration, have a greater incentive to bring unmeritorious review proceedings in comparison to access seekers, in order to delay the effects of declaration. There is also more than a suggestion in the Explanatory Memorandum that the proposed amendment was focussed on unsuccessful applicants rather than unsuccessful respondents to a review proceeding, perhaps reflecting the fact that respondents do not initiate the review proceedings. Despite those suggestions, however, the Explanatory Memorandum does not contain any clear statement that the power to award costs would be intentionally confined to proceedings for review of declarations (made under s 44K(1)), and would not extend to proceedings for review of decisions not to declare a service (made under s 44K(2)). Nor does the Explanatory Memorandum contain any clear statement that the power would be intentionally confined to the award of costs against unsuccessful applicants (as opposed to unsuccessful respondents).
2. It follows, in my view, that all that can be safely gleaned from the extrinsic materials is that the purpose of the power to award costs in s 44KB is to reduce incentives for delaying tactics, frivolous review applications or other inappropriate behaviour in review proceedings. There is otherwise no clear indication that the power was intended to be limited to an award of costs against service providers in proceedings for review of declarations made under s 44K(1).

### Contextual considerations

1. In discerning the intended meaning of s 44KB, there are two key contextual indicators that favour a broader interpretation of the provision (to include proceedings for review of decisions not to declare a service).
2. First, when referring specifically to the review of a decision to declare a service (as opposed to the review of a decision not to declare), the legislature has sought to make that clear by referring to a declaration “under subsection 44K(1)”. The use of the phrase occurs in:
3. s 44KA(1), which refers to the Tribunal’s ability to stay the operation of a declaration when an application for a review of a declaration has been made;
4. s 44W(4A), which provides that the Tribunal must not make an access determination in relation to a service where an application for a review of a declaration has been made; and
5. ss 44ZZCBA(1) and (2), which relates to deferral of access arbitrations when an application for a review of the declaration has been made.
6. This choice in legislative drafting suggests that, if the legislature had intended the power to award costs in s 44KB to be limited to the review of a decision to declare a service, s 44KB would have used the same language as appears in ss 44KA(1), 44W(4A) and 44ZZCBA(1) and (2). Instead, the legislature chose different language, referring to proceedings for a review of a declaration under s 44K, not confined to s 44K(1). While the legislative intention would have been clearer if the phrase “declaration decision” were used (as in the Explanatory Memorandum) as opposed to “declaration”, the reference to s 44K rather than 44K(1) provides a substantial indication that both forms of review proceeding were intended to be covered.
7. This approach to construction is supported by the *expressio unius est exclusion alterius* maxim, that where legislation includes provisions relating to similar matters in different terms, it is reasonable to assume that there is a deliberate intention to deal with them differently. While this maxim is to be applied with caution, it may serve, as in the present case, to bolster an available interpretation rather than to produce a result in itself: D C Pearce, Statutory Interpretation in Australia (LexisNexis, 9th edition, 2019) at [4.43] citing *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139 at 150; *Riley v Commonwealth* (1985) 159 CLR 1 at 12. The strength of the application of this maxim in the present circumstances is reinforced by the fact that ss 44KA and 44KB, with their respective references to “subsection 44K(1)” and “section 44K”, were introduced at the same time and the difference in their drafting is therefore less likely to be the product of inadvertent inconsistency: cf *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151 at [15] per North J.
8. The second matter of context is the headings used in Div 2 to Part IIIA (in which s 44KB is found). Since the passing of the *Acts Interpretation Amendment Act 2011* *(No 46 of 2011)* (Cth), s 13 of the AIA now provides that all material in an Act forms part of the Act. Headings to parts, divisions, subdivisions and sections in all Commonwealth legislation are therefore part of the legislation, and regard can be had to such headings for the purposes of interpretation: *Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* (2014) 222 FCR 13 (***Quikfund***) at [81] per Allsop CJ, White and Wigney JJ; *Berenguel v Minister for Immigration and Citizenship* [2010] HCA 8; 264 ALR 417 at [15], [26]; *Pearce* *on Statutory Interpretation* at [4.59], [4.71]. NSWMC’s reliance on *R v A2* at [40] in this regard is misplaced: that case concerned the construction of a NSW statute to which s 35(2) of the *Interpretation Act 1987* (NSW) applied (stipulating that headings of a provision do not form part of a statute).
9. As noted earlier, the heading to Div 2 of Part IIIA is “Declared services”. The heading to Subdiv B of Div 2 is “Declaration by the designated Minister”. The heading of s 44H is “Designated Minister may declare a service”. The heading to s 44K is “Review of declaration”. It can be observed that each of those headings refers only to the *declaration* of a service, even though s 44H concerns decisions to declare or *not to declare* a service and s 44K concerns the review of decisions to declare or *not to declare* a service. The use of headings in that form suggests that, unless the context indicates otherwise (as it does in s 44I(2)), the phrase “review of a declaration” is an umbrella term that refers to both types of review proceedings contemplated under s 44K.

