AUSTRALIAN COMPETITION TRIBUNAL

Application by Co-operative Bulk Handling Limited (No 2) [2012] ACompT 9

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| Citation: | | Application by Co-Operative Bulk Handling Limited [2012] ACompT 9 |
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| Parties: | | **APPLICATION BY CO-OPERATIVE BULK HANDLING LIMITED FOR A REVIEW OF THE GIVING OF A NOTICE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION UNDER SECTION 93(3) OF THE COMPETITION AND CONSUMER ACT 2010 TO REVOKE NOTIFICATION N93439** |
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| Tribunal: | | **JUSTICE MANSFIELD (PRESIDENT)**  **MR GF LATTA (MEMBER)**  **MR R STEINWALL (MEMBER)** |
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| Date of judgment: | | 20 March 2012 |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
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| RE: | APPLICATION BY CO-OPERATIVE BULK HANDLING LIMITED FOR A REVIEW OF THE GIVING OF A NOTICE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION UNDER SECTION 93(3) OF THE COMPETITION AND CONSUMER ACT 2010 TO REVOKE NOTIFICATION N93439  Applicant |

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| TRIBUNAL: | JUSTICE MANSFIELD (PRESIDENT)  MR GF LATTA (MEMBER)  MR R STEINWALL (MEMBER) |
| DATE: |  |
| PLACE: |  |

