AUSTRALIAN COMPETITION TRIBUNAL

Application by Port of Newcastle Operations Pty Ltd [2021] ACompT 1

|  |  |
| --- | --- |
| Review from: | Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020 |
|  |  |
| File number: | ACT 2 of 2020 |
|  |  |
| Tribunal: | **O'BRYAN J (Deputy President)** |
|  |  |
| Date of Determination: | 9 March 2021 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** – submissions and materials filed by interested third party – imposition of confidentiality restrictions – relevance of Harman undertaking – whether personal undertaking by individual recipient required |
|  |  |
| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 101, 103, 106 |
|  |  |
| Cases cited: | *Harman v Secretary of State for the Home Department* [1983] 1 AC 280  *Hearne v Street* (2008) 235 CLR 125  *Otter Gold Mines v McDonald* (1997) 76 FCR 467 |
|  |  |
| Date of hearing: | Determined on the papers |
|  |  |
| Date of last submissions: | 5 March 2021 |
|  |  |
| Registry: | Victoria |
|  |  |
| Number of paragraphs: | 14 |
|  |  |
| Solicitor for Port of Newcastle Operations Pty Limited: | Clayton Utz |
|  |  |
| Solicitor for NSW Minerals Council: | Clifford Chance |
|  |  |
| Solicitor for ACCC: | Australian Government Solicitor |
|  |  |
| Solicitor for Port Authority of New South Wales: | Herbert Smith Freehills |

|  |  |
| --- | --- |
| **IN THE AUSTRALIAN COMPETITION TRIBUNAL** | |
|  | |
|  | **ACT 2 OF 2020** |
| **RE:** | **APPLICATION FOR AUTHORISATION AA1000473 LODGED BY NEW SOUTH WALES MINERALS COUNCIL ON BEHALF OF ITSELF, CERTAIN COAL PRODUCERS THAT EXPORT COAL THROUGH THE PORT OF NEWCASTLE, AND MINING COMPANIES REQUIRING FUTURE ACCESS THROUGH THE PORT, AND THE DETERMINATION MADE BY THE ACCC ON 27 AUGUST 2020** |
|  | **PORT OF NEWCASTLE OPERATIONS PTY LTD**  Applicant |

**DIRECTIONS**

|  |  |
| --- | --- |
| **TRIBUNAL:** | **JUSTICE O’BRYAN (DEPUTY PRESIDENT)** |
| **DATE OF DETERMINATION:** | **9 MARCH 2021** |

**THE TRIBUNAL DIRECTS THAT:**

1. Disclosure of the documents listed in Annexure A to these directions and the information contained in them (**Confidential Information**) be restricted to:
   1. the Australian Competition and Consumer Commission (**ACCC**) and its external legal advisers and engaged experts (and their direct staff);
   2. Port of Newcastle Operations Pty Limited (**PNO**) and its external legal advisers and engaged experts (and their direct staff);
   3. the external legal advisers and experts (and their direct staff) engaged by the New South Wales Minerals Council (**NSWMC**); and
   4. the Chief Executive Officer of NSWMC (Stephen Galilee) and the Policy Director of NSWMC (Andrew Abbey), subject to their providing to the Tribunal a signed Confidentiality Undertaking in the form of Annexure B and provided that only the redacted form of the Confidential Information provided to the Tribunal on 4 March 2020 is to be disclosed to those two persons.
2. Other than the disclosure permitted by paragraph 1, the Confidential Information must not be disclosed to any other person or otherwise made public.
3. Without the leave of the Tribunal, the Confidential Information must not be used by any person to whom it has been disclosed other than for the purposes of this proceeding.
4. Any written submission made to the Tribunal, or other document provided to the Tribunal, that refers to or incorporates the Confidential Information must be marked to identify clearly the Confidential Information.
5. The Confidential Information must not be referred to orally during the hearing of this proceeding (whether in oral submissions made to the Tribunal or cross-examination) unless the Tribunal has directed that the hearing of the submissions or cross-examination is to take place in private pursuant to s 106(2) of the *Competition and Consumer Act 2010* (Cth).
6. Until further order of the Tribunal, the Confidential Information is not to appear in any transcript of the proceeding before the Tribunal other than in a confidential copy of the transcript, which shall only be made available to the persons referred to in paragraph 1 of these Orders.
7. Nothing in these directions imposes an obligation on the ACCC in respect of a document or information which has been obtained by it otherwise than in the course of these Tribunal proceedings, or on PNO or NSWMC in respect of a document or information which has been obtained by it otherwise than in the course of these Tribunal proceedings or the preceding application for authorisation before the ACCC.
8. The parties have liberty to apply to vary these directions.

# ANNEXURE A

1. The Port Services Agreement dated 17 December 2013 between Newcastle Port Corporation and Port of Newcastle Operations Pty Limited.
2. The Harbour Management System Access Agreement dated 17 December 2013 between Newcastle Port Corporation and Port of Newcastle Operations Pty Limited.

