AUSTRALIAN COMPETITION TRIBUNAL

Application by New South Wales Minerals Council [2021] ACompT 2

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| Review of: | Decision of the Designated Minister 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: | **O'Bryan J (Deputy President)** |
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| Date of Determination: | 20 May 2021 |
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| Catchwords: | **TRADE PRACTICES** – review under s 44K of the *Competition and Consumer Act* *2010* (Cth) of a decision not to declare services – application for intervention by the Australian Competition and Consumer Commission – consideration of the procedural powers of the Tribunal in a review under s 44K – nature of a review under s 44K – whether the Australian Competition and Consumer Commission has an interest in the review that warrants the grant of leave to intervene – application dismissed |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 31, 37, 39, 41, 42, 44CA, 44F, 44H, 44K, 44K, 44KA, 44KB, 44V, 44ZP, 44ZQ, 44ZZOA, 44ZZOAA, 44ZZOAAA, 44ZZOAAA, 44ZZP, 87CA, 103, 104, 106, 108, 109, 110  *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth)  *Competition and Consumer Regulations 2010* (Cth) regs 22, 22B, 28K, 28L, 28M |
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| Cases cited: | *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1  *Applications by Tabcorp Holdings Limited* [2017] ACompT 5  *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Limited* [2010] FCA 521  *BUSB v The Queen* (2011) 80 NSWLR 170  *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145; (2020) 382 ALR 331  *Grassby v The Queen* (1989) 168 CLR 1  *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465  *Managing Director, New South Wales Technical and Further Education Commission v Fines* (1993) 32 NSWLR 385  *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1  *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435  *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379  *Queensland Wire Industries Pty Ltd v BHP Proprietary Co Limited* (1989) 167 CLR 177  *Re Fortescue Metals Group Ltd* [2006] ACompT 6; 203 FLR 28  *Re Freight Victoria Ltd* [2002] ACompT 1; ATPR 41-884  *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281; ATPR 40-058  *Re Lakes R Us Pty Ltd* [2006] ACompT 3; 200 FLR 233  *Roadshow Films Pty Ltd v iiNet Limited* (2011) 248 CLR 37 |
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| Category: | Catchwords |
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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 |

DIRECTIONS

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| TRIBUNAL: | JUSTICE O’BRYAN (Deputy President) |
| DATE: | 20 MAY 2021 |

**THE TRIBUNAL DIRECTS THAT:**

1. The application of the Australian Competition and Consumer Commission dated 21 April 2021 seeking leave to intervene in the proceeding be dismissed.

REASONS FOR DETERMINATION

O’BRYAN J:

## Introduction

1. On 23 July 2020, the New South Wales Minerals Council (**NSWMC**) applied to the National Competition Council (**NCC**) under s 44F(1) of the *Competition and Consumer Act 2010* (Cth) (**Act**) asking the NCC to recommend that a service at the Port of Newcastle (**Port**) provided by Port of Newcastle Operations Pty Ltd (**PNO**) be declared. 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 (**relevant service**).
2. On 18 December 2020, the NCC provided its final recommendation to the designated Minister, the Hon Josh Frydenberg MP, Treasurer of the Commonwealth of Australia (**Treasurer**). The NCC recommended that the relevant service not be declared on the basis that the criteria in paragraphs 44CA(1)(a) and (d) of the Act had not been satisfied.
3. On 16 February 2021, the Treasurer decided under s 44H(1) of the Act not to declare the relevant service on the same basis, namely that the criteria in paragraphs 44CA(1)(a) and (d) had not been satisfied.
4. In this proceeding, NSWMC has applied to the Tribunal under s 44K(2) of the Act for a review of the Treasurer’s decision.
5. By application dated 21 April 2021, the Australian Competition and Consumer Commission (**ACCC**) seeks leave to intervene in this proceeding. In support of its application, the ACCC relies on an affidavit of Sarah Maryjean Proudfoot, Executive General Manager, Infrastructure Regulation Division, affirmed on 21 April 2021. The ACCC filed written submissions in support of its application on 21 April 2021, and submissions in reply on 5 May 2021.
6. NSWMC filed written submissions supporting the ACCC’s application on 28 April 2021.
7. PNO filed written submissions opposing the ACCC’s application on 28 April 2021.
8. At the request of PNO, I conducted a hearing of the application on 13 May 2021.
9. The ACCC’s application raises two questions for determination: first, whether the Tribunal has power to permit a third person to intervene in a proceeding of this kind (being a review under s 44K(2) of the Act); secondly, if the Tribunal has power, the principles that govern the exercise of that power and whether, applying those principles, the ACCC should be granted leave to intervene.
10. For the reasons given below, I consider that the Tribunal has implied power to permit a third person to intervene in a review under s 44K of the Act, but that the ACCC does not have an interest in the subject of the proceeding to warrant the grant of leave to intervene.

## The ACCC’s application

1. By its application, the ACCC applied for leave to intervene in the proceeding pursuant to s 109(2) of the Act, alternatively s 44K(5) of the Act, or pursuant to the Tribunal’s implied powers in respect of matters of procedure in proceedings before the Tribunal.
2. In her affidavit, Ms Proudfoot summarised the functions and powers of the ACCC under the Act. Ms Proudfoot also deposed that the ACCC participated in the process before the NCC with respect to the application by NSWMC for a recommendation that the relevant service be declared. The ACCC lodged two written submissions with the NCC in that process, being:
3. a written submission to the NCC dated 26 August 2020 in response to the NCC's invitation for interested parties to make submissions on the application for a declaration recommendation; and
4. a written submission to the NCC dated 23 November 2020 in response to the NCC's invitation for interested parties to make submissions in response to the NCC's draft recommendation.
5. In those submissions, the ACCC indicated that it disagreed with the approach taken by the NCC to the construction of declaration criterion (a), and the application of declaration criteria (a) and (d), being the criteria set out in s 44CA(1) of the Act.
6. Ms Proudfoot deposed that the ACCC applies to intervene in this proceeding in order to make written and oral submissions regarding the issues raised in the application for review lodged by the NSWMC, in particular in connection with the proper construction and application of criteria (a) and (d). The ACCC seeks to make submissions regarding the matters the subject of its previous submissions to the NCC, without duplicating the submissions of the existing parties to this proceeding. Ms Proudfoot submitted that, having regard to its significant expertise as a competition regulator, the ACCC will bring a different perspective to the Tribunal's consideration of the application of those criteria to that of NSWMC, PNO and the NCC.