**REASONS FOR RULING**

1. The applicant, Co-Operative Bulk Handling Limited (CBH) on 6 March 2012, at the commencement of the hearing, applied for leave to adduce evidence from Mr Euan Morton, Economist, in accordance with his report of 17 February 2012. His evidence was said to be evidence in reply to the proposed evidence to be given by Dr Brian Fisher, whose report was filed by the Australian Competition and Consumer Commission (ACCC) on 19 December 2011. The application was opposed by the ACCC. For reasons which have been provided, the Tribunal determined to give the CBH leave to call Mr Morton to give evidence in reply to the evidence proposed to be led from Dr Fisher.
2. At that time, there was no suggestion that Dr Fisher’s evidence was objectionable in form. There had been no objection either then or at an earlier time. There was also at the time no suggestion that counsel for CBH had difficulty in understanding Dr Fisher’s report, or would have difficulty in cross-examining him, and his proposed evidence was built into the evidence timetable presented in the course of opening. Dr Fisher also provided a supplementary report of 16 March 2012 to respond to Mr Morton’s report.
3. The expert evidence in this matter was listed for hearing in the week commencing 19 March 2012, with the first proposed evidence to be that to be adduced from Mr Morton, and then Dr Fisher. On Sunday, 18 March 2012, CBH provided notice of objection to the proposed evidence of Dr Fisher. The notice of objection ran to 31 pages. The objections to Dr Fisher’s proposed evidence would, of course, have been relevant to how much of Mr Morton’s proposed evidence was itself admissible.
4. Some of the objections to Dr Fisher’s proposed evidence were fundamental. As his first report had obviously been considered at an earlier time, the grounds of objection now made should have been made earlier. In the summary of the outline of submissions concerning the objections to his report, each of the matters set out in paragraphs 1(a), (b), (c), (e), (f) and (g) were matters which should have been apparent when his report was first considered. The only matter which had novelty, in the sense of having apparently emerged only as a result of the evidence given thus far, as set out in that summary, is contained in para 1(d), namely that Dr Fisher seeks to draw inferences and conclusions from a body of material assembled himself, rather than from the evidence that the Tribunal had heard over the preceding eight sitting days.
5. In considering the objections, the Tribunal has had the benefit of the written and oral submissions of counsel for CBH, and the written and oral submissions of counsel for the ACCC.
6. The Tribunal does not propose, with two qualifications set out in [36] below, to reject the evidence of Dr Fisher in his report of 19 December 2011 or his subsequent report of 16 March 2012.
7. The Tribunal has considered each of the grounds of objection, but does not consider that, subject to the particular matters to be mentioned, they have been made out. The Tribunal observes that it is unfortunate that the grounds of objection were expressed at such a late stage in the course of the hearing. That has meant that the Tribunal was required to make a ruling on a complex and detailed set of contentions in a relatively short space of time. It has also meant that the ACCC was not on notice about those objections at a time when, if the objections were upheld either in part or in whole, the ACCC could in any meaningful way have had him restructure the report to address in more detail or in a more refined and limited way matters which might have been perceived as weaknesses or flaws in his report. In those circumstances, whilst the Tribunal in making the within ruling is applying the well accepted principles which are helpfully discussed in the written submissions on behalf of CBH, at [3]-[9], the Tribunal indicates that its ruling in this particular case is made in the particular circumstances and having regard to the particular terms of the report of Dr Fisher. It is not intended to provide any general guidance as to the admissibility or otherwise of expert reports in matters before the Tribunal in the future, whether structured in the same way as Dr Fisher’s reports or otherwise.
8. The Tribunal considers, in the circumstances outlined above, that it would be unfair to the ACCC to accede to the objection. As noted, although the ACCC has had an opportunity to respond to the objections, it may have conducted its case in a different way by having Dr Fisher refine or revisit his report, or the manner in which it is expressed, perhaps to eliminate certain expressions, perhaps to provide more detail, perhaps to confine his views, or perhaps identify more clearly the bases for his views. It has had no practical opportunity to do so. The parties have obviously cooperated in a very sensible manner in the preparation of this matter. The Tribunal accepts that the decision to object to Dr Fisher’s evidence in its totality was one made belatedly and not for strategic reasons, and perhaps prompted by a further careful consideration of his report. If there is any element of “ambush” it was not strategic or intended. But that is the consequence of the matter being raised at this point.
9. Secondly, the Tribunal is of the view that it would be unfair to both parties, and to the Tribunal (or, more accurately, it would be of limited assistance to the Tribunal) generally to receive both Dr Fisher’s reports and Mr Morton’s report as submissions only. It would be unfair to the parties, potentially, because the Tribunal itself has a number of matters arising in each of those reports upon which it anticipates that questions will be asked to elucidate or explain certain views, or to test certain views expressed in those reports, which the Tribunal would otherwise be unable to have explained or tested. It may be unfair to one or other of the parties if the Tribunal, having received those reports as submissions only, accepted part or parts of either of them without the parties having the opportunity to explore their reliability in certain respects. The Tribunal itself considers that it will be better placed to make an appropriate and proper final determination in this matter with the benefit of certain matters dealt with by each of those witnesses being addressed by being tested to an extent in cross-examination. The Tribunal is mindful that each of those reports, but relevantly for present purposes, Dr Fisher’s reports, to a degree involves material that might be regarded as argumentative. CBH accepted that if Dr Fisher’s reports in their entirety were not to be received in evidence, it would not seek to adduce Mr Morton’s report but would provide it as part of its submissions.
