FEDERAL COURT OF AUSTRALIA

OPENetworks Pty Ltd v Myport Pty Ltd [2019] FCA 1659

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| File numbers: | VID 52 of 2019VID 710 of 2019 VID 711 of 2019 |
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| Judge: | **O'BRYAN J** |
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| Date of judgment: | 14 October 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE –** whether Court shoulddismiss proceedings on the basis of undertakings – whether undertakings are required to be given to the Court – whether Court should continue proceeding seeking review of a decision of the Telecommunications Industry Ombudsman (TIO) pursuant to section 16(1)(a) of the *Administrative Decisions (Judicial Review) Act* 1976 (Cth) – where TIO decision has no practical effect due to undertakings given– whether costs should be awarded where there has been no adjudication on the merits – costs awarded **–** proceedings dismissed  |
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| Legislation: | *Administrative Decisions (Judicial Review) Act* 1976 (Cth) s 16(1)(a)*Federal Court of Australia Act* 1976 (Cth) ss 37N, 43*Telecommunications Act* 1997 (Cth) Sch 3, Div 3, cll 6(1), 6(3), Div 5, cll 15, 17*Federal Court Rules* 2011 (Cth) Pt 25, r 25.14(1)*Telecommunications Code of Practice* 2018 (Cth) Ch 4 Pt 5*Telecommunications (Low‑impact Facilities) Determination* 2018  |
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| Cases cited: | *ACI Operations Pty Ltd v Berri Limited (No 2)* [2005] VSC 55*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd (No 2)* (2015) 235 FCR 366*Cain v Glass (No 1)*, NSW Court of Appeal, 3 October 1985, unreported*Civil Aviation Safety Authority v Administrative Appeals Tribunal* [2001] FCA 1319*Garwolin Nominees Pty Ltd v Statewide Building Society* [1984] VR 469*Lamb v Moss* (1983) 49 ALR 533*Mayne Nickless Ltd v Transport Workers Union of Australia* [1998] FCA 984*ONE.TEL Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548*OPENetworks Pty Ltd v MyPort Pty Ltd* (2019) FCA 486*R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13*Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin* (1977) 186 CLR 622*Srotyr v Clissold* [2015] NSWSC 1770*Summers v Repatriation Commission (No 2)* [2015] FCAFC 64*Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480  |
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| Date of hearing: | 18 September 2019 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
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| Number of paragraphs: | 83 |
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| Counsel for the Applicant: | Mr D A Kelly QC with Mr W LeMass |
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| Solicitor for the Applicant: | TelcoTech Legal Pty Ltd |
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| Counsel for MyPort Pty Ltd: | Mr T Clarke |
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| Solicitor for MyPort Pty Ltd: | King & Wood Mallesons |
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| Solicitor for the Telecommunications Industry Ombudsman: | Mr G Phillips of Phillips Law & Advisory |

ORDERS

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|  | VID 52 of 2019 |
|   |
| BETWEEN: | OPENETWORKS PTY LTD ACN 118 525 821Applicant |
| AND: | MYPORT PTY LTD ACN 121 129 280Respondent |

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| JUDGE: | O'BRYAN J |
| DATE OF ORDER: | 14 october 2019 |

**UPON THE RESPONDENT’S UNDERTAKING TO THE COURT**:

(a) not to act upon the land access and activity notice given by the respondent to the applicant pursuant to clause 17 of schedule 3 of the *Telecommunications Act* 1997 (Cth) and part 5 of chapter 4 of the *Telecommunications Code of Practice* 2018 (Cth) in relation to the building described as Australia 108, located at 70 Southbank Boulevard, Southbank in the State of Victoria, dated 31 July 2018; and

(b) not to serve any further land access and activity notices in relation to the building described as Australia 108 which is referred to in paragraph (a) above.

THE COURT ORDERS THAT:

1. The proceeding be dismissed.

2. The respondent pay the applicant’s costs of the proceeding until 20 August 2019.

3. The applicant pay one half of the respondent’s costs of the interlocutory application dated 23 August 2019.

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

ORDERS

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|  | VID 710 of 2019 |
|   |
| BETWEEN: | OPENETWORKS PTY LTD ACN 118 525 821Applicant |
| AND: | MYPORT PTY LTD ACN 121 129 280Respondent |

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| JUDGE: | O'BRYAN J |
| DATE OF ORDER: | 14 october 2019 |

**UPON THE RESPONDENT’S UNDERTAKING TO THE COURT**:

(a) not to act upon the land access and activity notice given by the respondent to the Body Corporate for East Quays Community Title Scheme 47242 pursuant to clause 17 of schedule 3 of the *Telecommunications Act* 1997 (Cth) and part 5 of chapter 4 of the *Telecommunications Code of Practice* 2018 (Cth) in relation to the buildings described as East Quays, located at 25 East Quays Drive, Biggera Waters in the State of Queensland, dated 31 July 2018 (the **LAAN**); and

(b) not to act upon the decision of the Telecommunications Industry Ombudsman dated 7 June 2019 in relation to the objection made by the Body Corporate for East Quays Community Title Scheme 47242 with respect to the LAAN; and

(c) not to serve any further land access and activity notices in relation to the buildings described as East Quays which are referred to in paragraph (a) above.