## The first issue: the question of power

### The parties’ contentions

1. The question of the Tribunal’s power to grant leave to intervene in a proceeding of this kind was addressed by the ACCC and PNO. As noted above, the ACCC put its application for leave to intervene on three alternative bases: under s 109(2) of Act, under s 44K(5) of the Act, or pursuant to the implied powers of the Tribunal.
2. Section 109(2) is located within Division 2 of Part IX of the Act which is titled “Review by Tribunal of Determinations of Commission”. Division 1 empowers the Tribunal to review certain categories of determinations made by the ACCC. Division 2 is titled “Procedure and Evidence” and confers various powers on the Tribunal “in proceedings before the Tribunal”. While the powers conferred by Division 2 are not expressly limited to Tribunal proceedings under Division 1, a long-standing question is whether the powers are so limited by implication. Within Division 2, s 109(2) provides that: “The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal”.
3. In respect of s 109(2), the ACCC relied on a decision of the Tribunal in *Re Fortescue Metals Group Ltd* [2006] ACompT 6; 203 FLR 28 (***Fortescue Metals***) in which Goldberg J decided (at [22]) that s 109(2) provides a basis for an application by a party to intervene in or participate in the hearing of a review under s 44K of the Act. The ACCC acknowledged that the decision of the High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (the ***Pilbara case***) “appears to be inconsistent” with the conclusion of Goldberg J in *Fortescue Metals*, but the ACCC submitted that the majority judgment of the High Court did not consider Goldberg J’s decision and did not say that the decision was incorrect. PNO submitted that, in the *Pilbara case*, the High Court determined that s 109(2) does not apply to a proceeding of the Tribunal under s 44K of the Act.
4. Section 44K(5) is located within Division 2 of Part IIIA of the Act titled “Declared Services”. This proceeding concerns the powers conferred by that Division and has been instituted under s 44K(2). Accordingly, there is no question that s 44K(5) applies to this proceeding. Section 44K(5) provides: “For the purposes of the review, the Tribunal has the same powers as the designated Minister”.
5. In respect of s 44K(5), the ACCC relied on statements of Goldberg J in *Fortescue Metals* to the effect that, in determining whether to declare a service under s 44H, the designated Minister was entitled to consider whether there was any person who may be able to provide assistance to the Minister in respect of the decision and was entitled to invite such a person to make submissions and, by virtue of s 44K(5), the Tribunal had the same powers. The ACCC also drew attention to s 44K(6B)(a)(iv) of the Act which assumes that persons other than the applicant for review, the provider of the service and the person who originally applied for the declaration recommendation may be made a party to the proceeding. Relying on observations of the High Court in the *Pilbara case*, PNO submitted that it is implicit in the statutory provisions within Division 2 of Part IIIA that the designated Minister is only empowered to seek assistance from the NCC and not from any other person.
6. In respect of implied powers, the ACCC submitted that the Tribunal has the powers which are necessary to enable it to act effectively within its jurisdiction, and those powers are derived by implication from the statutory provisions which confer jurisdiction upon it, relying on *Grassby v The Queen* (1989) 168 CLR 1 (***Grassby***) at 16-7 per Dawson J; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 (***Pelechowski***) at [50]-[51] per Gaudron, Gummow and Callinan JJ; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (***John Fairfax***) at 476 per McHugh JA; and *Managing Director, New South Wales Technical and Further Education Commission v Fines* (1993) 32 NSWLR 385 (***NSW Tafe Commission***) at 394-5 per Handley JA. PNO submitted that the authorities establish that the test of necessity does not extend to what is merely desirable or useful, relying on *BUSB v The Queen* (2011) 80 NSWLR 170 (***BUSB***) at [32] per Spigelman CJ (with whom other members of the Court of Criminal Appeal agreed). PNO submitted that, in the context of a review under s 44K, where the Tribunal is empowered to obtain assistance from the NCC under s 44K(6), it is not necessary for the Tribunal to have a power to permit intervention by other interested parties such as the ACCC.

### Consideration of the first issue

#### The legislative framework

1. It is unfortunate that the procedural powers of the Tribunal in conducting proceedings are legislated in a piecemeal manner under the Act and the *Competition and Consumer Regulations 2010* (Cth) (**Regulations**) made pursuant to the Act. In part, this has come about by the expansion (and contraction) of the Tribunal’s review jurisdiction over time. The piecemeal legislative framework creates unnecessary disputation and accompanying legal expense as illustrated by the present application.
2. The Tribunal is created by Part III of the Act and its powers derive from the Act. Section 31 provides for the appointment of presidential members of the Tribunal who must be judges of the Federal Court and the appointment of other members who are qualified for appointment by virtue of their knowledge of, or experience in, industry, commerce, economics, law or public administration. Section 37 governs the constitution of the Tribunal into a “Division” to hear and determine a particular matter under the Act. The section refers to such matters as “proceedings” and provides that:

The Tribunal shall, for the purpose of hearing and determining proceedings, be constituted by a Division of the Tribunal consisting of a presidential member of the Tribunal and two members of the Tribunal who are not presidential members.

