AUSTRALIAN COMPETITION TRIBUNAL

Application by SPI Electricity Pty Limited [2013] ACompT 1

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| Citation: | Application by SPI Electricity Pty Limited [2013] ACompT 1 |
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| Review from: | Australian Energy Regulator  |
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| Parties: | **SPI ELECTRICITY PTY LIMITED (ABN 91 064 235 776)** |
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| File number: | ACT 7 of 2010 |
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| Tribunal: | **FOSTER J (DEPUTY PRESIDENT), MR G LATTA AM AND PROFESSOR D ROUND** |
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| Date of decision: | 31 January 2013  |
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| Legislation: | *National Electricity Law*, s 71P(2)(b)*National Electricity Rules*  |
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| Cases cited: | *Application by SPI Electricity Pty Ltd* [2012] ACompT 2 related*Application by United Energy Distribution Pty Limited* (2012) 261 FLR 1 related*SPI Electricity Pty Ltd v Australian Competition Tribunal* [2012] FCAFC 186 cited  |
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| Date of hearing: | Decided on the papers |
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| Place: | Sydney |
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| Category: | No Catchwords |
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| Number of paragraphs: | 16 |
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| Solicitor for SPI Electricity Pty Limited: | SP AusNet |
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| Counsel for the Australian Energy Regulator: | Ms M Sloss SC, Mr S Lloyd SC, Mr P Gray, Mr D Star, Dr V Priskich, Mr T Clarke and Mr L Merrick |
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| Solicitor for the Australian Energy Regulator: | Corrs Chambers Westgarth |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | NO: ACT 7 of 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to spi electricity pty limited pursuant to clause 6.11.1 of the national electricity rules |
| BY: | SPI ELECTRICITY PTY LIMITED (ABN 91 064 235 776) |

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| TRIBUNAL: | JUSTICE foster (deputy PRESIDENT),MR G LATTA AM AND PROFESSOR D ROUND |
| DATE OF ORDER: | 31 JANUARY 2013 |
| WHERE MADE: | SYDNEY |

PREAMBLE:

This Order is made in place of paragraph 3 of the Tribunal’s Order made on 5 April 2012 in this review application, No ACT 7 of 2010, which Order was set aside by Order of the Full Court of the Federal Court of Australia made on 17 January 2013 in proceeding VID 338 of 2012 between the review applicant, SPI Electricity Pty Limited, as applicant, and the Tribunal and the Australian Energy Regulator, as respondents.

THE TRIBUNAL:

1. Pursuant to s 71P(2)(b) of the *National Electricity Law*, remits the final determination made by the Australian Energy Regulator in respect of the review applicant in October 2010 (**the final determination**) to be remade by the Australian Energy Regulator upon a basis which:
	1. conforms to the requirements of the National Electricity Rules in respect of the Indexation of the review applicant’s Regulatory Asset Base for inflation in accordance with the Tribunal’s Reasons for Decision in *Application by United Energy Distribution Pty Limited* [2012] ACompT 1; (2012) 261 FLR 1 at 91–100 [338]–[386];
	2. but which, subject to:
		1. the variations effected by paragraph 2 of the Orders made by the Tribunal on 5 April 2012 in this review application, No ACT 7 of 2010, as a result of the Tribunal’s Reasons for Decision given in *Application by United Energy Distribution Pty Limited* [2012] ACompT 1; (2012) 261 FLR 1 and in *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8; and
		2. paragraph 2 of the Orders made by the Tribunal on 6 January 2012 in *Application by SPI Electricity Pty Limited* [2012] ACompT 2;

otherwise proceeds upon the final determination as published.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | nO: act 7 OF 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to spi electricity pty limited pursuant to clause 6.11.1 of the national electricity rules |
| BY: | SPI ELECTRICITY PTY LIMITED (ABN 91 064 235 776) |

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| tribunal: | foster j (deputy president), mr g latta am and professor d round |
| DATE: | 31 January 2013 |
| PLACE: |  |

**REASONS FOR DECISION**

1. On 6 January 2012, the Tribunal delivered two decisions which affected the delivery of electricity distribution services in the State of Victoria.
2. In *Application by United Energy Distribution Pty Limited* (2012) 261 FLR 1 (**the principal decision**), the Tribunal determined 15 issues raised by five separate applications for review. Each of the five registered distribution network service providers in Victoria (**DNSPs**) had made an application to the Tribunal for review of certain specific parts of the final determination and reasons for that determination made by the Australian Energy Regulator (**AER**) on 29 October 2010 in respect of the delivery of those distribution services.
3. In *Application by SPI Electricity Pty Ltd* [2012] ACompT 2, the Tribunal determined on a confidential basis a discrete issue raised by SPI Electricity Pty Limited (**SPI**) in respect of the AER’s final determination.
4. One of the issues dealt with by the Tribunal in the principal decision was an issue raised by Jemena Electricity Networks (Vic) Ltd (**JEN**) in respect of the AER’s determination of the appropriate method for indexing JEN’s regulatory asset base (**RAB**) for inflation. The Tribunal dealt with that issue at (2012) 261 FLR 91–100 [338]–[386] in the principal decision. JEN contended that its 2006 opening RAB values should be indexed by 6½ years’ inflation whereas the AER argued that those values should only be indexed by 6 years’ inflation. At the hearings of the review applications before the Tribunal, all of the DNSPs indicated that they would wish to get the benefit of any decision which the Tribunal might make in favour of JEN, even though most of them had never taken issue with the AER’s approach to this question. At that time, the AER submitted that the issue was, in truth, common to all DNSPs.
5. In the principal decision, the Tribunal concluded that the AER erred in the approach which it took to this question. For this reason, it remitted to the AER its final determination in respect of JEN to the remade upon a basis which conformed to the *National Electricity Rules* in respect of the indexation of JEN’s RAB for inflation as interpreted by the Tribunal in the principal decision.
6. Because of the position adopted by the parties at the hearings before the Tribunal, the Tribunal also granted liberty to the other four DNSPs and to the AER to apply to the Tribunal in respect of the consequences of the Tribunal’s decision concerning the indexation of JEN’s RAB for inflation. The AER and the other four DNSPs all exercised that liberty to apply. Each DNSP sought to get the benefit of the Tribunal’s decision in respect of JEN. The AER and the Victorian Minister for Energy and Resources opposed any extension of the Tribunal’s decision in respect of the indexation of JEN’s RAB for inflation to any of the remaining DNSPs.
7. In *Application by United Energy Distribution Pty Limited (No 2)* [2012] A CompT 8, delivered on 5 April 2012 (**the second decision**), the Tribunal rejected all of the applications made by the remaining DNSPs for orders applying to each of them the reasoning in the principal decision in respect of the indexation of JEN’s RAB for inflation.
8. SPI was dissatisfied with that decision. It was also dissatisfied with another aspect of the second decision which is not presently relevant.
9. For reasons which we need not explain in detail here, on 5 April 2012, the Tribunal vacated the orders which it had made on 6 January 2012 in order to give effect to the principal decision and remade some of those orders.
10. In the case of SPI, the precise orders made on 5 April 2012 were:

