FEDERAL COURT OF AUSTRALIA

Telstra Corporation Limited v Australian Competition and Consumer Commission (No 2) [2017] FCA 430

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| File number: |  |
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| Judge: | **FOSTER J** |
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| Date of judgment: | 27 April 2017 |
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| Catchwords: | **COSTS** – whether an applicant for judicial review of a regulatory decision, having failed to obtain any relief by way of judicial review, should pay the costs of certain entities who were added as parties to the proceeding upon their own application after the proceeding had been commenced in circumstances where those entities had taken a substantial role in the public inquiry which had led to the regulatory decision and where they had an obvious legitimate commercial interest in the outcome of the inquiry and of the judicial review proceeding |
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| Cases cited: | *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2017] FCA 316*Credit Lyonnais Australia Ltd v Darling* (1991) 5 ACSR 703*R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 1*State of Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174  |
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| Date of hearing: | Decided on the papers  |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 20 |
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| Counsel for the Applicant: | Mr AC Archibald QC and Ms TL Wong |
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| Solicitor for the Applicant: | Gilbert + Tobin Lawyers |
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| Counsel for the First Respondent: | Mr NJ Williams SC and Ms AM Mitchelmore |
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| Solicitor for the First Respondent: | DLA Piper  |
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| Counsel for the Second Respondent: | Mr R Lancaster SC and Mr CG Arnott |
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| Solicitor for the Second Respondent: | Maddocks Lawyers |
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| Counsel for the Third Respondent: | Mr B Walker SC and Mr AK Flecknoe-Brown |
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| Solicitor for the Third Respondent: | Thomson Geer |
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| Counsel for the Fourth to Sixth Respondents: | Mr SJ Free |
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| Solicitor for the Fourth to Sixth Respondents: | Baker & McKenzie |

ORDERS

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|  | NSD 1338 of 2015 |
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| BETWEEN: | TELSTRA CORPORATION LIMITED (ACN 051 775 556)Applicant |
| AND: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONFirst RespondentOPTUS NETWORKS PTY LIMITED (ACN 008 570 330)Second RespondentTPG TELECOM LIMITED (ACN 093 058 069) (and others named in the Schedule)Third Respondent |

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| JUDGE: | FOSTER J |
| DATE OF ORDER: | 27 APRIL 2017 |

THE COURT ORDERS THAT:

1. The applicant pay the second, third, fourth, fifth and sixth respondents’ costs of and incidental to the Application for Judicial Review filed by the applicant on 5 November 2015.

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

REASONS FOR JUDGMENT

FOSTER J:

1. On 28 March 2017, I dismissed the applicant’s Application for Judicial Review and ordered the applicant to pay the first respondent’s costs of and incidental to that Application. At the same time, I put in place a timetable for the provision of brief Written Submissions by the second to sixth respondents, and the applicant, in the event that any of the second to sixth respondents also sought an order for costs in its favour. Thereafter, all remaining questions of costs were to be decided on the papers.
2. Subsequently, each of the second to sixth respondents filed a Written Submission in support of an application by each of them for costs. The applicant (**Telstra**) filed a Written Submission in which it endeavoured to address the submissions made by each of the respondents in support of their claims for costs.
3. In its Written Submission, Telstra accepted that, given the success achieved by the second to sixth respondents in the proceeding, it should pay a proportion of those respondents’ costs. It went on to argue that the appropriate proportion in each case was 70%.
4. In light of the concession made by Telstra in its Written Submission on costs, the issue between Telstra, on the one hand, and the second to sixth respondents, on the other hand, is whether Telstra should only be required to pay 70% of each of the second to sixth respondents’ costs or whether it should be required to pay all of their costs.