1. Section 39 empowers the President of the Tribunal to give directions as to the arrangement of the business of the Tribunal and the constitution of Divisions of the Tribunal. Thus, Part III contemplates that the Tribunal will exercise its powers under the Act by being constituted into a Division and conducting a proceeding. The Act does not empower the Tribunal to be constituted or exercise its powers in any other manner. In this context, it is apparent that the word "proceeding" takes its ordinary meaning as the formal process by which a matter is determined by the Tribunal.
2. A number of other provisions of Part III regulate a “Division” of the Tribunal so constituted. Section 41 provides that the presidential member who is a member of a Division must preside at proceedings of that Division. Section 42 provides that a question of law arising in a matter before a Division of the Tribunal must be determined in accordance with the opinion of the presidential member presiding, but otherwise a question arising in proceedings before a Division of the Tribunal must be determined in accordance with the opinion of a majority of the members constituting the Division. Part III of the Act does not otherwise contain provisions governing the procedural powers of the Tribunal.
3. When the Act was first enacted (as the *Trade Practices Act 1974* (Cth)), the powers of the Tribunal were confined to the review of determinations of the ACCC relating to authorisations granted under Part VII of the Act. Those powers of the Tribunal continue to be governed by Part IX of the Act. Division 1 confers the powers of review, while Division 2 addresses procedure and evidence. The matters addressed by Division 2 include:
4. the procedure to be applied by the Tribunal in conducting a proceeding including the rules of evidence (s 103);
5. the making of regulations to govern certain procedural matters including production of documents, witnesses and representation before the Tribunal (s 104);
6. the conduct of hearings in a proceeding, including the power to close a hearing to the public to maintain confidentiality (s 106);
7. the manner in which evidence may be given in a proceeding (s 108);
8. the participants in a proceeding and the grant of leave to a person to intervene in a proceeding (s 109); and
9. the representation of persons in a proceeding (s 110).
10. Certain regulations have been made pursuant to s 104. In particular, regulation 22 mirrors the terms of s 104 and provides as follows:

**22 Directions by the Tribunal as to certain matters**

(1) Without limiting the generality of the powers of the Tribunal under the Act or these Regulations, the Tribunal may, in any proceedings before the Tribunal, give directions:

(a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal; and

(aa) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report); and

(b) with respect to the representation in any such proceedings of persons having a common interest in the proceedings.

(2) The powers of the Tribunal to give directions under subregulation (1):

(a) may be exercised by the Tribunal constituted by a presidential member; and

(b) are subject to subsections 102(8) to (10) of the Act.

1. Over time, as the scope of administrative decision making under the Act expanded, so did the jurisdiction of the Tribunal to review such administrative decisions. It is unnecessary to trace the history of such expansions and, in recent years, contractions of the Tribunal’s jurisdiction. It is relevant, though, to refer to the Tribunal’s jurisdiction to review certain decisions made under the powers conferred by Part IIIA of the Act (Access to Services), particularly declaration decisions of the designated Minister under s 44H and arbitration determinations of the ACCC under s 44V.
2. The Tribunal is empowered by s 44K to review declaration decisions of the designated Minister under s 44H. Section 44K provides 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.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal’s decision on the review (see section 44ZZOA).

(5) For the purposes of the review, the Tribunal has the same powers as the designated Minister.

(6) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review (including for the purposes of deciding whether to make an order under section 44KA).

(6A) Without limiting subsection (6), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(6B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the provider of the service; and

(iii) the person who applied for the declaration recommendation; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

(7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.

(8) If the designated Minister decided not to declare the service, the Tribunal may either:

(a) affirm the designated Minister’s decision; or

(b) set aside the designated Minister’s decision and declare the service in question.

(9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section).

1. Subsection 44K(6) assumes that, in a review under s 44K, the Tribunal will be constituted with a presiding member, thereby invoking s 41 and its reference to a proceeding.
2. As noted earlier, subs 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. Subsection 44K(6B) was inserted in the Act by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth). The same assumption underpins a number of related amendments that were made at that time, including:
3. under s 44KA, a person who has been made a party to the proceedings for review of a declaration decision may apply to the Tribunal for an order staying the declaration;
4. under s 44KB, the Tribunal may order that a person who has been made a party to proceedings for a review of a declaration decision pay all or a specified part of the costs of another person who has been made a party to the proceedings;
5. under s 44ZZOAAA, if the Tribunal gives a written notice to a person requesting that person to provide specified information for the purposes of a review under Part IIIA, the Tribunal must give a copy of the notice to any person who has been made a party to the proceedings for review;
6. under s 44ZZOA, if the Tribunal gives notice to the designated Minister extending the period of time for it to make a decision, the Tribunal must give a copy of the notice to any person who has been made a party to the proceedings for review.
7. A review by the Tribunal under s 44K is also governed by provisions within Division 8 of Part IIIA. Relevantly, s 44ZZOAAA governs the provision of information to the Tribunal. Broadly, subsection (3) requires the decision maker to give the Tribunal all of the information that the decision maker took into account in making the decision. Subsection (4) empowers the Tribunal to request such additional information that the Tribunal considers reasonable and appropriate for the purpose of making its decision on the review. Section 44ZZOAA defines the information to which the Tribunal must have regard under the review. Section 44ZZOA stipulates a time limit for the conduct of the review. Each of ss 44ZZOAAA, 44ZZOAA and 44ZZOA were enacted by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth). Section 44ZZP states that regulations may be made about certain matters in relation to the functions of the Tribunal under Part IIIA, including (relevantly) procedure and evidence. Very few regulations have been made under that power with respect to a review of a declaration decision under s 44K. Regulation 20A prescribes the form to be used in filing an application for review in the Tribunal under s 44K, while regulation 22B stipulates that:
8. in a review under s 44K of a declaration of a service, the person who applied for the declaration recommendation may participate in the review, in addition to the provider (of the service); and
9. in a review under s 44K of a decision not to declare a service, the provider (of the service) may participate in the review, in addition to the person who applied for the declaration recommendation.
10. There are no other provisions of the Act or the Regulations that expressly govern the procedure of a review under s 44K.
11. The nature of the power of the Tribunal to review a declaration decision under s 44K was the subject of detailed analysis by the High Court in the *Pilbara case*, which is considered below. However, the High Court’s decision concerned the Act as it stood prior to the amendments made by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) (although the High Court was cognisant of that enactment when it made its decision). Accordingly, it will be necessary to consider whether and to what extent those amendments affect the conclusions reached by the High Court.
12. The provisions governing the review of a declaration decision under s 44K can be contrasted with the power of the Tribunal to review an arbitration determination of the ACCC under s 44V. The Tribunal is empowered to conduct such a review by s 44ZP which provides as follows:

**44ZP Review by Tribunal**

(1) A party to a final determination may apply in writing to the Tribunal for a review of the determination.