**THE TRIBUNAL:**

1. Vacates the orders made on 6 January 2012.

2. Pursuant to s 71P(2)(a) of the *National Electricity Law*, hereby varies the Final Distribution Determination dated October 2010 in respect of the 2011–2015 regulatory control period applicable to the applicant (SPI Electricity Pty Limited) (**the final determination**) by:

(a) Replacing the figure “4.05%” for the debt risk premium in Table 14 of the final determination with the figure “4.22%”; and

(b) Replacing the figure “0.5” as the value for gamma with the figure “0.25” as the value for gamma when used as an input into the calculation of the cost of corporate income tax.

3. Subject to the variations made in par 2 above and subject to the remitter in par 2 of the relief granted by the Tribunal in *Application by SPI Electricity Pty Limited* [2012] ACompT 2, pursuant to s 71P(2)(a) of the *National Electricity Law*, otherwise affirms the final determination.

1. By Originating Application for Judicial Review filed in early May 2012, SPI sought judicial review of that part of the second decision whereby the Tribunal decided not to permit SPI to have the benefit of the Tribunal’s reasoning in the principal decision which dealt with the indexation of JEN’s RAB for inflation. SPI also challenged another part of the second decision but that challenge was not pressed in light of certain legislative changes made by the Victorian Parliament. SPI’s challenge in the Court proceeded upon the basis that the Tribunal’s reasoning and decision in respect of the indexation of JEN’s RAB for inflation contained in the principal decision were correct. SPI’s complaint was that the Tribunal erred in not giving to SPI the benefit of that decision.
2. On 20 December 2012, the Full Court of the Federal Court of Australia delivered Reasons for Judgment in SPI’s judicial review application (*SPI Electricity Pty Ltd v Australian Competition Tribunal* [2012] FCAFC 186). The Full Court acceded to that application. The Full Court noted that the AER had indicated at the hearing of SPI’s application for judicial review that, if SPI was successful, the AER would accept a remitter of its final determination in respect of SPI for the limited purpose of adjusting the allowances for the RAB to accommodate the extra six months’ indexation which should have been taken into account.
3. On 17 January 2013, the Full Court made the following orders in SPI’s judicial review application:

**THE COURT ORDERS BY CONSENT THAT:**

1. Paragraph 3 of the Order of the First Respondent made on 5 April 2012 in *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8 (ACT No 7 of 2010) be set aside.

2. In lieu thereof, the matter be referred for further consideration by the First Respondent subject to a direction as follows: the First Respondent shall pursuant to s 71P(20(b) of the National Electricity Law, remit the final determination to the Australian Energy Regulator to be remade upon a basis which:

(a) conforms to the requirements of the National Electricity Rules in respect of the indexation of the regulatory asset base of the Applicant for inflation in accordance with the First Respondent’s reasons for decision in *Application by United Energy Distribution Pty Limited* [2012] A CompT 1 at [338]–[386];

(b) but which, subject to:

(i) the variations made in paragraph 2 of the Order of the First Respondent made on 5 April 2012 in [2012] A CompT 8 (ACT No 7 of 2010); and

(ii) paragraph 2 of the Order of the First Respondent made on 6 January 2012 in *Application by SPI Electricity Pty Ltd Limited* [2012] ACompT 2;

otherwise proceeds upon the final determination as published by the Australian Energy Regulator in October 2010.

3. No order as to costs.

1. The orders of the Full Court require the Tribunal to reconsider that part of the Tribunal’s decision made on 5 April 2012 whereby it refused to apply to SPI its reasoning in the principal decision concerning the indexation of JEN’s RAB for inflation and to do so in accordance with the direction of the Full Court.
2. The Tribunal has reconsidered the second decision as directed by the Full Court and will make orders giving effect to the decision of the Full Court.
3. The AER and SPI have submitted draft orders for the Tribunal’s consideration. The Tribunal proposes to make orders substantially along the lines of the draft orders submitted by the parties. There will be orders accordingly.

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| I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster (Deputy President), Mr G Latta AM and Professor D Round. |

Associate:

Dated: 31 January 2013