### Construction of s 44KB(1) in light of context and purpose

1. In my view, the purposive and contextual considerations referred to above support the conclusion that s 44KB(1) empowers the Tribunal to award costs in proceedings for review of declarations (which are made under s 44K(1)) and proceedings for review of decisions not to declare a service (which are made under s 44K(2)). The purpose of the power to award costs in s 44KB is to reduce incentives for delaying tactics, frivolous review applications or other inappropriate behaviour in review proceedings. While service providers may have greater incentives to engage in such conduct, the extrinsic materials do not provide clear support for a conclusion that the legislative purpose was limited to review proceedings brought by service providers. Contextually, the common use of the word “declaration” to describe decisions to declare or not to declare, and the reference to review proceedings under s 44K as opposed to s 44K(1), provide contextual support for reading the power as applicable to both types of review proceedings under s 44K.
2. The Tribunal rejects NSWMC’s submissions that the clarity of the statutory text in s 44KB(1) provides no room for an alternative construction. It can be accepted that the statutory text is unfortunate. It would have been far clearer if the subsection had referred to “proceedings for a review of a declaration **decision** under section 44K”. The insertion of the word “decision” would make clear that the subsection is referring to decisions concerning declaration made under s 44K (being decisions to declare or not to declare). In the view of the Tribunal, the subsection should be construed as if the word “decision” was implicitly read in, consistently with the principles of construction stated in *Taylor*. The error in drafting is plain and the word to be supplied (“decision”) can be identified with exactitude. This construction is consistent with the language in fact used by the legislature and enhances the consistency of language in Part IIIA: *Taylor* at [39].