(2) The application must be made within 21 days after the Commission made the final determination.

(3) A review by the Tribunal is a re‑arbitration of the access dispute based on the information, reports and things referred to in section 44ZZOAA.

Note: There are time limits that apply to the Tribunal’s decision on the review: see section 44ZZOA.

(4) For the purposes of the review, the Tribunal has the same powers as the Commission.

(5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the other party or parties to the final determination; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

(6) The Tribunal may either affirm or vary the Commission’s determination.

(7) The determination, as affirmed or varied by the Tribunal, is to be taken to be a determination of the Commission for all purposes of this Part (except this section).

(8) The decision of the Tribunal takes effect from when it is made.

1. It can be seen that the above provision is framed in similar terms to s 44K. However, there is an additional provision that applies to the Tribunal’s review of an arbitration determination of the ACCC under s 44V which is not replicated in respect of the Tribunal’s review of a declaration decision of the designated Minister under s 44K. Section 44ZQ provides as follows:

**44ZQ Provisions that do not apply in relation to a Tribunal review**

Sections 37, 39 to 43 (inclusive) and 103 to 110 (inclusive) do not apply in relation to a review by the Tribunal of a final determination made by the Commission.

1. It might be thought implicit by the express exclusion of ss 103 to 110 (being Division 2 of Part IX) that those provisions would otherwise apply to a review of an arbitration determination of the ACCC under s 44V. In turn, that might raise an implication that those provisions would ordinarily apply to a review of a declaration decision of the designated Minister under s 44K. However, in the *Pilbara case* the High Court unanimously concluded that Division 2 of Part IX is not applicable to a review under s 44K.
2. Sections 44ZZOAAA, 44ZZOAA, 44ZZOA and 44ZZP, referred to above, also apply to a review of an arbitration determination of the ACCC under s 44V. Significantly, having regard to s 44ZQ, the Regulations contain a separate part, being Part 2A, regulating the procedure to be applied in a review of an arbitration determination of the ACCC under s 44V. Similar to Division 2 of Part IX, the matters addressed by Part 2A include the following:
3. that the review hearing is to be conducted in private (reg 28K);
4. representation of persons at the review hearing (reg 28L); and
5. the procedure to be applied by the Tribunal in conducting the review hearing, including the manner in which evidence may be given (reg 28M).

#### Decisions pre-dating the Pilbara case

1. In a number of decisions pre-dating the *Pilbara case*, the Tribunal assumed or concluded that Division 2 of Part IX was applicable to the conduct of a review of a declaration decision under s 44K: *Re Freight Victoria Ltd* [2002] ACompT 1 at [17] (Goldberg J presiding); *Re Lakes R Us Pty Ltd* [2006] ACompT 3; 200 FLR 233 at [26]-[27] (French J presiding); and *Fortescue Metals* at [19]-[22] (Goldberg J presiding). In *Fortescue Metals*, Goldberg J considered that the heading to Division 2 of Part IX, and the generality of its terms, indicated a legislative intention that Division 2 of Part IX would apply to all proceedings before the Tribunal brought under the provisions of the Act from time to time (at [19]). His Honour also considered it significant that the express exclusion of Division 2 of Part IX in respect of reviews of arbitration determinations by s 44ZQ did not apply to reviews of declaration decisions.
2. In *Fortescue Metals*, Goldberg J also concluded that there was an alternative source of power for the Tribunal to grant leave to intervene grounded in ss 44H(1), 44K(4) and (5) of the Act. His Honour reasoned that (at [23] – [26]):

23 I also consider that there is an alternative basis on which an application for leave to intervene, or participate, in such a proceeding may be made. That basis is grounded in s 44H(1) and s 44K(4) and (5) of the Act. The re-consideration of the matter by the Tribunal, possessing the same powers as the designated Minister, is a re-consideration of the decision, having received a declaration recommendation from the Council, whether to declare or not to declare the service.

24 When the Minister received the declaration recommendation from the Council and pursuant to s 44H(1) he had to decide, in the light of that recommendation, whether to declare the service or not to declare the service, the Minister was obliged to consider whose rights or interests might be affected by his decision one way or the other and then to give a person whose rights or interests might be so affected the opportunity to make submissions to him. He was also entitled to consider whether there was any person who may be able to provide assistance to the Minister in respect of his decision and, in particular, in respect of the matters specified in s 44H(4).

25 There is considerable learning on the issues of procedural fairness and the obligation of an administrative decision-maker to give a person who may be affected by the decision a right to be heard. For example, in *Kioa v West* (1985) 159 CLR 550 Brennan J said (at 619):

If a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large, the repository of the power will ordinarily be bound or entitled to have regard to the interests of the individual before he exercises the power. No doubt the matters to which the repository is bound or is entitled to have regard depend upon the terms of the particular statute and, if there be no positive indications in its text, the subject-matter, scope and purpose of the statute must be looked at to determine whether the repository is bound or is entitled to have regard to individual interests [citations omitted]. When the repository is bound or is entitled to have regard to the interests of an individual, it may be presumed that observance of the principles of natural justice conditions the exercise of the power, for the legislature can be presumed to intend that an individual whose interests are to be regarded should be heard before the power is exercised.

Those observations when applied to the present circumstances, mean that the Minister had to turn his mind to a consideration of whose interests might be affected by his decision and who may be able to assist him in respect of his decision-making process.

26 The Tribunal has to give consideration to the same issues as are addressed by the Minister as well as exercising the same powers as the Minister. The Tribunal must therefore ask whose rights or interests may be affected by its decision and who may be able to assist it in its decision-making process. If a person whose rights or interests may be affected by the Tribunal’s decision wishes to make submissions to the Tribunal, ordinarily he should be allowed to do so, so long as he can demonstrate a right or interest which may be affected.