10. The Tribunal accepts that there is in the case of expert economic evidence a line between argument and opinion evidence which is sometimes hard to draw. Those matters were discussed in the *Re Qantas Airways* [2004] ACompT 9 at [216]-[217]. The Tribunal feels confident that, in the light of all the evidence including such testing, albeit limited testing as may be appropriate in cross-examination, it will be better placed to appreciate which parts of the proposed evidence of each of those witnesses which is more clearly a professionally held view based upon the application of economic principles and theory on the one hand, and which may traverse a little beyond that line. As we have mentioned, the line is sometimes hard to draw. It is inevitable in the case of expert economic evidence which takes a particular viewpoint, favourable to one party or another in proceedings before the Tribunal, that there will be perceived to be some element of argumentation in that opinion. That is what the opinion is. Nevertheless, it is often, indeed frequently, properly founded upon an understanding of the facts in the case, the application of economic principle and theory to those facts, and the expression of conclusions in relation to them. Sometimes the conclusion may be close to, or directly relate to, the final matter which the Tribunal is required to determine. Sometimes, as a result of the testing of those opinions, inappropriate partisanship may appear.
11. In addition to those general reasons, it is appropriate to address the particular objections made by CBH.
12. The first objection raised is that Dr Fisher does not have any specialised knowledge as an economist that enables him to respond to the matters which he was asked to comment upon by the ACCC. There was no application to examine him on the voir dire, that is to go beyond his declared curriculum vitae. The Tribunal is satisfied, having regard to that curriculum vitae, that Dr Fisher is amply qualified to express the views which he has expressed (with the one qualification expressed in the ruling below). It is not helpful to set out his full curriculum vitae. His professional training, including his PhD in Agricultural Economics, his professional working career, his membership of a number of economic and agricultural and economic associations or societies, and his extensive publications are sufficient to satisfy the Tribunal that, at least on the face of things, he has the appropriate qualifications and experience to address the matters which the Tribunal proposes to admit on his behalf.
13. Secondly, the summary indicates that Dr Fisher is said to be proposing to give evidence of underlying facts in the case rather than opinions based on his specialised knowledge as an economist. The Tribunal has carefully considered his report. It is correct that he has expressed a number of underlying facts, many of which are identified specifically by reference to evidence proposed to be given from witness statements and expresses opinions about the significance of that evidence. The opinions appear to be expressed within his competence or area of expertise. They may be tested. We do not consider that his evidence is confined only to the expression of facts which are “underlying facts in the case”.
14. Thirdly it is said that Dr Fisher has drafted his report so that he has not differentiated his opinions from the assumed facts on which the opinions are based. This was said to be inconsistent with the requirements of Federal Court Practice Note CM.7. While not bound by the rules of evidence, or the Federal Court’s Practice Notes, such notes should be had regard to: *Re Qantas Airways* [2004] ACompT 9 at [217]. The procedure of the Tribunal, including the admission of evidence, is within the discretion of the Tribunal, subject to the *Competition and Consumer Act 2010* (Cth) (CCA) and regulations: CCA s 103(1)(a). In addition, Tribunal proceedings are to be conducted with as little formality and technicality as the requirements of the CCA and proper consideration of the matters before the Tribunal permit.
15. The Tribunal does not accept that Dr Fisher’s report fundamentally fails to comply with the requirements of Practice Note CM.7. Inevitably, or perhaps not inevitably but commonly, an expert economic opinion has shades between assumed facts, facts based on evidence, and the expression of opinion. But the opinions expressed by Dr Fisher are clearly set out in the executive summary to his report in response to the specific questions which he has been asked. To the extent to which there is some lack of clear expression of the factual foundation for certain opinions in the then extensive content to his report, it appears that that is in part due to the sequential steps which he has taken on different topics which he has considered. They are referred to below when considering some matters in detail. However, we do not consider that his report is expressed in a way which precludes, or should in a real sense impede, counsel for CBH from understanding Dr Fisher’s report and, to the extent to which it expresses opinions based upon the application of economic principles and theory, to test his conclusions. If that involves exposing the existence of an assumed fact which is not established in the evidence, that can be done. If that involves Dr Fisher having failed to take into account a fact which (CBH contends) is material and has been established in the evidence, that may also be exposed.
