Federal Court of Australia

 AustCorp Consulting Pty Limited v Callaghan (No 2) [2024] FCA 367

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| File number: | NSD 139 of 2023 |
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| Judgment of: | **YATES J** |
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| Date of judgment: | 15 April 2024 |
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| Catchwords: | **COSTS** – determination of appropriate costs order – review of Registrar’s decision to grant preliminary discovery – where on review prospective respondents unsuccessfully opposed preliminary discovery being granted – where prospective respondents achieved partial success in limiting the scope of some categories of documents to be discovered  |
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| Legislation: | *Federal Court Rules 2011* (Cth) r 7.23 |
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| Cases cited: | *AustCorp Consulting Pty Limited v Callaghan* [2023] FCA 1228 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: |  |
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| Number of paragraphs: | 23 |
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| Date of last submission/s: | 20 December 2023 |
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| Date of hearing: | Determined on the papers  |
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| Counsel for the Prospective Applicant: | Mr S Meehan SC |
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| Solicitor for the Prospective Applicant: | Gadens Lawyers |
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| Counsel for the Prospective Respondents: | Mr P Boncardo |
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| Solicitor for the Prospective Respondents: | Segelov Taylor Lawyers |

ORDERS

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|  | NSD 139 of 2023 |
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| BETWEEN: | AUSTCORP CONSULTING PTY LIMITEDProspective Applicant |
| AND: | MEGAN CALLAGHANFirst Prospective RespondentLEAD GROUP CONSULTING PTY LTD (ACN 632 022 274)Second Prospective Respondent |

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| order made by: | YATES J |
| DATE OF ORDER: | 15 APRIL 2024 |

THE COURT ORDERS THAT:

1. The orders made on 15 May 2023 be discharged.
2. The prospective respondents pay the prospective applicant’s costs of the application for preliminary discovery, including in relation to the costs of the proceeding before the Registrar.
3. If:
	1. the prospective applicant commences a substantive proceeding against the prospective respondents within 90 days of their compliance with the preliminary discovery orders made on 13 November 2023, the prospective respondents’ costs of compliance with those orders be costs in the cause of that proceeding; or if
	2. the prospective applicant does not commence such a proceeding, the prospective applicant pay the prospective respondents’ costs of compliance.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

YATES J:

# Introduction

1. On 13 November 2023, I made orders for preliminary discovery against the first prospective respondent, Ms Callaghan, and the second prospective respondent, Lead Group Consulting Pty Ltd (**Lead Group**). The background to the making of those orders is explained in *AustCorp Consulting Pty Limited v Callaghan* [2023] FCA 1228.
2. The application before me (which I will call the **review hearing**), was a review of an earlier decision of a Registrar of the Court to order, on 15 May 2023, that the prospective respondents give preliminary discovery in favour of the prospective applicant, AustCorp Consulting Pty Limited (**AustCorp**). In the review hearing, the prospective respondents achieved a degree of success in limiting the scope of some of the categories of documents that the Registrar ordered to be discovered.
3. Notwithstanding that success, I expressed the conclusion that, as the substantial part of the review hearing had been about whether an order for preliminary discovery should be made at all, and as AustCorp had succeeded on that question, the appropriate order for costs was that the prospective respondents pay AustCorp’s costs of its application for preliminary discovery, including in relation to the costs of the proceeding before the Registrar. However, at that time, I did not make an order to that effect.
4. When bringing in draft orders to give effect to my reasons, the parties sought to be heard on the question of costs, including in relation to the giving of preliminary discovery—a matter which, as I noted at the time I published my reasons, the parties had not addressed at the review hearing.