**ANNEXURE B**

**CONFIDENTIALITY UNDERTAKING**

I, [insert name, position and address],

HEREBY UNDERTAKEto the Australian Competition Tribunal(**Tribunal**)in relation to the documents made available to me pursuant to the directions of the Tribunal dated 9 March 2021 (**Directions**) in proceeding ACT 2 of 2020 (**Confidential Documents**) as follows:

1. I will not use the Confidential Documents except for the purpose of Tribunal proceeding ACT 2 of 2020.
2. Without the leave of the Tribunal, I will not disclose or otherwise make public the Confidential Documents or any part of them other than as permitted by the Directions.
3. I will not make any copies or record of the Confidential Documents or any part of them including by way of taking notes, photographs or screenshots.
4. If I become aware of any unauthorised use or disclosure of the Confidential Documents, I will inform the Port Authority of New South Wales' legal advisers as soon as practicable.
5. At the conclusion of Tribunal proceeding ACT 2 of 2020, I will return the Confidential Documents to the Port Authority of New South Wales' legal advisers as soon as practicable.
6. The terms of this undertaking may be varied by direction of the Tribunal.
7. The provision of this undertaking does not constitute any acknowledgement that the Confidential Documents contain information of a nature that warrants their inspection in this proceeding to be limited.
8. This undertaking does not apply to any part of the Confidential Documents which is made public at any time.
9. I give this undertaking subject to the extent that I am required to disclose the Confidential Documents or any part of them by law, statutory body or court.

Dated:

REASONS FOR DIRECTIONS

# THE TRIBUNAL:

## Introduction

1. Port of Newcastle Operations Pty Limited (**PNO**) has applied to the Tribunal pursuant to section 101 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for review of a determination of the Australian Competition and Consumer Commission (**ACCC**) dated 27 August 2020 (Commission file no. AA1000473) (**Determination**). In the Determination, the ACCC granted authorisation to enable the NSW Minerals Council (**NSWMC**) and certain coal producers that export coal through the Port of Newcastle to collectively negotiate with PNO in relation to the terms and conditions of access, including price, to the Port.
2. On 25 November 2020, the Tribunal made timetabling directions, including that interested third parties file and serve any submissions and supporting material to which the Tribunal may have regard on or before 22 February 2021.
3. By letter dated 22 February 2021, the solicitors for the Port Authority of New South Wales (**Port Authority**) notified the Tribunal that the Port Authority wished to make a submission as an interested third party and sought a short extension of time to file a submission by 25 February 2021. The Tribunal received a submission from the Port Authority on that day. The submission records that the Port Authority is a state-owned corporation established under the *State Owned Corporations Act 1989* (NSW) and *Ports and Maritime Administration Act 1995* (NSW). It is responsible for and manages the navigation, security and operational safety needs of commercial shipping in the Port of Newcastle, as well as Sydney Harbour, Port Botany, Port Kembla and the ports of Eden and Yamba. The Port Authority supports PNO’s application for review of the ACCC’s final determination made on 27 August 2020.
4. The Port Authority’s submission attached the following two agreements between the Port Authority (formerly the Newcastle Port Corporation) and PNO:
   1. Port Services Agreement dated 17 December 2013 (**PSA**), being Confidential Attachment 1; and
   2. Harbour Management System Access Agreement dated 17 December 2013 (**HMSAA**), being Confidential Attachment 2.