### A person who has been made a party to the proceedings

1. It is necessary to address NSWMC’s further submission that if s 44KB(1) does apply to these proceedings, the Tribunal does not have the power under s 44KB(1) to order costs against NSWMC because it is not “a person who has been made a party to the proceedings” within the meaning of s 44KB(1).
2. The phrase “a person who has been made a party to the proceedings” is used in a number of provisions within Div 2 of Part IIIA of the Act (specifically ss 44K(6B), 44KA and 44KB), but it is a somewhat unfortunate phrase. As explained in *Application by New South Wales Minerals Council* [2021] ACompT 2 (***Application by NSWMC (No 1)***), there is no express legislative provision that confers power on the Tribunal to “make” a person a “party” to a review proceeding under Div 2. Rather, as observed in that decision (at [61]-[62]):
3. reg 22B of the *Competition and Consumer Regulations 2010* (Cth) stipulates that in a review under s 44K(1) of a declaration of a service, the person who applied for the declaration recommendation may participate in the review, in addition to the service provider and in a review under s 44K(2) of a decision not to declare a service, the service provider may participate in the review, in addition to the person who applied for the declaration recommendation; and
4. subpara 44K(6B)(a)(iv) assumes that the Tribunal has power to make a person, other than the applicant for review, the provider of the service and the person who originally applied for the declaration recommendation, a party to the proceeding for review.
5. Despite the absence of express powers to make a person a party to a proceeding under Div 2, for the reasons given in *Application by NSWMC (No 1)*, the Tribunal has an implied power to grant leave to a person to participate in the review so as to be heard on the review (see at [63]). Further, and again for the reasons given by the Tribunal in *Application by NSWMC (No 1)*, a person who has and exercises the right to participate in the review proceeding may properly be described as a party to the proceeding (see at [58]-[62]).
6. If the Tribunal exercises an implied power to grant leave to a person to participate in the review, the person would properly be regarded as a “person who has been made a party to the proceedings”. The person would have been made a party by reason of the Tribunal’s grant of leave.
7. So too, reg 22B of the *Competition and Consumer Regulations 2010* (Cth) stipulates that, relevantly, in a review under s 44K(2) of a decision not to declare a service, the service provider may participate in the review, in addition to the person who applied for the declaration recommendation. If the service provider elects to so participate, the service provider would properly be regarded as a “person who has been made a party to the proceedings” by force of that regulation.
8. The question raised by NSWMC’s contention is whether NSWMC, as the person who applied for the declaration recommendation and the applicant on the review, is a “person who has been made a party to the proceedings”. While the statutory phrase is awkward, the legislative purpose as revealed in the extrinsic materials and other contextual considerations require an affirmative answer to the question.
9. As to the legislative purpose, [5.8] of the Explanatory Memorandum makes clear that s 44KB was enacted with unsuccessful review applicants in mind. Further, at [5.14] and in the table beneath [5.14], the intended effect of the section was expressed in broader terms, as allowing the Tribunal to order that a party to the proceedings of a review of a declaration decision under s 44K pay the costs of another party to the review. As submitted by PNO, there is no apparent reason why the Tribunal would only be empowered to order costs against a party to the proceeding other than the applicant, when it would be expected that any such person would have a lesser role in the proceeding. Such a limitation would seem perverse. A further consequence of NSWMC’s construction would be that an applicant on the review could neither be ordered to pay costs, nor seek to recover costs (as the section provides that a costs order is made in favour of “another person who has been made a party to the proceedings”).
10. Two matters of statutory context point away from NSWMC’s construction. First, as submitted by PNO, the more natural construction of s 44K(6B)(a) is that each of the persons listed at subparas (i) to (iv) is to be regarded as a person who has been made a party to the proceedings. The reference in subpara (iv) to “any other person who has been made a party to the proceedings” suggests that the persons referred to in subparas (i) to (iii) (which include the applicant on the review) are also persons who have been made parties to the proceedings. Second, s 44KA(2) confers power on the Tribunal to stay the operation of a declaration “on application by a person who has been made a party to the proceedings”. The person most likely to seek a stay of a declaration is the service provider who, in the case of a review of a declaration, would also be the applicant on the review. It is implicit that the legislature considered that the service provider, as applicant, would be a “person who has been made a party to the proceedings”.
11. For those reasons, the Tribunal considers that the preferred construction of “a person who has been made a party to the proceedings” within the context of s 44KB(1) includes the review applicant who, by commencing proceedings for review under s 44K, is made a party to the proceedings.

# C. Should an award of costs be made

1. Having determined that the Tribunal has power to award costs against NSWMC in these proceedings, it is necessary to consider whether such an order should be made.

## Applicable principles

1. The Tribunal’s discretion to award costs under s 44KB is unconfined, save that it must be exercised consistently with the purpose of the power and taking account of relevant facts and circumstances of the proceedings. As discussed above, the extrinsic materials make clear that the purpose of the power is to reduce incentives for delaying tactics, frivolous review applications or other inappropriate behaviour in review proceedings.
2. As was stated by the Tribunal in *Re Glencore (No 2)* (at [10]), the principles concerning the award of costs in *inter partes* litigation in the courts are generally not applicable to the power to award costs in proceedings of a tribunal. Indeed, in tribunal proceedings there is typically no presumption that an award of costs will be made and the ordinary practice is not to award costs. In that proceeding, the Tribunal endorsed (at [12]) the earlier statement of the Tribunal in *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3; ATPR 41-827 (***Re Duke Eastern Gas***) at [7]-[8] (made in respect of a power to award costs under s 38(10) of the Gas Pipelines Access Law in respect of a proceeding to review a decision of the Minister that a particular gas pipeline be covered under the *National Third Party Access Code for Natural Gas Pipeline Systems*):

