

AUSTRALIAN COMPETITION TRIBUNAL

Application by ActewAGL Distribution [2014] ACompT 2

Citation: Application by ActewAGL Distribution [2014] ACompT 2

Review from: Australian Energy Regulator

Parties: **ACTEWAGL DISTRIBUTION (ABN 76 670 568 688)**

File number: ACT 2 of 2014

Tribunal: **MANSFIELD J (PRESIDENT)**

Date of decision: 25 August 2014

Catchwords: Leave to withdraw application where deemed decision of AER preceded formal putative decision – observations about whether there is any right to seek leave to review deemed decision

Legislation: *National Electricity (South Australia) Act 1996 (SA)*
Electricity (National Scheme) Act 1997
Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013 (SA)
Competition and Consumer Act 2010 (Cth)

Cases cited: *Re Lakes R Us Pty Ltd* [2006] ACompT 3

Date of hearing: Heard on the papers

Date of last submissions: 21 August 2014

Place: Sydney

Category: Catchwords

Number of paragraphs: 31

Counsel for the Applicant: F Gibbons

Solicitor for the Applicant: DLA Piper

Counsel for the Australian Energy Regulator : F Williams

Solicitor for the Australian Energy Regulator: Corrs Chambers Westgarth

IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 2 of 2014

**RE: APPLICATION UNDER S 71B OF THE NATIONAL
ELECTRICITY LAW FOR A REVIEW OF A PASS
THROUGH DETERMINATION MADE BY THE
AUSTRALIAN ENERGY REGULATOR IN RELATION TO
ACTEWAGL DISTRIBUTION PURSUANT TO CLAUSE 6.6.1
OF THE NATIONAL ELECTRICITY RULES**

**BY: ACTEWAGL DISTRIBUTION (ABN 76 670 568 688)
Applicant**

JUDGE: MANSFIELD J (PRESIDENT)

DATE OF ORDER: 25 AUGUST 2014

WHERE MADE: SYDNEY

THE TRIBUNAL DIRECTS THAT:

1. To the extent necessary ActewAGL Distribution is given leave to withdraw the application dated 29 July 2014 for leave to apply under s 71B of the National Electricity Law in relation to a determination of the Australian Energy Regulator.

**RE: APPLICATION UNDER S 71B OF THE NATIONAL
ELECTRICITY LAW FOR A REVIEW OF A PASS
THROUGH DETERMINATION MADE BY THE
AUSTRALIAN ENERGY REGULATOR IN RELATION TO
ACTEWAGL DISTRIBUTION PURSUANT TO CLAUSE 6.6.1
OF THE NATIONAL ELECTRICITY RULES**

**BY: ACTEWAGL DISTRIBUTION (ABN 76 670 568 688)
Applicant**

JUDGE: MANSFIELD J (PRESIDENT)

DATE: 25 AUGUST 2014

PLACE: SYDNEY

REASONS FOR DECISION

APPLICATION FOR LEAVE TO APPLY FOR REVIEW

1 By application dated 29 July 2014, ActewAGL Distribution (ActewAGL) sought leave to apply under s 71B of the National Electricity Law (NEL) for a review by the Australian Competition Tribunal (Tribunal) of a purported cost pass through determination made by the Australian Energy Regulator (AER) in respect of ActewAGL's electricity distribution network in the Australian Capital Territory (ACT).

2 The NEL is set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA). Section 9 of the NEL gives the National Electricity Rules (NER), which are made under the NEL, the force of law. Pursuant to Part 2 of the *Electricity (National Scheme) Act 1997* (ACT), the NEL and regulations made under it apply in the ACT. ActewAGL now seeks leave to withdraw its application.

3 ActewAGL owns and operates an electricity distribution network in the ACT. It is a registered distribution network service provider under s 11(2) of the NEL and clause 2.5.1 of the NER.

4 The AER is responsible for the economic regulation of electricity network services.

5 It is necessary to note only briefly the background to the application.

6 On 28 April 2009 the AER had made a distribution determination for ActewAGL for the regulatory control period 1 July 2009 to 30 June 2014. In April 2012, that determination was revoked and a substituted determination for that period was made (Distribution Determination). It included provision for a specified sum for ActewAGL's vegetation management costs as part of its total operating expenditure allowance in the regulatory period.

7 The Distribution Determination provided for a "general nominated pass through event" in certain circumstances. It is not necessary for present purposes to refer to those circumstances in any detail.

8 On 1 November 2013, ActewAGL submitted to the AER an application to pass through a positive pass through amount for increased vegetation management costs. Following the AER publishing a Draft Determination on 10 June 2014, the AER on 9 July 2014 published a document entitled "Final Determination ActewAGL Distribution cost pass through application Vegetation management costs for the 2012-13 regulatory year" (Final Determination).