16. It is next contended that Dr Fisher sought to draw inferences and conclusions from a body of material assembled himself, rather than the evidence that the Tribunal has heard. That too is not accepted as a general criticism of Dr Fisher’s report. There is extensive material which he has identified by footnote as sourced from proposed evidence. There is also some additional material which he has identified and has been used as the source of certain of his more general statements describing his understanding of the grain industry and its operations. Other experts have adopted the same technique. The Tribunal does not understand that in those respects the general descriptions of Dr Fisher are significantly different from those of other expert witnesses. If there is a significant opinion relevant to the determination of this matter which is not supported by evidence, ultimately that opinion will be given no weight. As mentioned in the preceding paragraph, that can be identified either in the course of final submissions or if appropriate exposed in the course of cross-examination.
17. It is next contended that Dr Fisher’s conclusions amount only to submissions and argument which would be made by lawyers acting for the ACCC without the use of his reports at all. The Tribunal does not regard his reports as simply representing argument which may be developed and presented without the understanding of economic principles and theory, and the explanation at least in some significant respects as to how those principles and theory are applied to the facts which are established or which Dr Fisher assumes to exist. As we have indicated above, the Tribunal notes that the line between argument and firmly expressed opinion based upon proven or assumed facts is sometimes a difficult one in the case of expert economic evidence. The Tribunal does not consider that Dr Fisher has routinely overstepped the line, or that the way his views are expressed would impair counsel for CBH from cross-examining him to expose the matters referred to above. Indeed, the same comments might be made of Mr Morton’s report and the difficulties confronting counsel for the ACCC.
18. The final two grounds of objection in the summary of objections can be dealt with together. It is said that it would take a substantial period of time to “unpick” in cross-examination the basis of Dr Fisher’s opinions and identify with precision the assumed facts upon which he relies, and so it would be unfair and prejudicial, as well as impractical, for the cross-examiner to be forced to undertake this exercise in circumstances where it was the duty of the witness to have provided clearly a report which enabled those things to be done.
19. As the Tribunal noted, if that were the case, the Tribunal may have expected that CBH would have identified those problems at a much earlier point. It did not do so. It is not a matter simply of “water under the bridge”, that is the further process of receiving evidence demonstrating the flaws in Dr Fisher’s reports which were not previously identified. In the Tribunal’s view, each of the matters which CBH now seeks to raise (as expressed in its summary) were matters which could and should have been raised at a much earlier time but were not. They were not raised when a substantial period of time was set aside for cross-examination of Dr Fisher in the original program of evidence presented in the course of opening the case. The Tribunal is conscious of the experience and competence of counsel appearing for CBH. It does not consider that there is unfairness to CBH by requiring its counsel now to cross-examine Dr Fisher as it had been contemplated would be done at least at the commencement of the hearing.
20. Indeed, it may be assumed that Dr Fisher’s report was not only considered by solicitors and counsel for CBH at an earlier time when Mr Morton was engaged, but also by Mr Morton who himself has expressed no difficulties in understanding Dr Fisher’s report for the purpose of responding to it.
21. It is appropriate to consider some specific elements of Dr Fisher’s first report.
22. It is, in general terms, divided into three sections (so far as the objections are concerned).
23. The first is under the heading “Competitive and Industry Context”.
24. The Tribunal considers that this section of Dr Fisher’s report is setting the factual scene for his subsequent view. If it is not correct, either in its entirety or in a significant respect, that can be identified in the course of submissions and will of course affect the weight, if any, which is attributed to his views. It is also apparent that Mr Morton has not himself sought to dispute in any material way Dr Fisher’s description of those elements of the matter. Nor is there anything which, in the view of the Tribunal, is so opaque as to mean that counsel for CBH could not, if so instructed, point out in cross-examination or challenge in cross-examination the accuracy of that factual data and explore (if counsel considers it is appropriate) its consequences to the views subsequently expressed.
25. The second section of the report is headed “Barriers to Entry and Grain Storage”.
26. The Tribunal makes the same comments as it made in relation to the preceding heading. It does not regard this evidence as merely a recital of the evidence given, but includes opinions based upon a recital of the evidence (whether accurate or not accurate is a matter that can be explored in cross-examination). It regards the opinions as expressed sufficiently clear to enable them to be tested by cross-examination if that is appropriate.
27. The third section of Dr Fisher’s first report is headed “Public Benefits”. It is the most extensive part of his report in volume, and has attracted the most extensive series of objections.
28. It is important to note the way in which Dr Fisher has approached his consideration of these matters. He has taken seriatim each of the nine topics, and within them the sub-topics, of public benefit addressed by CBH in its statement of facts issues and contentions. Under each of those nine topics and in part in sub-topics, he has then addressed seven separate questions by heading, and in the case of question one by sub-headings. He has done so in the following way:
29. Nature and extent of CBH claimed public benefit -