# Costs of the application for preliminary discovery

1. The prospective respondents accept that the bulk of the review hearing was occupied by argument about whether the preconditions to exercising the power under r 7.23 of the *Federal Court Rules 2011* (Cth) had been established. They contend, however, that they had offered to resolve the application for preliminary discovery, before the review hearing, by agreeing to orders for discovery which, they say, were in terms equivalent to those ultimately ordered on 13 November 2023. They contend that, had their offer been accepted, the costs and expense of the review hearing would have been avoided. Further, they submit that the categories of discovery ordered by the Court were narrower than those ordered by the Registrar. For those reasons, they contend that the Court should, in the exercise of its broad discretion on costs, make no order as to the costs of the application for preliminary discovery. Alternatively, the prospective respondents contend that (a) if AustCorp commences a substantive proceeding against them within 90 days of their compliance with the discovery orders, the costs of the preliminary discovery application be costs in that proceeding; or (b) if AustCorp does not commence such a proceeding, there be no order as to costs.
2. AustCorp contends that I should adhere to my initial conclusion and make the order I had contemplated in my reasons. AustCorp contends that the alternative contingent costs order proposed by the prospective respondents is not appropriate because their response to the preliminary discovery application was to act in an adversarial manner. For that reason, costs should follow the event.
3. In order to consider these submissions, it is necessary to say something more about the background circumstances.
4. The preliminary discovery application that was heard by the Registrar was fully contested (i.e., including as to AustCorp’s entitlement to preliminary discovery). AustCorp was successful, although the Registrar placed some limitations on the documents to be discovered. In light of that fact, the Registrar ordered the parties to bear their own costs of the application.
5. The prospective respondents elected to challenge the Registrar’s decision, as they were entitled to do. However, the consequence of that decision was that a hearing de novo was required. The review hearing was conducted accordingly, with the prospective respondents once again challenging AustCorp’s entitlement to preliminary discovery.
6. On 21 August 2023, one week before the review hearing, the prospective respondents made a settlement offer to the effect that they would provide preliminary discovery of certain documents. On 23 August 2023, AustCorp rejected that offer and made a counter-offer. The prospective respondents did not accept this counter-offer. However, on 25 August 2023, the last business day before the review hearing, they made a further offer to produce certain documents. The offer remained open for less than one day. AustCorp did not accept it.
7. As events transpired, the orders for preliminary discovery I made in relation to Ms Callaghan were: (a) broader in scope than one category of documents in the prospective respondents’ offer of 25 August 2023, even though, at the review hearing, Ms Callaghan accepted that this category was “within the discretion conferred by r 7.23(2)”; (b) included one category of documents in the prospective respondents’ offer of 25 August 2023 but whose production was nevertheless resisted at the review hearing by Ms Callaghan on the ground of undue breadth; and (c) included one category of documents substantially in accordance with the corresponding category proposed in the prospective respondents’ offer of 25 August 2023.
8. The orders for preliminary discovery I made in relation to Lead Group: (a) did not include two categories of documents sought by AustCorp; (b) included one category of documents sought by AustCorp which was included in AustCorp’s offer of 23 August 2023 and, subsequently, the prospective respondents’ offer of 25 August 2023; (c) included one category of documents in the prospective respondents’ offer of 25 August 2023; and (d) included one category of documents in the prospective respondents’ offer of 25 August 2023 but whose production was nevertheless resisted at the review hearing by Lead Group on the ground of undue breadth.
9. It can be seen that, although AustCorp had mixed success in obtaining preliminary discovery according to the categories of documents it sought, and although preliminary discovery was ordered in respect of some of the categories of documents that the prospective respondents had proposed in their offer of 25 August 2023, the prospective respondents nevertheless resisted giving preliminary discovery in respect of some categories even though they, themselves, had proposed those categories in their offer of 25 August 2023.
10. And, of course, it is not to be forgotten that, at the review hearing, the prospective respondents objected to giving any preliminary discovery on the ground that AustCorp had not established its entitlement to that relief. As I have said, the question of AustCorp’s entitlement to preliminary discovery was the substantial part of the review hearing.
11. Having considered the parties’ submissions on this topic, I remain of the view that I initially expressed. It was always open to the prospective respondents to contest AustCorp’s application for preliminary discovery on the basis that some of the categories that AustCorp sought were unnecessary or too broad, and that the categories they had proposed in their offer of 25 August 2023 provided appropriate and adequate discovery in all the circumstances. Had the prospective respondents adopted that course, there would be some merit in their contention that, had AustCorp accepted their offer of 25 August 2023, the costs and expense of the review hearing would have been avoided, or at least substantially avoided.
12. However, at the review hearing the prospective respondents charted a different forensic course by challenging AustCorp’s entitlement to preliminary discovery which, it seems to me, was completely unnecessary in light of the offer that the prospective respondents had made. The course they adopted at the review hearing shifted the focus from the adequacy of the categories of documents they had offered to a fully contested application as to whether AustCorp was entitled to preliminary discovery at all. This shift exposed them to a significantly greater risk of an adverse costs order.
13. In the circumstances, the appropriate costs order is that the prospective respondents pay AustCorp’s costs of its application for preliminary discovery, including in relation to the costs before the Registrar.

# Compliance costs

1. The prospective respondents contend that AustCorp should pay their costs of complying with the preliminary discovery orders that have been made. They submit that these costs are “likely to be not insubstantial”. The evidence before me supports that submission.
2. Alternatively, the prospective respondents contend that (a) if AustCorp commences a substantive proceeding against them within 90 days of their compliance with the preliminary discovery orders, their costs of compliance with those orders be costs in the cause of that proceeding; or (b) if AustCorp does not commence such a proceeding, it be ordered to pay the prospective respondents’ costs of compliance.
3. AustCorp proposes a similar order to the prospective respondents’ proposed alternative. AustCorp contends that (a) if it commences a substantive proceeding against the prospective respondents within 90 days of their compliance with the preliminary discovery orders, the prospective respondents’ costs of compliance be their costs in that proceeding; or (b) if it does not commence such a proceeding, it be ordered to pay the prospective respondents’ costs of compliance.
4. It does not seem to me that AustCorp’s proposed order is appropriate as a matter of form. As it is the prospective respondents’ obligation to comply with the preliminary discovery orders, not AustCorp’s obligation, AustCorp, itself, does not have any preliminary discovery compliance costs whose burden can be carried into the contemplated substantive proceeding. Therefore, an order for compliance costs conditioned as “the prospective respondents’ costs in the cause” (of the contemplated substantive proceeding) is illusory. There are no compliance costs incurred by AustCorp whose burden can be lifted from the prospective respondents in the event that the prospective respondents are unsuccessful in the contemplated substantive proceeding. In short, AustCorp’s proposed order cannot have any practical operation. I say this even though, in reply submissions, the prospective respondents accepted that an order in this form would be appropriate.
5. The appropriate order in respect of compliance costs is the alternative order originally proposed by the prospective respondents. I am not persuaded by the prospective respondents’ principal submission that their costs of compliance should be AustCorp’s costs in any event. In this connection, I accept AustCorp’s submission that it seems highly likely that the documents captured by the orders for preliminary discovery would be the subject of orders for discovery in the substantive proceeding.

# Disposition

1. Orders will be made accordingly. For the sake of good order, I will also discharge the orders made by the Registrar on 15 May 2023.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates. |

Associate:

Dated: 15 April 2024