Whether the statutory criteria for coverage of a pipeline are met will often be, as the present case illustrates, a matter on which there can be different points of view and legitimate differences of opinion. It is important that the Tribunal be acquainted with all factors which are potentially relevant to its determination. Responsible intervention by interested parties who have a worthwhile contribution to make ought not to be discouraged by fear of adverse costs orders. The review process benefits from such participation. Nor should a pipeline operator be discouraged from exercising its statutory right of review by fear that costs orders may be made against it if unsuccessful, potentially in favour of multiple parties. For these reasons, the adoption of a general rule applicable in the case of *inter partes* litigation to the proceedings before the Tribunal would not be conducive to the effective discharge by the Tribunal of its statutory functions.

Costs orders should only be made in proceedings before the Tribunal where there are circumstances which justify the making of an order. The fact that a particular outcome of proceedings before the Tribunal may be seen as conducive (or not conducive) to the commercial interests of a party, would not ordinarily provide, of itself, a sufficient reason for making a costs order for (or against) that party. In principle, the power to order costs should be exercised sparingly, and not so as to discourage participation in the review process. Generally the power to award costs should be reserved for cases where a party’s participation in the proceedings before the Tribunal materially and unnecessarily increases what would otherwise have been the costs of those proceedings.

1. After endorsing the above statement of principles, the Tribunal in *Re Glencore (No 2)* continued (at [15]):

Once it is accepted that the proceedings in this matter are not the equivalent of *inter partes* litigation, for reasons which are apparent, the Tribunal considers that the discretion to order costs against a party should not be exercised unless there is, in the particular circumstances, a reason to do so arising out of the nature of the issue or issues raised or put [sic, out] of the conduct of that party in the conduct of the matter. As in *Duke*, it is important for the Tribunal to have the benefit of the identification of all factors relevant, or potentially relevant, to its determination. The determination may have effect on a much wider group than the parties. That was said to be a feature of the present case: if the declaration were made, others may take advantage of it. That process, generally speaking, is facilitated or supported by responsible intervention by interested parties and should not be discouraged by fear of adverse costs orders. In particular, as the NCC submitted, the Tribunal’s ability to assess the application for review may be impeded if cost disincentives hinder or prevent a service provider from fully and properly participating in the review. Nor should a potential applicant for review be discouraged from exercising its statutory right of review by fear of costs orders, if it is unsuccessful, except if the matters it raises are not substantial or there is an unsatisfactory feature of the way its case is presented. Consequently, given the nature of the jurisdiction, the Tribunal reaffirms that the adoption of a general rule applicable in the case of *inter partes* litigation to proceedings before the Tribunal would not be conducive to the effective discharge by the Tribunal of its statutory functions.