#### The Pilbara case

1. The nature of a review by the Tribunal of a declaration decision of the designated Minister under s 44K, and the powers of the Tribunal in the conduct of such a review, were considered by the High Court in the *Pilbara case*. As noted earlier, the provisions of the Act considered by the High Court were those in force prior to amendments made by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth).
2. A number of issues arose for consideration in the *Pilbara case*, including the proper construction of certain of the declaration criteria (now found in s 44CA) (see at [26]). However, the High Court also considered a further question, raised for the first time in the High Court, concerning the nature of a review of a declaration decision, and particularly whether the Tribunal’s powers of review contemplated the Tribunal conducting a *de novo* hearing on new evidence. The plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) framed the question as follows (at [27]):

Late in the argument of the appeals to this Court, there emerged an issue which had not previously been raised by any party or by the NCC, whether in the Tribunal, the Federal Court or this Court. What was the nature of the task which the Tribunal was required to perform when asked to review the Minister’s decision? Was it, as the Tribunal and those who were represented before the Tribunal took it to be, a fresh hearing on new evidence of whether a service should be declared? Or was the task more limited?

1. That question is not the same question as arises before the Tribunal on this application. The question presently before the Tribunal concerns the power of the Tribunal to grant leave to a person to intervene in the proceeding and, if there be power, the scope of that power. Nevertheless, the conclusions stated by the High Court in the *Pilbara case* have a bearing on that question.
2. In respect of the further question raised in the High Court, the judgment of the plurality stated the following conclusions.
3. First, the “matter” to be reviewed by the Tribunal under s 44K(4) is the Minister’s decision to declare or not to declare the service, not the NCC’s recommendation to the Minister. The plurality stated (at [37]):

37 The “matter” referred to in s 44K(4) was identified in s 44K(1) and (2). In a case where the Minister has declared a service, the “matter” is “the declaration” made by the Minister. In a case where the Minister decided not to declare a service, the matter is “the designated Minister’s decision” not to make a declaration. In both cases, the hinge about which the identification of the “matter” turns is what the Minister has done, not what the NCC did when it made its declaration recommendation. The requirement of s 44K(4) – that the Tribunal review the matter and that the review be “a re-consideration of the matter” – necessitates identification of the Minister’s task. It is that task, and the result of its performance, which is to be subject to “re-consideration” by the Tribunal.

1. Second, the Minister’s decision, which is the subject of review by the Tribunal, was defined by s 44H(1). Upon receiving a recommendation from the NCC, the Minister was required to “either declare the service or decide not to declare it”. The plurality stated (at [45]-[47]):

45 The Minister had only a short time to decide how to respond to a declaration recommendation. While the NCC could extend (s 44GA) the time for making its recommendation about an application for a declaration, the Minister was given sixty days after receiving the NCC’s declaration recommendation to decide whether to declare the service. Section 44H(9) provided that, if the Minister did not publish his or her decision on the declaration recommendation within sixty days after receiving it, the Minister was taken, at the end of that period, to have decided not to declare the service and to have published that decision. In such a case, the Minister would publish no reasons for decision but the NCC’s reasons for recommending a declaration would be published pursuant to s 44GC. If the Minister made a decision, the Act obliged (s 44HA(1)) the Minister to publish that decision and the reasons for it.

46 There is one other aspect of the Act’s treatment of the Minister’s task to which attention should be drawn. The Minister, unlike the Tribunal (s 44K(6)), was given no express power to request any further information, assistance or report from the NCC. The statutory supposition appears to have been that the Minister could and would make a decision on the NCC’s recommendation without any need for further information from the NCC.

47 The content of those provisions of Pt IIIA to which reference has been made suggests that it was expected that, armed with a recommendation from an expert and non-partisan body (the NCC), the Minister would make a decision quickly and would do so according to not only the Minister’s view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Minister had to be satisfied before a declaration could be made. And it is the Minister’s decision, not the NCC’s recommendation, that was the matter that was to be reviewed by the Tribunal.

1. Third, the provisions of Division 2 of Part IX are only applicable to Tribunal proceedings under Division 1 of Part IX. The plurality stated (at [51]):

51 Division 2 of Pt IX (ss 103-110) made more particular provision for the procedure of and evidence before the Tribunal in reviews by the Tribunal of determinations of the Commission. Section 103 made general provision for the procedure of the Tribunal including a provision (s 103(1)(c)) that the Tribunal was not bound by the rules of evidence. Section 105(1) gave the Tribunal power to take evidence on oath or affirmation and for that purpose permitted a member of the Tribunal to administer an oath or affirmation. Both by their location as a division of Pt IX, and in their terms, the provisions of Div 2 of Pt IX regulating the procedure of and evidence before the Tribunal were apt to apply only to the particular kind of proceeding for which Div 1 of Pt IX provided – an application under s 101(1) for a review of a determination by the Commission regarding authorisation.

1. Fourth, a review of the Minister’s decision under s 44K(4) “neither permits nor requires a quasi‑curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared” (at [48]). In contrasting a “re-hearing” by the Tribunal under Part IX of the Act and a “re-consideration” by the Tribunal under s 44K(4), the plurality stated (at [60] and [65]):

60 When s 101(2) of the Act used “re-hearing” to describe the task of the Tribunal reviewing a determination of the Commission, it was using “re-hearing” in a context wholly divorced from the exercise of judicial power. And when s 44K(4) referred to “re-consideration”, it too used that word in a context divorced from the exercise of judicial power. Nonetheless, some different meaning must presumably be intended by the use of the different words in identifying the review to be undertaken by the Tribunal. The contrast is best understood as being between a “re-hearing” which requires deciding an issue afresh on whatever material is placed before the new decision maker and a “re-consideration” which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44K(6)).