9 That gave rise to the present application.

10 There is no issue that ActewAGL is the regulated network service provider to whom the Determination applies and is thus an "affected or interested person or body" as that term is defined in s 71A of the NEL. Nor is there any dispute that the application for leave to apply for review was within 15 business days after the Final Determination was published as required by s 71D.

11 The AER indicated that it did not agree that ActewAGL should be given leave to apply for review, having regard to the matters of which the Tribunal must be satisfied under ss 71E and 71F of the NEL.

12 To address the question of whether leave to apply for review should be given, the Tribunal set a timetable for the exchange of written submissions between ActewAGL and the AER and a date for hearing oral submissions. It is not the practice of the Tribunal to have an oral hearing on the issue of leave, but it did so on this occasion at the suggestion of the AER, having regard to the recently introduced additional criterion for the grant of leave in s 71E.

13 By the *Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA) (*the 2013 Amendments*), Subdiv 3A of the NEL concerning review by the Tribunal of decisions of the AER was significantly amended. Relevantly for immediate purposes, an application under s 71B must now specify the proposed grounds of review and it must also specify the manner in which the determination sought through the Tribunal (either directly or through remittal to the AER and a fresh decision made by the AER) would, or would be likely to, result in a materially preferable NEO decision as defined in s 71P(za)(c); s 71C(1)(a). It must appear to the Tribunal, before giving leave to apply for review, that there is a *prima facie* case that a determination made by it on review would satisfy that test: s 71E(b).

14 In the course of preparing the written submissions, it became apparent that the Final Determination is of no effect. The reason was explained by ActewAGL in terms to which the AER acceded, as set out in the following paras [15] – [19]. Although not cited as a quotation, they are taken directly from that source (other than a footnote).

15 Pursuant to Division 2 of Part M of Chapter 11 of the National Electricity Rules (NER), Chapter 6 of the NER applies in relation to the NSW and ACT distribution network service providers (DNSPs) in respect of the regulatory control period 2009-2014 as if that Chapter were amended so as to be in the form set out in Appendix 1 to the NER (Transitional Chapter 6) (see clause 11.15.2, in particular paragraph (a)). Chapter 6 as in force apart from clause 11.15.2 (General Chapter 6) does not apply in relation to the NSW and ACT DNSPs in respect of the regulatory control period 2009-2014 except as provided by paragraphs (a) and (b) of that clause and to the extent that a provision of Transitional Chapter 6 expressly applies a provision of General Chapter 6 or expressly provides that an act, matter or thing has to be done in accordance with a provision of or a procedure in General Chapter 6 (clause 11.15.2(c) and definition of “general Chapter 6” in clause 11.15.2(f)).

16 Clause 6.6.1 of Transitional Chapter 6 differs from clause 6.6.1 of General Chapter 6 in the following respects:

1. Clause 6.6.1(e) of Transitional Chapter 6 provides that, if the AER does not make the determination referred to in paragraph (d) of that clause within 60 business days from the date it receives the DNSP’s statement and accompanying evidence under

paragraph (c) of that clause, then, on the expiry of that period, the AER is taken to have determined that:

- the positive pass through amount as proposed in the DNSP's statement under paragraph (c) is the approved pass through amount in respect of that positive change event; and
- the amount of that approved pass through amount that the DNSP proposes in that statement should be passed through to distribution network users in the regulatory year in which, and each regulatory year after that in which, the positive change event occurred, is the amount that should be so passed through in each such regulatory year.

Clause 6.6.1(e) of General Chapter 6 is in similar terms but is stated to be "subject to paragraph (k1)" and provides a period of 40 business days from the later of the date it receives the DNSP's statement and accompanying evidence under paragraph (c) of that clause and the date it receives any additional information required under paragraph (e1) of that clause for the making of the determination referred to in paragraph (d) of that clause.

2. Transitional Chapter 6 does not contain a provision analogous to clause 6.6.1(e1) of General Chapter 6, which provides that a DNSP must provide the AER with such additional information as the AER requires for the purpose of making a determination under paragraph (d) of that clause within the time specified by the AER in a notice provided to the DNSP by the AER for that purpose.
3. Transitional Chapter 6 does not contain a provision analogous to clause 6.6.1(k1) of General Chapter 6, which provides that, if the AER is satisfied that the making of a determination under clause 6.6.1(d) involves issues of such complexity or difficulty that the time limit fixed in paragraph (e) should be extended, the AER may extend that time limit by a further period of up to 60 business days, provided that it gives written notice to the DNSP of that extension not later than 10 business days before the expiry of that time limit.