1. Each of the parties accepted the foregoing as a correct statement of the applicable principles.

## PNO’s submissions

1. PNO’s primary submission in support of an order for costs was that NSWMC’s application for review was unmeritorious and NSWMC ought to have known that it would not succeed. In that respect, PNO relied on two principal matters.
2. First, one of the members of NSWMC, Glencore, had previously brought an application for review of an earlier decision not to declare the shipping channel service at the Port. That application was the subject of the decision of the Tribunal (differently constituted) in *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 (***Re Glencore (No 1)***). That application was determined by the Tribunal on the basis of the law prior to its amendment by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**2017 Amendment Act**). Specifically, applying declaration criterion (a) as interpreted by *Sydney Airport Corporation v Australian Competition Tribunal* (2006) 155 FCR 124, the Tribunal was required to consider whether access to the shipping channel service would promote a material increase in competition, and answered the question in the affirmative. The Tribunal declared the service, and the Tribunal’s decision was upheld on appeal (in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115).
3. As discussed in *Application by NSWMC (No 3)*, criterion (a) was amended in a significant way by the 2017 Amendment Act (at [45]-[46]). Prior to the amendment, the criterion required a comparison of the future state of competition in the dependent market with a right or ability to use the service and the future state of competition in the dependent market without any right or ability, or with a restricted right or ability, to use the service. Following the amendment, the criterion requires a comparison of access on reasonable terms and conditions as a result of a declaration of the service and the circumstances that would be likely to prevail with respect to access in the absence of declaration.
4. Relevantly for present purposes, in *Re Glencore (No 1)*, the Tribunal also expressed its view on whether criterion (a) would have been satisfied if it were interpreted as requiring that access to the shipping channel service, as a result of declaration, would promote a material increase in competition; that is, in a similar manner to its amended form following the enactment of the 2017 Amendment Act. The Tribunal concluded that criterion (a) would not have been satisfied in respect of the shipping channel service at the Port if it had that meaning (see at [157]). On that basis, PNO submitted that NSWMC had the benefit of, effectively, an indicative determination of the Tribunal on the question that was raised in this proceeding.
5. Second, PNO submitted that NSWMC did not adduce any evidence on the application to show that either the Tribunal’s indicative determination in *Re Glencore (No 1)* was wrong or that facts and circumstances had changed since the decision in *Re Glencore (No 1)*. To the contrary, PNO argued that its subsequent introduction of the open access arrangements for the shipping channel service, including its offer of the Pro Forma Pricing Deeds, only strengthened the conclusion expressed by the Tribunal in *Re Glencore (No 1)*. The Tribunal’s reasons in this proceeding (as recorded in *Application by NSWMC (No 3)*) demonstrate that NSWMC’s application for review in this proceeding lacked merit. In that regard, PNO referred to the following findings made by the Tribunal in this proceeding:
6. that NSWMC was unable to refer the Tribunal to any evidence adduced by it before the NCC that would contradict the NCC’s assessment that the coal tenements market is effectively competitive (at [175]);
7. there was no substantive evidence before the NCC that PNO’s pricing under its open access arrangement or the Pro Forma Pricing Deeds was having any detrimental impact on investment and competition in the coal tenements market (at [240]);
8. NSWMC’s principal argument in relation to the impact of declaration on the coal tenements market, that declaration would remove hold-up risk for coal tenement investment and thereby promote a material increase in competition, was not supported by any empirical evidence (at [246]) or any financial analysis of the impact of the rates of the navigation service and wharfage charges on returns in the coal mining sector in the Hunter Valley (at [251]); and
9. NSWMC did not provide financial data to the NCC to support its assertions that there would be investment uncertainty without declaration (at [260]).
10. PNO also submitted that it incurred unnecessary costs associated with NSWMC’s interlocutory application under ss 44K(6) and/or 44ZZOAAA(5) of the Act for the Tribunal to issue a direction or request for the certain documents referred to by the NCC to be provided to the Tribunal for the purposes of the review proceedings (see *Application by New South Wales Minerals Council (No 2)* [2021] ACompT 3). PNO submitted that the application was made late and demonstrated that NSWMC’s application was ill-considered.

## NSWMC’s submissions

1. In response, NSWMC advanced three principal submissions.
2. First, NSWMC submitted that its application for review was not unmeritorious. It argued that the Tribunal’s earlier decision in *Re Glencore (No 1)* (at [157]) under the predecessor provisions of Part IIIA was not determinative of the present application. The present application was the first application made since the law was amended by the 2017 Amendment Act and there were important legal issues that were determined in this application as to the proper construction of the new declaration criteria (for example, the meaning of the expression “promote a material increase in competition”). Whilst the new declaration criteria were addressed by the NCC in its recommendation to revoke the declaration of the shipping channel service, the revocation determination was not able to be reviewed by the Tribunal. NSWMC referred to the fact that the ACCC sought to intervene in NSWMC’s application on the basis that it disagreed with the approach of the NCC to criteria (a) and (d) (the Tribunal refused the ACCC’s application to intervene in *Application by New South Wales Mineral Council* [2021] ACompT 2). NSWMC also referred to the fact that the Tribunal concluded that the NCC’s decision was partly based on an erroneous approach to criterion (a) (referring to *Application by NSWMC (No 3)* at [145]-[148]). As to the factual circumstances, NSWMC said that, since the Tribunal’s decision in *Re Glencore (No 1)*, PNO had further increased the navigation service charge and had refused to negotiate collectively with coal producers in respect of that charge.
3. Second, NSWMC submitted that the contention that its application lacked merit was not a sufficient basis to make a costs order under s 44KB(1). In that regard, NSWMC relied on the statements made by the Tribunal in *Re Duke Eastern Gas* (at [8]), approved by the Tribunal in *Re Glencore (No 2)* (at [10]), to the effect that the power to award costs should be reserved for cases where a party’s participation in the proceedings before the Tribunal materially and unnecessarily increases what would otherwise have been the costs of those proceedings. NSWMC submitted that its conduct of the proceeding did not warrant the imposition of an adverse costs order.
4. Third, NSWMC submitted that its application under ss 44K(6) and/or 44ZZOAAA(5) of the Act for certain documents, referred to by the NCC, to be provided to the Tribunal for the purposes of the review proceedings was ultimately successful in respect of a number of documents.