Nature of public benefit claimed by CBH;

Extent of claim to public benefit by CBH.

1. Whether claimed public benefit is a consequence of notified conduct.
2. Whether claimed public benefit has been or can be quantified.
3. Whether claimed public benefit is enduring and of substance
4. Beneficiaries of the claimed public benefit.
5. Whether claim to any public benefit could be achieved in the counterfactual.
6. Response in relation to CBH claimed benefit.
7. The Tribunal has considered the detailed objections to various sections of Dr Fisher’s report dealing with public benefits under each of those topics and within them the sub-headings which Dr Fisher has utilised. It is satisfied that, with one exception, he has sought to apply accounting or economic theory to the question of whether the claimed public benefit is made out, and if so to what extent. The Tribunal notes that, as the ACCC in its written submission has pointed out at paragraph [6], expert economic evidence has been given in a number of other matters before the Tribunal concerning asserted public benefits and whether they are likely in the future with and without the relevant conduct. It is not necessary to repeat those cases or list them in detail in these reasons. The Tribunal also notes that Mr Morton, in his responsive report, does not express any concern about his ability to understand the approach of Dr Fisher and has, in fact, vigorously responded to that approach.
8. Accordingly, without addressing each of those detailed matters separately, the Tribunal indicates that it is of the view that Dr Fisher’s views are apparently within his expertise, and apparently involve the application of economic theory and principles to identified factual foundation. It is then a matter of the weight which, in the light of cross-examination to the extent it is appropriate, his opinions should be given by the Tribunal in its final decision. As noted, the Tribunal will be assisted by his response to a number of those matters in cross-examination or in answer to questions from the Tribunal.
9. There is one exception to that. The Tribunal does not consider that paragraphs [468]-[488] of Dr Fisher’s report dealing with topic 4.8(g) of the public benefits claimed by CBH in its statement of facts issues and contentions involves any application by him of his expertise. It does not propose to receive those paragraphs of his report.
10. As noted, his views are necessarily conclusory, and to that extent may be seen as somewhat argumentative. Nevertheless, that is inherent in the nature of expert economic opinion on matters which the Tribunal is required to consider. Where the line has been over-stepped, if it has been, the Tribunal will treat the matter as argument rather than professional opinion. It has not been possible, in the limited time available to the Tribunal to ensure that the matter proceeds in the time available and in adherence to the program of evidence which the parties have set, to address each of those matters in detail. Nor does the Tribunal consider that it would be helpful to do so.
11. The remaining objection is to paragraphs [33[-[50] of Dr Fisher’s second report of 16 March 2012. It is said, accurately, that that part of his second report goes beyond his reply to Mr Morton and responds to some evidence given by Mr Owen Davies, the CBH freight manager, earlier in the course of the hearing.
12. The Tribunal proposes to receive that evidence subject to one qualification. It notes that Mr Davies’ evidence was filed only on 28 February 2012, that is after the time when lay evidence on behalf of CBH was contemplated, and so Dr Fisher had not had an opportunity to consider it earlier. It was evidence which properly may have attracted expert commentary from an expert such as Dr Fisher. It is mindful that Dr Fisher is still available to be cross-examined on those views. In general terms (subject to paragraphs [47]-[50]) it does not see that evidence as particularly critical of Mr Davies’ views but more as a commentary upon them and a recital of them, and the expression of general economic theory.
13. Counsel for the ACCC accepts that, to the extent to which things might be said by Dr Fisher which should properly have been put to Mr Davies in cross-examination and were not put to him, it would be improper for the ACCC to rely upon that part of Dr Fisher’s second report. The Tribunal accepts that acknowledgment is properly given. It was agreed between senior counsel for the parties that they would identify for the Tribunal those parts of Dr Fisher’s second report within paragraphs [33]-[50] which fall within that category. It is better for the parties through counsel to agree on those matters than for the Tribunal to form what might be an inaccurate or incomplete view about those matters. Senior counsel are best placed to do so. That is the second qualification upon the receipt of Dr Fisher’s evidence.
14. Accordingly, for the reasons given, the Tribunal indicated at the hearing on 20 March 2012 that it proposed to receive Dr Fisher’s evidence, provided he were presented for cross-examination, in both his first and second reports subject to not receiving in evidence paragraphs [468]-[488] of his first report for the reasons referred to above and subject to not receiving such paragraphs within paragraphs [36]-[50] of his second report as would be unfair because Mr Davies was not cross-examined on the matters or views which Dr Fisher has now criticised.

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| I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield (President) Mr GF Latta (Member) and Mr R Steinwall (Member). |

Associate:

Dated: 5 April 2012