…

65 As has already been noted, the Tribunal treated its task as being to decide afresh on the new body of evidence and material placed before it whether the services should be declared. That was not its task. Its task was to review the Minister’s decisions by reconsidering those decisions on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the NCC in response to a request made under s 44K(6)…

1. Fifth, the power given to the Tribunal by s 44K(5), being the same powers as the designated Minister, is for the “purposes of the review” and the scope of such power depends on the nature of the review function conferred on the Tribunal by s 44K. The plurality observed (at [63]):

63 Rio Tinto and the NCC also drew attention to s 44K(5), which provides that “[f]or the purposes of the review, the Tribunal has the same powers as the designated Minister”. It was said that the Minister, in deciding whether to declare a service, has “incidental” or “implied” power to request additional information beyond the NCC’s recommendation. And, the argument continued, it followed by reason of s 44K(5) that the Tribunal also had extensive incidental or implied power to obtain information. Whether, or to what extent, the Minister has an incidental or implied power to obtain additional information need not be decided. Any such power that is given to the Tribunal by s 44K(5) must be “[f]or the purposes of the review”. The scope of any such incidental or implied power depends upon first identifying the nature of the Tribunal’s review, which in turn depends upon construing s 44K.

1. Sixth, the amendments made to s 44K by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) did not assist in the proper construction of that provision prior to the amendments. The plurality stated (at [61], footnote omitted):

61 Contrary to the submissions of the respondents, the amendments that were made to s 44K in 2010 by the *Trade Practices Amendment (Infrastructure Access) Act 2010 (Cth)* (the 2010 Act) shed no light on the proper construction of that section as it stood before those amendments were made. It may be accepted that, as was submitted, the amendments proceeded on the assumption that, when conducting a review under s 44K, the Tribunal would otherwise proceed in the manner in which it did in these matters. But that assumption was based upon what the Tribunal had done in the past. It was not based upon any authoritative consideration of the question of construction that now arises.

1. In a separate judgment, Heydon J reached materially the same conclusions as the plurality in relation to the further question raised on the appeal, being the nature of the review power under s 44K and, particularly, the power of the Tribunal to receive new evidence from the participants before it. In the course of reasoning, His Honour expressed a conclusion on the nature of a review under s 44K that was not expressed by the plurality: that there are no “parties” in a s 44K review (at [133]-[134]). His Honour based that conclusion on the observation that there were no “parties” as such in the context of an application to the NCC for a declaration recommendation, nor in the Minister’s consideration of the recommendation. From those observations, his Honour stated (with respect to the NCC’s argument to the contrary): “The Council did not explain how review of a decision that was not *inter partes* by a Tribunal having the same powers as the decision-maker became *inter partes*.” His Honour stated that the terms of regulation 22B, which gave rights of “participation” in a review under s 44K to the access seeker (the person who applied for the declaration recommendation) and the service provider, “did not suggest a right of participation so extensive as to permit the Tribunal to enlarge the field of material that the Minister considered”.

#### Implied powers of the Tribunal

1. It has long been recognised that inferior courts, lacking express powers to perform a function entrusted to them by statute, have implied powers that are necessary for the performance of the function, upon the principle that “a grant of power carries with it everything necessary for its exercise”: *Grassby* at 16 per Dawson J (with whom other members of the Court agreed). His Honour stated the applicable test in the following terms (at 17):

Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be “derived by implication from statutory provisions conferring particular jurisdiction”.

1. The same principle is applicable to tribunals: see *John Fairfax* at 476 per McHugh JA (as a judge of the NSW Court of Appeal, Glass JA in agreement); *NSW TAFE Commission* at 394-5 per Handley JA (Mahoney JA and Shellar JA in agreement).
2. In *Pelechowski*, the High Court applied the *Grassby* test to the District Court of New South Wales. The majority stated (at [51], citations omitted):

The term “necessary” in such a setting as this is to be understood in the sense given it by Pollock CB in *Attorney-General v Walker*, namely as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided in Div 4 of Pt 3 of the District Court Act. In this setting, the term “necessary” does not have the meaning of “essential”; rather it is to be “subjected to the touchstone of reasonableness”.

1. In *BUSB*, Spigelman CJ (with whom other members of the Court of Criminal Appeal agreed) stated (at [32]) that “…a test of necessity cannot be stretched to encompass what is merely desirable or useful”.