17 As ActewAGL's proposed pass through event occurred during the regulatory control period 2009-2014, the incremental costs ActewAGL incurred as a result of that event were incurred in the 2012/13 regulatory year of that regulatory control period and its application for pass through titled Vegetation management cost pass through (Pass Through Application)

was made in November 2013, Transitional Chapter 6 applied in respect of the making by the AER of the Final Determination.

18 However, in making the Final Determination, the AER proceeded on the basis that General Chapter 6 applied, notwithstanding that ActewAGL's Pass Through Application was made on the express basis of Transitional Chapter 6. In particular, the AER purported to exercise the powers conferred by clauses 6.6.1(e1) and (k1) of General Chapter 6 in making its Final Determination with the consequence that the Final Determination was not made within 60 business days from the date it received ActewAGL's Pass Through Application.

19 It follows that the Final Determination was not made within the timeframe specified by clause 6.6.1(e) of Transitional Chapter 6 and is void ab initio, and the AER is taken to have determined that:

- the positive pass through amount as proposed in ActewAGL's Pass Through Application is the approved pass through amount; and
- the amount of that approved pass through amount that ActewAGL proposed in that Application should be passed through to distribution network users in the regulatory year in which, and each regulatory year after that in which, the positive change event occurred, is the amount that should be so passed through in each such regulatory year.

20 The complexity of the applicable regulatory provisions, in the circumstances, makes it readily understandable how the oversight came about.

21 The AER accepts that it is deemed to have accepted ActewAGL's application for a pass-through with effect from 30 January 2014.

22 As the Final Determination is of no effect, to the extent necessary leave should be given to ActewAGL to withdraw its application. That course was taken by French J (as he then was) as a Deputy President of the Tribunal in *Re Lakes R Us Pty Ltd* [2006] ACompT 3. That step was taken by his Honour in a different legislative context, but there does not appear to be any sensible reason why a parity of reasoning should not apply in the present circumstances. I respectfully adopt that reasoning. Section 44ZZR, introduced into the *Competition and Consumer Act 2010* (Cth) following that decision would, in any event, put the question beyond doubt.

23 Accordingly, to the extent necessary, I formally give leave to ActewAGL to withdraw
its application on the basis that it and the AER accept that the Final Determination is of no
effect. That will mean that the application is at an end.

24 I note that the other members of the Tribunal, as presently constituted (Mr R Davey
and Dr D Abraham) concur in giving that leave in any event.

25 There are a few additional observations I wish to make, prompted by *the 2013
Amendments*.

26 The policy underlying the 2013 Amendments, at least so far as they apply in or to
Div 3A of the NEL, are clearly aimed in part at securing an improved opportunity for
interests other than those of the DNSP to be more actively involved in any review of a
determination by the AER.

27 In s 71A, the definition of an affected or interested person or body was amended to
include “a reviewable regulatory decision process participant”, and a definition of that term
was inserted. Section 71B enabling an application for leave to review an AER decision
thereby extended the range of persons who may seek review. It is extended to a Minister of a
participating jurisdiction and a person or body who made a submission or comment to the
AER upon invitation, in relation to the AER’s reviewable regulatory decision.

28 In the event that the Tribunal gives leave to a DNSP to apply for review under s 71B,
ss 71K and 71L provide the circumstances in which a reviewable regulatory decision process
participant may, by leave, intervene in the review. Section 71M enables an intervener to raise
new grounds of review. The material provided by ActewAGL and the AER to the Tribunal
indicates that there is at least one reviewable regulatory decision process participant in this
matter (other than a Minister of a participating jurisdiction).

29 The point of referring to those matters now is that the deemed decision of the AER
itself is, or may be, a reviewable regulatory decision: see the definition in s 71A of the NEL,
Regulation 9(1)(a) of the National Electricity Regulations and Rule 6.6.1(d) and (e) of the
NER. It is not presently necessary to decide that. If the deemed decision is a reviewable
regulatory decision, then there may be issues as to if, and when, the reviewable regulatory
decision was published by the AER so that any application for leave to review it is within the
time prescribed by s 71D of the NEL. The Tribunal has no power to extend that time. If it is

not, although the effect of the deemed decision is to allow the pass through of the claimed costs (that is, the outcome which is the opposite of the putative effect of the Final Decision), there is no entitlement on any body or person to seek leave to review the deemed decision despite its consequence for any reviewable regulatory decision process participant and for end users of electricity in the ACT.

30 In any event, even if the deemed decision is a reviewable regulatory decision, any affected or interested person or body, may have difficulty in specifying the grounds for review as required by s 71C.

31 It may well be that the occasions in which the AER is deemed to have made a decision are so few as not to give rise to particular concern, despite the above comments. I suspect that is the case. If it is not, the matters referred to might be worthy of consideration to ensure that the policy or one of the policies underlying *the 2013 Amendments* is effective.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield (President).

Associate:



Dated: 25 August 2014