## Consideration

1. The question whether to award costs against NSWMC in favour of PNO is finely balanced.
2. Contrary to NSWMC’s submission, the extrinsic materials to the enactment of s 44KB make clear that the purpose of the power includes deterring frivolous review applications. Costs may be awarded against a review applicant if the application lacks merit such that it might be described as frivolous or, to adopt the language of the Tribunal in *Re Glencore (No 2)*, if the matters it raises are insubstantial. Costs may also be awarded against a party if their conduct in the review proceedings materially and unnecessarily increases what would otherwise have been the costs of the proceedings.
3. The issues the subject of these proceedings were extensively canvassed in earlier decisions and proceedings concerning the declaration of the shipping channel service at the Port. Those earlier decisions and proceedings are summarised in *Application by NSWMC (No 3)* and involved an ultimately successful application for declaration by Glencore (see at [74]-[76]) and the revocation of the declaration by the NCC following the enactment of the 2017 Amendment Act (see at [84]-[85]). The earlier Tribunal’s reasons in *Re Glencore (No 1)* expressed the view that, if criterion (a) required assessment of whether declaration (that is, access on terms brought about by declaration) would promote a material increase in competition, the criterion would not be satisfied (at [157]).
4. Given the history of previous decisions and proceedings concerning the possible declaration of the shipping channel service at the Port, it would be expected that NSWMC’s renewed application to the NCC for declaration would have been based on additional evidence, not considered in the earlier decisions, demonstrating that a different conclusion should be reached. However, NSWMC failed to adduce evidence in support of its main contention in the review. As the Tribunal explained in giving its reasons for dismissing NSWMC’s application for review (*Application by NSWMC (No 3)* at [7]), the principal contention advanced by NSWMC to the NCC and maintained in the review before the Tribunal was that, without declaration of the shipping channel service, companies considering investments in the coal tenements market in the Hunter Valley region would face uncertainty with respect to future prices to be charged by PNO for the shipping channel service, resulting in increased investment risk and causing investment delay. Despite that, as the Tribunal found (at [8]):

NSWMC’s principal contention to the NCC was not supported by any empirical evidence concerning the coal tenements market. NSWMC failed to present to the NCC any financial or quantitative evidence concerning the coal tenements market conditions, structure, prices or expected returns. No financial evidence was presented as to how investment decisions are made in the coal tenements market and how Port charges figure in investment decisions. Instead, NSWMC relied on assertions by a limited number of existing coal mining companies to the effect that investment decisions would be affected if the shipping channel service were not declared, supported by a theoretical economic report from Synergy Consulting.