## Submissions

1. By letter dated 25 February 2021 that accompanied the Port Authority’s submission, the solicitors for the Port Authority claimed confidentiality in respect of the PSA and the HMSAA. The letter stated:
   1. The terms of those agreements are and are expressed to be confidential as between those parties, have not been made public, and are commercially sensitive to the parties.
   2. The Port Authority is obliged under a master confidentiality agreement with PNO to keep the contents of the PSA and HMSAA confidential.
   3. The documents detail aspects of the confidential terms on which the NSW Government privatised the Port of Newcastle, which neither PNO nor the NSW Government have otherwise disclosed.
   4. The terms of the PSA and HMSAA may also be commercially and competitively sensitive as between PNO and third parties.
   5. The Port Authority does not object to the PSA and HMSAA being provided to the ACCC (including its external legal representatives and consultants), and the documents are not confidential as against PNO.
   6. The Port Authority requests that the Tribunal make confidentiality orders to the effect that the PSA and HMSAA are otherwise to be disclosed only to the external legal advisors and experts retained by NSWMC.
2. On 26 February 2021, the Tribunal requested the parties to confer and seek to agree appropriate confidentiality directions to be proposed to the Tribunal and, failing agreement, to provide proposed directions and a short submission by 3 March 2021. The Tribunal indicated that it would determine any dispute about confidentiality directions on the papers unless any party sought a hearing.
3. On 3 March 2021, the NSWMC made a submission in accordance with the Tribunal’s request. The NSWMC submitted that the confidentiality restrictions sought by the Port Authority would cause prejudice to NSWMC because it would not be entitled to view the agreement except by external counsel. Further, in receiving the documents the NSWMC would be subject to an implied undertaking that the documents will be used only for the purpose of the litigation and this ordinarily provides sufficient protection to the party producing the confidential document. Alternatively, the NSWMC proposed that directions be given that would permit two senior officers of the NSWMC to access the agreements subject to a confidentiality undertaking.
4. On 4 March 2021, the Port Authority and PNO made a joint submission responding to the submission of the NSWMC. In substance, they accepted the confidentiality regime proposed by the NSWMC save for relatively minor variations. However, they proposed that the two senior officers of the NSWMC be given access to a version of the PSA and HMSAA with limited redactions to three specific matters: the monetary figure in the definition of the term “Navigation Services Floor” in the PSA (which appears twice); the percentage figure in Schedule 3 item 1.2 and item 2.1 of the HMSAA; and the monetary figure in Schedule 3 item 2.1 of the HMSAA. They submitted that those figures are confidential and commercially sensitive to the Port Authority, PNO and third parties, and that disclosure of that information to the two NSWMC personnel is not necessary for them to properly instruct their solicitors in this matter.
5. The ACCC informed the Tribunal that it has no comment in relation to the orders proposed by either the NSWMC or the Port Authority and PNO. The ACCC noted the public interest in ensuring that third parties continue to provide, and are not deterred from providing, information to the Tribunal to assist it in making its decision. The ACCC submitted that this public interest will, in some circumstances, be served by restricting access to confidential information.
6. None of the parties sought a hearing on the directions to be made.

## Consideration

1. There is no reason to doubt that the implied undertaking, often referred to as the Harman undertaking after *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, applies in the Tribunal: c.f. *Otter Gold Mines v McDonald* (1997) 76 FCR 467. A breach of the implied undertaking in a curial context is punishable as a contempt of court: *Hearne v Street* (2008) 235 CLR 125 (***Hearne***) at [96] (Hayne, Heydon & Crennan JJ). In the Tribunal, a failure to comply with the implied undertaking would constitute an offence by virtue of the operation of s 162 of the CCA. The implied undertaking arises where a person is compelled by the rules, processes or orders of a court or tribunal to disclose documents or information to a party to the proceeding. That includes an order or direction for a party to file evidence or produce documents: *Hearne* at [96]. The existence of the undertaking may be less clear where a third party is given permission to file submissions and supporting material in a tribunal proceeding, but is not compelled to do so. In such circumstances, I accept the submission of the ACCC that there is a public interest in ensuring that third parties are not deterred from voluntarily providing information to the Tribunal to assist it in making its decision which will, in some circumstances, be served by restricting access to confidential information so provided.
2. Section 106(2)(b) of the CCA empowers the Tribunal, where it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter, to give directions prohibiting or restricting the publication of, amongst other things, matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal. A power so exercise is procedural in nature and, by s 103(2), may be exercised by a presidential member of the Tribunal.
3. I am satisfied on the basis of the submissions made by the Port Authority that the PSA and the HMSAA contain commercial information that is not publically available and that the parties to those agreements (the Port Authority and PNO) regard as commercially sensitive. The NSWMC has not sought to test that conclusion and has indicated that it does not oppose the making of confidentiality directions, provided that two of its executives are able to have access to the documents in order to provide instructions to its legal advisers.
4. In the circumstances, I consider it is appropriate to make confidentiality directions consistent with the form proposed by the NSWMC and with adjustments proposed by the Port Authority. I note two matters. First, the confidentiality directions proposed by the NSWMC require that the two executives of the NSWMC who are to receive the documents are to give a personal confidentiality undertaking to the Tribunal. It seems to me that the Tribunal’s directions as to confidentiality would have been binding on those executives without the need for a personal undertaking to the Tribunal. However, as the giving of the undertaking formed part of the NSWMC’s proposed directions, I will make directions to that effect. Second, the confidentiality directions proposed by the NSWMC contain anticipatory directions relating to the possible reliance on the documents by the Tribunal in the making of its determination in this proceeding. As I understand it, the directions contemplate that the Port Authority will be given an opportunity to apply for directions preventing the disclosure of the documents as part of the Tribunal’s reasons for decision. In my view, it is unnecessary to make orders of that kind at this time. Requests for suppression of parts of the Tribunal’s reasons for decision on the grounds of confidentiality will be addressed at the time that the decision is made.

|  |
| --- |
| I certify that the preceding 14 (fourteen) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice O'Bryan. |

Associate:

Dated: 9 March 2021