AUSTRALIAN COMPETITION TRIBUNAL

Application by Jemena Gas Networks (NSW) Ltd (No 4) [2011] ACompT 8

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| Citation: | Application by Jemena Gas Networks (NSW) Ltd (No 4) [2011] ACompT 8 |
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| Review from: | Australian Energy Regulator |
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| Parties: | **JEMENA GAS NETWORKS (NSW) LTD** **(ABN 87 003 004 322)** |
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| File number: |  |
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| Tribunal: |  **(PRESIDENT)****PROFESSOR D ROUND****MR R STEINWALL** |
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| Date of decision: | 29 April 2011 |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth)*Judiciary Act 1903* (Cth), s 39BNational Gas Law, ss 245, 247, 259, 260  |
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| Solicitor for the Applicant: | Gilbert + Tobin |
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| Solicitor for the Australian Energy Regulator: | Australian Government Solicitor |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
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| re: | APPLICATION UNDER SECTION 245 OF THE NATIONAL GAS LAW FOR A REVIEW OF A FULL ACCESS ARRANGEMENT DECISION MADE BY THE AUSTRALIAN ENERGY REGULATOR PURSUANT TO RULE 64 OF THE NATIONAL GAS RULES |
| BY: | JEMENA GAS NETWORKS (NSW) LTD (ABN 87 003 004 322)Applicant |

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| TRIBUNAL: |  (PRESIDENT)PROFESSOR D ROUNDMR R STEINWALL |
| DATE: |  |
| PLACE: |  |

**REASONS FOR DECISION**

1. Jemena Gas Networks (NSW) Ltd (JGN) has made application to review a full access arrangement decision of the Australian Energy Regulator made in relation to JGN’s gas distribution network. The application relies on several grounds of review. In addition interveners have raised several other grounds of review. The Tribunal has considered and ruled on some grounds ([2011] ACompT 6) but has not yet considered the balance. The question that has arisen is whether the Tribunal can make a determination in respect of the grounds which it has considered, or whether it must wait and make one determination when it has considered all the issues in the application.
2. The relevant provisions of the National Gas Law (NGL) are:
* Section 245 which confers on “an affected or interested person or body” (a defined term) the right to apply for review of a relevant decision with the leave of the Tribunal.
* Section 247 which requires the application to be made within 15 days of the publication of the impugned decision.
* Section 259 which provides that:

(1) the Tribunal must make a determination in respect of the application; and

(2) a determination may –

(a) affirm, set aside or vary the impugned decision; and/or

(b) remit the matter to the original decision-maker to make the decision again.

* Section 260 which requires the Tribunal to use its best endeavours to make its determination within 3 months of granting leave.
1. It is also worthwhile noting that Tribunal determinations are judicially reviewable. They are reviewable as decisions to which the *Administrative Decisions (Judicial Review) Act 1977* (Cth) applies. Applications for review under the Judicial Review Act must be made within 28 days of the determination. The Tribunal’s determinations are also reviewable by the Federal Court exercising jurisdiction under s 39B of the *Judiciary Act 1903* (Cth). There is no time fixed for the making of an application under s 39B but it is generally accepted that the application must be made within a reasonable period.
2. The implication of the provisions of the NGL to which we have referred is that the Tribunal can make only one determination on an application. Not only does this appear from the use of the singular in the provisions, but also from the nature of the proceedings before the Tribunal. The general practice in both curial and administrative proceedings is for there to be a single application (or claim) raising all issues the applicant (or claimant) seeks to have resolved. This is followed by evidence gathering (which may involve a hearing) and ultimately the rendering of a decision. If that unitary process is departed from, one would expect to find a rule or a statutory provision that brings about the change. For example, under the common law an arbitrator could only make one award. It had to be one entire and complete instrument. If the arbitrator made separate determinations on one application each determination was void. In due course this was changed by statute and arbitrators were given power to make interim awards. So far as courts are concerned, most are given authority by their rules to split hearings and make separate rulings. Importantly, any ruling before the final one is only interlocutory.
3. To avoid the conclusion that the Tribunal can make only one determination JGN has referred us to the interpretative provision in Schedule 2 cl 11(4)(a) of the NGL which provides that, subject to a contrary intention appearing, the singular includes the plural. And, further, to counter any suggestion that there is a contrary intention, JGN points out that a determination may do several things (eg affirm a decision in part, allow a decision in part and remit a decision in part). JGN also notes that it would be efficient were the Tribunal able to implement parts of a decision as soon as possible instead of waiting for a final determination. As well, JGN points to the fact that the Tribunal has in the past made several determinations on one application, although it acknowledges that the question of power was never raised.
4. The Tribunal is not persuaded that JGN’s arguments overcome what appears to be the clear operation of the provisions. In the first place, the whole review process is intended to be completed quickly (three months unless extended). Secondly, it will be a rare case where issues are split into separate hearings resulting in separate reasons. Thirdly, if the Tribunal could render separate determinations on one application, the system of judicial review would become unnecessarily complex. In particular, it would mean that there would often need to be separate judicial review applications to comply with the limitation period. That is hardly a desirable outcome.
5. In those circumstances the Tribunal is of the view that it can only make one determination on an application.

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| I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Tribunal. |

Associate:

Dated: 29 April 2011