#### Resolving the question of the Tribunal’s procedural powers

1. The question that arises in this proceeding is not the same as the question resolved in the *Pilbara case*. The question raised in this proceeding concerns the procedural power of the Tribunal to permit a person to intervene to make submissions to the Tribunal in the course of a review under s 44K; expressed differently, the question concerns the procedural power of the Tribunal to confer a right to be heard on persons in the conduct of the review. In the *Pilbara case*, the High Court determined whether, in a review under s 44K, the Tribunal was required or permitted to consider the matter again on evidence that was not before the designated Minister. The High Court answered that question in the negative, concluding that a review under s 44K required the Tribunal to review what the Minister decided by reference to the material that was placed before the Minister, supplemented only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44K(6).
2. Nevertheless, a number of the conclusions reached by the High Court are relevant in answering the present question and, of course, are binding on the Tribunal. First, the High Court determined that the provisions of Division 2 of Part IX have no application to a review under s 44K. Accordingly, the Tribunal’s procedural powers in conducting such a review must be found in the express powers conferred on it in Part IIIA of the Act and any powers to be implied from the nature of the Tribunal and the review function conferred on it by s 44K. Second, the High Court also determined that the express power given to the Tribunal by s 44K(5), being the same powers as the designated Minister, is confined by the requirement that the power is given for the “purposes of the review”. The power is thereby limited by reference to the nature of the review function conferred on the Tribunal by s 44K. For the reasons outlined earlier, the power did not permit the Tribunal to seek or receive new evidence (beyond seeking the assistance of the NCC under s 44K(6)).
3. In my view, the answer to the present question lies in answering a related question: who, if anyone, is entitled to participate in a review under s 44K by making submissions to the Tribunal? Is the Tribunal to conduct the review without receiving submissions from anyone or, if the Tribunal is empowered to receive submissions from the access seeker and service provider, is it also empowered to receive submissions from other interested persons?
4. Although some statements made by the High Court in the *Pilbara case* suggest that a review under s 44K is not an *inter partes* proceeding, I do not consider that the statements are intended to convey that there are no participants in a review under s 44K and no-one is entitled to make submissions to the Tribunal. The statement of the plurality (at [48]) that the review “neither permits nor requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared” must be read in context. The conclusion of the plurality (expressed at [60] and [65]) is that the review required the Tribunal to reconsider the Minister’s decision on the material before the Minister. The plurality did not decide that the access seeker and the service provider had no right to be heard on the review; the plurality decided that they had no right to conduct a quasi-curial trial on new material. In so far as Heydon J went further when concluding that there are no “parties” in a s 44K review (at [133]-[134]), I respectfully consider that that conclusion is not supported by the judgment of the plurality and is inconsistent with a number of features of the Act, including amendments made by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth). The following features of the Act and the amendments can be noted.
5. First, for each proceeding to be heard and determined, the Tribunal is constituted by a presidential member, being a judge of the Federal Court, and two lay members (per s 37). As noted earlier, there is no other provision of the Act that allows for the constitution of the Tribunal in a given matter that is to be determined the Tribunal. It follows that, under the Act, all matters to be determined by the Tribunal are described as “proceedings” which are to be heard and determined. Further, the proceedings are to be heard and determined by a three member Tribunal, the presiding member of which is a judge of the Federal Court. A proceeding is not “heard” by the Tribunal unless persons interested in the determination of the proceeding have been given an opportunity to make submissions to the Tribunal.
6. Second, the Tribunal is under a duty to act judicially; that is, with fairness and detachment: *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 296. While that conclusion was stated by the Tribunal (Deane J presiding) in the context of a review conducted under Part IX of the Act, the conclusion follows from the nature of the Tribunal as established under Part III of the Act and is generally applicable to the performance by the Tribunal of the various functions entrusted to it.
7. Third, regulation 22B stipulates that, in a review under s 44K, the person who applied for the declaration recommendation and the provider of the service may participate in the review. Regulation 22B is made under s 44ZZP, which stipulates that the regulations may make provision about certain matters in relation to the function of the Tribunal under Part IIIA including determining questions before the Tribunal and procedure and evidence. There is no reason to think that regulation 22B is beyond power. To the contrary, the regulation is consistent with the nature of the Tribunal and confirms that the persons most directly affected by a declaration decision, the access seeker and the service provider, may participate in the review.
8. Fourth, the amendments made by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) confirm what is already apparent from the legislative framework: that in performing its review function, the Tribunal must give interested persons an opportunity to be heard. Each of ss 44K(6B), 44KA, 44KB, 44ZZOAAA and 44ZZOA assume 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.
9. In my view, it follows from the foregoing that 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. Such a power is necessary in the sense of being reasonably required or legally ancillary to enable the Tribunal to perform its review function under s 44K in the manner contemplated by the Act as a whole (including the Regulations). Such an implied power does not conflict with or alter the nature or scope of the review as explained by the High Court in the *Pilbara case*. The task remains to review the decision of the Minister on the material before the Minister, and not to review the recommendation of the NCC. It is therefore necessary to consider further the principles that govern the exercise of that implied power and whether, applying those principles, the ACCC should be granted leave to intervene in the review.

## The second issue: the question of discretion

### The parties’ contentions

1. The ACCC submitted that the applicable test for the grant of leave to intervene is that stated by Goldberg J in *Fortescue Metals*, that it is necessary for the applicant to “show that some interest touching and concerning it can be demonstrated” (at [43]). The ACCC also placed reliance on cases in which the ACCC was granted leave to intervene such as *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 (***Melway***), *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Limited* [2010] FCA 521 (***Auskay***) and *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145; (2020) 382 ALR 331 (***Glencore Coal***). The ACCC submitted that it should be permitted to intervene in the review because it has a unique contribution to make: it is the repository of many of the powers and responsibilities conferred under the general access regime in Part IIIA and the telecommunications access regime in Part XIC. As a consequence of its statutory role, the ACCC has significant experience, knowledge and expertise not possessed by any party appearing in the review proceeding. The ACCC submitted that it has a contribution to make in respect of the proper construction and application of declaration criteria (a) and (d). These criteria, relating to promotion of competition and the public interest, were amended in 2017 and have not yet been the subject of detailed consideration by the Tribunal or the Court in their present form. The ACCC seeks to make submissions regarding the matters the subject of its previous submissions to the NCC, without duplicating the submissions of the existing parties to the proceeding.
2. NSWMC supported the application by the ACCC, but did not add to the ACCC’s submissions.
3. PNO submitted that the test to be applied for the grant of leave to intervene is that stated by the High Court in *Roadshow Films Pty Ltd v iiNet Limited* (2011) 248 CLR 37 (***Roadshow Films***): whether the person’s interests would be directly affected by the decision (at [2]). PNO submitted that the ACCC has failed to demonstrate the unique contribution it would make to the proceedings, relying on *Fortescue Metals* at [53]. PNO argued that the fact that the ACCC has expertise regarding the access regime in Part IIIA, or competition issues more generally, is insufficient because the Tribunal already has such expertise itself and, to the extent it needs further assistance, it can seek it from the NCC which is “an expert and non-partisan body” (referring to the description of the NCC given by the plurality in the *Pilbara case* at [47]). PNO observed that the ACCC does not have a role under the Act in relation to declaration, or the interpretation or application of the declaration criteria (which role is given to the NCC). The ACCC therefore has no specialist role in relation to the matters the subject of the present proceeding.

### Consideration of the second issue

1. In a curial setting, the grant of leave to intervene in a proceeding is usually confined to persons who can demonstrate that they have an interest that would be directly affected by a decision in the proceeding. The applicable principles were restated by the High Court in *Roadshow Films* as follows (at [2] – [4], citations omitted):

2 In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria*, are relevant. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court will satisfy a precondition for leave to intervene. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.

3 Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.

4 The grant of leave for a person to be heard as an amicus curiae is not dependent upon the same conditions in relation to legal interest as the grant of leave to intervene. The Court will need to be satisfied however, that it will be significantly assisted by the submissions of the amicus and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance.