1. As submitted by PNO, NSWMC brought its interlocutory application under ss 44K(6) and 44ZZOAAA(5) of the Act at a late stage of the proceeding. The question of what materials were able to be considered by the Tribunal in the proceedings ought to have been addressed by NSWMC at a much earlier stage of the proceeding. Instead, the parties to the review were required to engage in an urgent interlocutory dispute not long before the commencement of the hearing.
2. Notwithstanding those matters, the Tribunal has determined that it is not appropriate to award costs against NSWMC in favour of PNO in this proceeding.
3. The object of Part IIIA is to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets. By reason of declaration criterion (c) in s 44CA, declaration only applies to facilities of national significance. In *Pilbara Infrastructure v Australian Competition Tribunal* (2012) 246 CLR 379, the plurality observed (at [98]) that Part IIIA is intended to operate in a way that will contribute to national economic efficiency. The national access regime in Part IIIA therefore serves an important national economic policy objective. Further, as observed by the members of the Competition Policy Review in their final report dated March 2015 (at p 74): “[d]ecisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of making a wrong decision are likely to be high”. For that reason, and as stated by the Tribunal in *Re Glencore (No 2)*, the discretion to order costs in s 44KB should not be exercised in a manner that may discourage potential applicants for review from exercising their statutory right of review by fear of costs orders. The power should be exercised sparingly.
4. While NSWMC’s application for review was unsuccessful and aspects of its application can be criticised for lacking substance, overall the application raised questions of importance that required careful consideration by the Tribunal. Three matters can be noted in that regard.
5. First, the declaration criteria now located in s 44CA were amended by the 2017 Amendment Act with effect from 6 November 2017. As discussed by the Tribunal in *Application by NSWMC (No 3))* at [36]-[60], each of criterion (a) and (d) were the subject of material revision. The amendments gave rise to a number of arguments about the meaning of the new criteria which were resolved by the Tribunal (see at [128]-[152]). The Tribunal considers that the questions raised in relation to the meaning of the declaration criteria were properly raised by each party, and the Tribunal’s decision might have been different if different conclusions were reached about those issues. Further, the proceeding before the Tribunal raised an important question about whether, and in what circumstances, criterion (a) would be satisfied if the facility owner (service provider) is not vertically integrated, which was considered by the Tribunal (at [153]‑[169]). The Tribunal considers that the arguments advanced by the parties on that issue were properly raised and, again, the Tribunal’s decision might have been different if different conclusions were reached.
6. Second, following the NCC’s revocation decision in July 2019, there was a material change in circumstances concerning the terms on which PNO offered the shipping channel service. As summarised by the Tribunal in *Application by NSWMC (No 3)* at [87]:

…in December 2019 (and subsequent to the revocation decision), PNO published on its website new “open access” rates for the navigation service and wharfage charges for vessels using the shipping channel service taking effect from 1 January 2020. The “open access” rates published by PNO, available to any coal vessel entering the Port, are a navigation service charge of $1.0424 per gross tonne and a wharfage charge of $0.0802 per revenue tonne. In addition to publishing “open access” rates on its website, PNO also published, and offered on a standing basis, the Pro Forma Pricing Deeds. As noted earlier, the Port User Pricing Deed was published in December 2019 but was replaced by the Producer Pricing Deed and Vessel Agent Pricing Deed in March 2020. The Pro Forma Pricing Deeds were offered as an agreement in respect of the navigation service charge and wharfage charge pursuant to s 67 of the PAMA Act which could be entered into by, relevantly, coal producers or vessel agents. The Pro Forma Pricing Deeds have a 10 year term. Under each of the three deeds, PNO offered a navigation service charge of $0.8121 per gross tonne and a wharfage charge of $0.0802 per revenue tonne, subject to an annual price adjustment (the greater of CPI increases and 4%) and other adjustment terms.

1. The terms and effect of the Pro Forma Pricing Deeds were the subject of detailed argument in the proceeding. The Tribunal considers that the arguments advanced by the parties were properly raised and, again, the Tribunal’s decision might have been different if different conclusions were reached.
2. Third, while NSWMC brought its interlocutory application under ss 44K(6) and 44ZZOAAA(5) of the Act at a late stage of the proceeding, the provisions of the Act governing the Tribunal’s review, and particularly the material that may be considered by the Tribunal, have not previously received detailed consideration by the Tribunal or the Federal Court. It was unfortunate that NSWMC focussed on those issues at a late stage of the proceeding. However, while its late application caused inconvenience, the Tribunal is not persuaded that costs would have been saved if the issues were raised at an earlier stage of the proceeding.
3. Overall, the Tribunal is not persuaded that the matters raised by NSWMC on the review application were so insubstantial, or its conduct of the application was so unsatisfactory, that an order for costs ought to be made against it. Accordingly, the Tribunal is not satisfied that it is appropriate to make a costs order against NSWMC.

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| I certify that the preceding ninety-two (92) 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: 18 November 2021