AUSTRALIAN COMPETITION TRIBUNAL

Application by Glencore Coal Pty Ltd (No 2) [2016] ACompT 7

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| Review from: | **THE DECISION BY THE COMMONWEALTH TREASURER UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) IN RELATION TO THE APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY PORT OF NEWCASTLE OPERATIONS PTY LTD** |
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| File number: | ACT 1 of 2016 |
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| Tribunal: | **MANSFIELD J (PRESIDENT)**  **MR RF SHOGREN (MEMBER)**  **mR r STEINWALL (MEMBER)** |
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| Date of judgment: | 16 June 2016 |
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| Catchwords: | **COMPETITION** – Application for review of a decision by the Minister under s 44K(2) of the *Competition and Consumer Act 2010* (Cth) (the Act) not to declare a service – where decision of Minister is varied and service declared – where applicant applies for costs against monopoly infrastructure provider under s 44KB of the Act  **COSTS** – application for costs by applicant upon review of a decision by the Minister under s 44K(2) of the *Competition and Consumer Act 2010* (Cth) (the Act) not to declare a service – considerations relevant to exercise of discretionary power of Tribunal under s 44KB of the Act |
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| Legislation: | *Competition and Consumer Act 2010* (Cth)  *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth)  *National Third Party Access Code for Natural Gas Pipeline Systems*  *Gas Pipelines Access Law*  *Trade Practices Act 1974* (Cth)  *Copyright Act 1968* (Cth) |
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| Cases cited: | *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3  *MGV Pty Ltd v Phonographic Performance Company of Australia Ltd* [2000] ACopyT 8  *Perry v Comcare* (2006) 226 ALR 724  *R v Australian Broadcasting Tribunal; ex parte 2HD* (1980) 144 CLR 45  *Oshlack v Richmond River Council* (1998) 193 CLR 72 |
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| Date of hearing: | Heard on the papers |
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| Date of last submissions: | 10 June 2016 |
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| Registry: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Counsel for the National Competition Council: | RCA Higgins |
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| Solicitor for the National Competition Council: | Ashurst |

ORDERS

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|  | | ACT 1 of 2016 |
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| RE: | APPLICATION FOR REVIEW OF THE DECISION BY THE COMMONWEALTH TREASURER UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) IN RELATION TO THE APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY PORT OF NEWCASTLE OPERATIONS PTY LTD | |
| BY: | GLENCORE COAL PTY LTD | |

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| TRIBUNAL: | MANSFIELD J (PRESIDENT)  MR RF SHOGREN (MEMBER)  MR R STEINWALL (MEMBER) |
| DATE OF ORDERS: | 16 JUNE 2016 |

THE TRIBUNAL DIRECTS/ORDERS THAT:

1. The decision of the Acting Federal Treasurer made on 8 January 2016 not to declare the following service under s 44H of Part IIIA of the *Competition and Consumer Act 2010* (Cth):

the provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port of Newcastle (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,

be set aside.

1. The following service is declared pursuant to s 44K(8) of Part IIIA of the *Competition and Consumer Act 2010* (Cth), commencing on 8 July 2016 and expiring on 7 July 2031:

the provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port of Newcastle (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.

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

REASONS FOR DECISION

THE TRIBUNAL:

1. On 31 May 2016, the Tribunal published its reasons for decision in an application by Glencore Coal Pty Ltd (Glencore) for review of a decision made by the Acting Federal Treasurer (the Minister) not to declare certain services provided by Port of Newcastle Operations Pty Ltd (PNO) by means of the shipping channels at the Port of Newcastle. The Tribunal decided that it should set aside the decision of the Minister, and instead make an order declaring the service.
2. That order is the Order 1 made at the time of publishing these reasons for decision.
3. At the time of publishing those reasons, the Tribunal provided a timetable for any party to the proceeding to seek an order as to costs under s 44KB of the *Competition and Consumer Act 2010* (Cth) (the Act). That was at the invitation of the parties, made during the course of submissions on the principal hearing.
4. Glencore now seeks an order pursuant to s 44KB(1) of the Act that PNO pay its costs of the application.
5. Section 44KB was inserted into the Act by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth). That act was to streamline certain administrative processes which applied to the National Competition Council (NCC) in dealing with matters which it was required to consider. Clearly, s 44KB was inserted to provide the Tribunal with a discretion to order costs in reviews of decisions of the Minister to declare, or not to declare, a service under Pt IIIA of the Act.
6. Section 44KB(1) provides:

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

Section 44KB(2) restricts the circumstances in which an order for costs might be made against the Minister, having regard to the Minister’s conduct of the proceedings, in particular whether conduct was engaged in without due regard to the costs to be incurred or the time required by other parties to the proceedings as a result of that conduct. It is not necessary to refer to that subsection in any detail. Sections 44KB(3)-(5) deal with the means of assessing or fixing the amount of the costs and for their recovery if a costs order is made.

1. To date, there have been no other decisions of the Tribunal, or of a Court, concerning the circumstances in which, or the manner in which, the Tribunal should exercise its discretion under s 44KB(1).
2. The *Explanatory Memorandum to the* *Trade Practices Amendment (Infrastructure Access) Bill* 2009 makes the following comment:

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

As is apparent, the focus of the provision appears to have related to there being a meaningful issue to address and then the means by which an applicant (or another party) may have conducted the proceeding. It is an attempt to reduce the substantial costs and delays experienced during review proceedings.