1. It may be accepted, as the ACCC submitted, that courts have granted the ACCC leave to intervene in proceedings concerning the application of provisions of the Act: see for example *Melway* in which leave was granted, but contrast *Queensland Wire Industries Pty Ltd v BHP Proprietary Co Limited* (1989) 167 CLR 177 in which leave was refused. In 2001, s 87CA was inserted into the Act conferring an express power on the courts to grant the ACCC leave to intervene in proceedings brought under the Act. Cases such as *Auskay* and *Glencore Coal* concerned the grant of leave under s 87CA. Broadly, leave has been granted to the ACCC where the proceeding concerns a provision of the Act in respect of which the ACCC is given statutory powers (typically powers of enforcement), where the case raises a question of construction of the provision and the ACCC is able to make a contribution to the issue in question which differs from the parties to the proceeding.
2. Under s 109(2) (within Division 2 of Part IX), the Tribunal is given express power to permit a person to intervene in proceedings before the Tribunal. In *Fortescue Metals*, the Tribunal made the following observations about the grant of leave under s 109(2):

30 There is no “sufficient” or “real and substantial” interest requirement found in s 109(2) and the discretion to grant leave to intervene reposed in that subsection is not limited by the connotation of such expressions. The discretion is not constrained by any limitation and it is not easy, nor is it appropriate, to define or delimit the categories of persons who may be given leave to intervene under s 109(2). It does not follow that in exercising its discretion pursuant to s 109(2) of the Act, there are no limitations or restrictions on the persons who wish to intervene or participate in reviews by the Tribunal.

…

35 … an applicant for leave to intervene or participate under s 109(2) … must, as a minimum, be able to establish some connection with, or interest in, the subject matter of the proceeding which discloses that it is not merely an officious bystander. What the nature of that connection or interest must be, will vary from case to case. It is not necessary that an applicant be required to establish that its business interests or business activities or prospects may be detrimentally affected by the subject matter of the proceeding or its outcome. … However, the connection should usually be one that discloses that the applicant for leave to intervene has some interest which is ignited by the proceeding, which is an interest other than that found in members of the general community.

…

43 Although s 109(2) is not couched in terms of any particular “interest” being required to be demonstrated before leave should be granted, I consider that it is necessary for some connection with the subject matter of the application for review to be demonstrated. Obviously an officious bystander would not be given leave to intervene, but it is necessary to show some particular interest in the subject matter of the application. I do not consider that it is necessary for an applicant for intervention to go as far as to show that it may be affected in some way by the declaration but it is necessary, as I have noted earlier, to show that some interest touching and concerning it can be demonstrated.

1. For the reasons explained above, s 109(2) is not applicable to a review under s 44K. In my view, the nature of the review to be conducted by the Tribunal under s 44K, as explained in the *Pilbara case*, strongly suggests that leave to intervene should be granted only to persons who can demonstrate, at the least, an interest of the kind referred to in *Roadshow Films*. The Tribunal is required to review the decision of the Minister based on the material considered by the Minister. As explained by the High Court in the *Pilbara case*, the statutory supposition is that the Minister could and would make a decision on the recommendation of the NCC, an expert and non-partisan body. The statute contemplates that the Minister would make a decision quickly and would do so according to the Minister’s view of the public interest and the expert advice given by the NCC about the more technical criteria of which the Minister had to be satisfied before a declaration could be made. Further, the Tribunal is given express power in s 44K(6) to require the NCC to give assistance for the purposes of the review. That provision reinforces the primary role given to the NCC by the legislature in declaration decisions. Not only is the Minister to make a decision on receiving a recommendation from the NCC, but on review of the Minister’s decision the Tribunal is empowered to seek assistance from the NCC.
2. Although the nature of the review to be conducted by the Tribunal under s 44K is confined, it is understandable that the access seeker and the service provider are entitled to participate in the review (as per regulation 22B). Their interests are directly affected by a decision in the review proceeding. While the Tribunal should be regarded as having an implied power to hear from other persons in order to act fairly, such a power need only extend to persons whose interests would be directly affected by a decision.
3. In the context of a review under s 44K, the ACCC is not a person whose interests are affected by a decision, whether directly or indirectly. In contrast to the position of the NCC, the ACCC has no statutory power with respect to the declaration of services under Part IIIA of the Act. It may be accepted that the ACCC has knowledge and expertise about the Act and the economic concepts that underpin the Act including particularly competition and economic efficiency. However, the possession of such knowledge and expertise is not an interest in the review proceeding that supports the grant of leave to intervene.
4. It is also appropriate to consider whether leave can and should be given to the ACCC to make submissions to the Tribunal in the nature of *amicus curiae*. In that regard, I note that, in certain types of review proceedings, the Tribunal has given third parties the right to make submissions to the Tribunal without granting leave to intervene and making the person a party to or participant in the proceeding: see for example *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 (at [151], [272] and [392]) and *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 (at [53]). However, such proceedings involved *de novo* hearings on evidence adduced before the Tribunal, in contrast to the confined task required by s 44K. In circumstances where the Tribunal is expressly empowered to receive such assistance from the NCC under s 44K(6), in my view it is neither necessary nor appropriate for the Tribunal to grant leave to the ACCC to perform a supplementary role.
5. As a final consideration, the ACCC has not persuaded me that the person who applied for the declaration recommendation, the NSWMC, who is a participant in the review, is unable to advance all necessary submissions concerning the proper construction of declaration criteria (a) and (d), including the construction advocated by the ACCC before the NCC. To the extent necessary, it is open to the NSWMC to seek to place the ACCC’s submissions to the NCC before the Tribunal (by asking the Tribunal to exercise its powers under s 44K(6) to request the submissions from the NCC, or its powers under s 44ZZOAAA(5) to request the submissions from the ACCC). This is a further reason to refuse the ACCC’s application as a matter of discretion.

## Conclusion

1. In conclusion, for the reasons given above, I refuse the ACCC’s application for leave to intervene in this proceeding.

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| --- |
| I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice O'Bryan. |

Associate:

Dated: 20 May 2021