# Consideration

1. I will assume for present purposes that a reader of these Reasons for Judgment will also have read the Reasons for Judgment published by me on 28 March 2017 (*Telstra Corporation Limited v Australian Competition and Consumer Commission* [2017] FCA 316) in which I explained my reasons for dismissing Telstra’s Application for Judicial Review.
2. In the proceeding, the first respondent, the Australian Competition and Consumer Commission (**ACCC**), was represented by Senior and Junior Counsel instructed by DLA Piper. The second respondent, Optus Networks Pty Limited (**Optus**) was represented by Senior and Junior Counsel instructed by Maddocks Lawyers. The third respondent, TPG Telecom Limited (**TPG**), was represented by Senior and Junior Counsel instructed by Thomson Geer. Finally, the fourth, fifth and sixth respondents (**Macquarie Telecom**) were represented by Junior Counsel instructed by Baker & McKenzie. Thus, the respondents were divided into four separate groupings: the ACCC, Optus, TPG and Macquarie Telecom, each of which was separately represented.
3. The ACCC filed a Written Submission for the purposes of the hearing of Telstra’s Application for Judicial Review but made no oral submissions at that hearing. Each of the other three groupings on the respondents’ side of the record made Written Submissions and also addressed the Court orally at that hearing.
4. A number of matters are quite clear. These were relied upon by all of the respondents in support of their claims for costs. These matters are:
5. Telstra commenced its Application for Judicial Review naming only the ACCC as a respondent. While it is true that, as the relevant decision maker, the ACCC was a necessary party to Telstra’s application, it must have been plain to Telstra when it commenced its proceeding that a number of commercial entities (**access seekers**) who would, in due course, be seeking access to Telstra’s infrastructure the subject of the Final Access Decisions (**FADs)** made by the ACCC and who had taken a substantial role in the public inquiry conducted by the ACCC which ultimately led to the making of those FADs, would seek to be joined as parties to Telstra’s Application for Judicial Review. Of course, this is precisely what happened. Each of the second to sixth respondents applied to be joined and Telstra did not oppose the joinder application.
6. The Written Submissions filed and served by each of the access seekers were succinct, to the point and found to be helpful by the Court. Although some of those Written Submissions were lengthy, the length of those Submissions was largely the result of the very lengthy Submissions lodged by Telstra in support of its Application.
7. The oral submissions made on behalf of the access seekers were focussed and helpful and not unduly repetitive as between the three groupings of access seekers.
8. The hearing of Telstra’s Application for Judicial Review was not delayed or prolonged at all by the joinder of the access seekers. The time taken to hear that Application was as short a time as could reasonably have been expected in all the circumstances. Indeed, the hearing finished well within the time allocated for the hearing and was conducted efficiently by all parties, including Telstra.
9. In addition to the above matters, the fourth to sixth respondents submitted that, in light of the fact that Telstra had asserted to the ACCC that it (the ACCC) was bound to observe the limitations identified by the High Court in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 (*Hardiman*) at 35–36, it was extremely likely that the access seekers, being parties who would inevitably be seeking access to the infrastructure the subject of the FADs under challenge, would wish to be joined as parties. In addition, the fourth to sixth respondents argued that, because Telstra did not seek to impose any terms upon their participation in the proceeding nor did it suggest at any time that it was inappropriate for that group of respondents to be separately represented from the other groups of respondents, it is now too late for Telstra to seek to make such complaints in order to avoid an adverse costs order or to reduce the extent of its costs liability to the fourth to sixth respondents or indeed any other group of respondents (see *State of Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174 at [11]; *Credit Lyonnais Australia Ltd v Darling* (1991) 5 ACSR 703 at 717).
10. Optus submitted that it was a necessary party to Telstra’s Application for Judicial Review and should have been joined right from the start. It also submitted that its participation in the proceeding was measured and proportionate and did not result in any waste of time or any waste of money. Optus also submitted that the Court should determine the question of costs in light of the fact that Optus was entirely successful in defending the FADs made by the ACCC against the attack upon the FADs mounted by Telstra. Finally, Optus submitted that the Court placed considerable reliance upon its submissions in determining Telstra’s Application.
11. TPG also took up the *Hardiman* point in support of a submission that, once Telstra began to assert that the ACCC was bound by the principle in *Hardiman*, it became even more important for the access seekers to play an active role in the proceeding.
12. TPG also submitted that it would not have been safe for it to assume that the ACCC’s submissions would accord entirely with TPG’s interests. TPG also submitted that, given Telstra’s *“Titanic and detailed”* Written Submissions, it would be quite unfair of the Court not to compensate it to a large degree for the costs which it had had to incur in order to meet those submissions.
13. Telstra endeavoured to counter these arguments by making the following submissions: Notwithstanding the access seekers’ submissions to the contrary, there was duplication of effort and duplication of argument. The access seekers acted unreasonably by failing to make a sufficient effort to avoid that duplication which had been a concern expressed by Telstra at the time each of them had been joined as a party.
14. In its Written Submission on costs, Telstra developed its overall contention that, as between the various groups of access seekers and as between each of those groups and the ACCC, there had been unnecessary duplication which should reflect itself in a reduction in the amount of costs which the Court will now order.
15. I am not persuaded that there was unnecessary or unreasonable duplication in the way in which the respondents conducted themselves in and in relation to the proceeding. Of necessity, there was some repetition but, in all the circumstances, it did not rise to the point of being undue repetition. I reject Telstra’s submissions to the contrary.
16. Overall, I think that the submissions made on behalf of the access seekers in respect of costs are sound and I accept them.
17. The proceeding brought by Telstra was of great commercial significance to it and to each of the access seekers. It was also of considerable significance to the ACCC because Telstra challenged some fundamental planks in the ACCC’s reasoning which had led to the making of the FADs. Such an outcome carried with it the possibility that the Court might find that the analyses and approach adopted by the ACCC did not conform to the requirements of the various statutory provisions governing the exercise which it had undertaken.
18. In my view, this is not an occasion for being unduly parsimonious or nit-picking towards the access seekers in respect of costs. Their participation in the proceeding was, in truth, necessary. Their conduct was, at all times, reasonable and appropriate. Telstra’s concerns that the participation by the access seekers in the proceeding might delay or add unduly to the costs thereof never came to fruition.
19. In all the circumstances, I think that Telstra should pay the second to sixth respondents’ costs of and incidental to the proceeding.
20. There will be orders accordingly.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster. |

Associate:

Dated: 27 April 2017

SCHEDULE OF PARTIES

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| Respondents |  |
| Fourth Respondent: | MACQUARIE TELECOM PTY LIMITED (ACN 082 930 916) |
| Fifth Respondent: | TELCOINABOX OPERATIONS PTY LIMITED (ACN 162 159 935) |
| Sixth Respondent: | SYMBIO WHOLESALE PTY LIMITED (ACN 136 972 355) |