1. There is one decision of the Tribunal which has particular significance to the present issue. In *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3 (*Duke*), the Tribunal (Hely J, Dr MJ Messenger and Miss MM Starrs) considered an application for costs in a proceeding to review a decision of the Minister that a particular gas pipeline be covered under the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Code). The decision of the Minister under the Code was subject to review by the Tribunal under the *Gas Pipelines Access Law* (the Law). Section 38(10) of the Law provided:

The relevant appeals body may make such orders (if any) as to costs in respect of a proceeding as it thinks fit.

*Duke* applied for costs against AGL, the pipeline operator, but not against the NCC or the Minister.

1. The Tribunal noted that its power to award costs under s 38(10) of the Law (as it was at that time) was unique in relation to the Tribunal’s review role under Pt IIIA, IX or XIC of the *Trade Practices Act 1974* (Cth) having regard to the relevant provisions under the Code, and the Tribunal’s role under the Law. At [5] the Tribunal appropriately observed that the proceedings before the Tribunal are not, either in substance or in form, *inter partes* litigation so that there is no particular reason for applying principles developed in general *inter partes* litigation in the Courts to an application for costs under s 38(10) of the Law.
2. The Tribunal at [6] made the point that the inclusion of the words “if any” in s 38(10) indicated that in proceedings before the Tribunal, at least of that character, there is no presumption that orders as to costs will be made at all. The Tribunal also noted that s 174 of the *Copyright Act 1968* (Cth) confers a discretion on the Copyright Tribunal to make costs orders in relation to proceedings in that Tribunal. It is nevertheless the ordinary practice of that Tribunal not to make orders for costs: see per Burchett P in *MGV Pty Ltd v Phonographic Performance Company of Australia Ltd* [2000] ACopyT 8. It is said that a reason for that practice is that decisions of that Tribunal often affect wider interests than those arising between the immediate parties to the particular proceeding. See also per Greenwood J in *Perry v Comcare* (2006) 226 ALR 724 at [78].
3. In *Duke*, the Tribunal after referring to the particular words used in s 38(10) of the Law, emphasising the words “if any”, made the following observations at [7] and [8]:

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

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

1. The Tribunal as now constituted respectfully endorses those observations. It considers that they reflect the subject matter, scope and purpose of s 44KB: *R v Australian Broadcasting Tribunal; ex parte 2HD* (1980) 144 CLR 45 at 49; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81.
2. Although the statutory regime addressed in *Duke* was a little different from that applicable to the present application under Pt IIIA of the Act, it is not different in material respects. The comments made by the Tribunal in *Duke* at [7]-[8] apply equally to the present circumstances.
3. Once it is accepted that the proceedings in this matter are not the equivalent of *inter partes* litigation, for reasons which are apparent, the Tribunal considers that the discretion to order costs against a party should not be exercised unless there is, in the particular circumstances, a reason to do so arising out of the nature of the issue or issues raised or put of the conduct of that party in the conduct of the matter. As in *Duke*, it is important for the Tribunal to have the benefit of the identification of all factors relevant, or potentially relevant, to its determination. The determination may have effect on a much wider group than the parties. That was said to be a feature of the present case: if the declaration were made, others may take advantage of it. That process, generally speaking, is facilitated or supported by responsible intervention by interested parties and should not be discouraged by fear of adverse costs orders. In particular, as the NCC submitted, the Tribunal’s ability to assess the application for review may be impeded if cost disincentives hinder or prevent a service provider from fully and properly participating in the review. Nor should a potential applicant for review be discouraged from exercising its statutory right of review by fear of costs orders, if it is unsuccessful, except if the matters it raises are not substantial or there is an unsatisfactory feature of the way its case is presented. Consequently, given the nature of the jurisdiction, the Tribunal reaffirms that the adoption of a general rule applicable in the case of *inter partes* litigation to proceedings before the Tribunal would not be conducive to the effective discharge by the Tribunal of its statutory functions.
4. The Tribunal is prepared to take the step, urged by Glencore, of finding that PNO was a party to the proceeding. Although there was no formal direction to that effect, that is the basis upon which its role was pursued. It was treated as a party. It did not seek leave to intervene. It appeared at all stages of the proceeding, and as noted in the principal reasons it filed a Notice of Contention in respect of criterion (f) which required separate consideration. Indeed, its Counsel raised during the course of the hearing the prospect of it seeking an order for costs against Glencore if the Glencore review application was unsuccessful.
5. However, the Tribunal does not consider that the conduct of PNO by its Notice of Contention or in the course of the proceeding warrants the exercise of the discretion to order that it pay Glencore’s costs, or some of its costs, of the proceeding. To a significant extent, it acted as a contradictor to Glencore’s claim or submissions, but it did so in a manner complementary to, and broadly consistent with the contentions of the NCC. It did not unduly prolong the hearing by those submissions. Its submissions were focused and helpful.
6. It was entitled to put on a Notice of Contention, particularly having regard to the submissions as to the nature of the “public interest” to which criterion (f) refers and as to the scope of the considerations appropriately considered in respect of criterion (a).
7. In short, the Tribunal, in the exercise of its discretion, does not consider that it is appropriate to accede to the application for costs made by Glencore.

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| I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield, Mr RF Shogren and Mr R Steinwall. |

Associate:

Dated: 16 June 2016