THE COURT ORDERS THAT:

1. The proceeding be dismissed.

2. The respondent pay the applicant’s costs of the proceeding until 20 August 2019.

3. The applicant pay one half of the respondent’s costs of the interlocutory application dated 23 August 2019.

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

ORDERS

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|  | VID 711 of 2019 |
|   |
| BETWEEN: | OPENETWORKS PTY LTD ACN 118 525 821Applicant |
| AND: | TELECOMMUNICATIONS INDUSTRY OMBUDSMAN ACN 057 634 787 First RespondentMYPORT PTY LTD ACN 121 129 280Second Respondent |

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| JUDGE: | O'BRYAN J |
| DATE OF ORDER: | 14 october 2019 |

THE COURT ORDERS THAT:

1. The proceeding be dismissed.

2. The second respondent pay the applicant’s costs of the proceeding until 20 August 2019.

3. The applicant pay one half of the second respondent’s costs of the interlocutory application dated 23 August 2019.

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

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

1 The applicant, OPENetworks, has commenced three proceedings in this Court against the respondent, MyPort. MyPort seeks the dismissal of the proceedings based on undertakings it has given to OPENetworks. The parties are in dispute as to the resolution of the proceedings.

2 Each of OPENetworks and MyPort (which trades under the name Gigafy) is a carrier licensed under the *Telecommunications Act* 1997 (Cth) (**Telco Act**). Each conducts a business involving the installation and provision of telecommunications networks within multi-dwelling residential buildings, although their business models and networks differ.

3 OPENetworks designs, builds, operates and maintains “fibre to the premises” telecommunications networks. OPENetworks’ business includes the installation and operation of such networks in residential multi-dwelling buildings. It contracts with the developer of the building to construct the facilities required to install and operate such a network within the building. It is a wholesale service provider and its customers are retail service providers who contract with individual residents within the building to provide them with retail telecommunications services (such as voice and broadband). OPENetworks has installed networks in a residential apartment and hotel development at Southbank in Melbourne called Australia 108 and at a residential building located at 25 East Quay Drive, Biggera Waters QLD known as East Quays.

4 MyPort’s primary business is also the installation and operation of telecommunications networks in residential multi-dwelling buildings. MyPort installs telecommunications infrastructure during or shortly after the construction of residential buildings through contractual agreement with the developer, body corporate or building manager, or by use of the powers conferred by Division 3 of Schedule 3 to the Telco Act, or by a combination of both. MyPort’s business model differs from OPENetworks’ in that MyPort supplies telecommunications services directly to end user residents within the building.

5 Each of the three proceedings concerns MyPort’s legal entitlement to install “low-impact” telecommunications facilities within a multi-dwelling residential building, exercising powers under Division 3 of Schedule 3 to the Telco Act. Clause 6(1) (within Division 3) of Schedule 3 provides that a carrier may, for purposes connected with the supply of a carriage service, carry out the installation of a facility if, among other things, the facility is a low-impact facility as defined by clause 6(3). Clause 6(3) provides that the Minister may, by legislative instrument, determine that a specified facility is a low-impact facility for the purposes of clause 6. On 20 February 2018, the Minister for Communications made the *Telecommunications (Low‑impact Facilities) Determination* 2018 (the **Determination**).

6 Division 5 of Schedule 3 to the Telco Act stipulates various requirements that a carrier must comply with when seeking to engage in an activity under Division 3. Relevantly, clause 15 of Schedule 3 stipulates that the carrier must comply with the code of practice made by the Minister under that clause, which is the *Telecommunications Code of Practice* 2018 (Cth) (**Telco Code**). Clause 17 of Schedule 3 stipulates that, before engaging in an activity under Division 3 in relation to any land, the carrier must give written notice of its intention to do so to the owner and any occupier of the land. Such notices have been referred to by the parties as a “land access and activity notice” (**LAAN**).

7 Part 5 of Chapter 4 of the Telco Code establishes a regime by which the recipient of a LAAN under clause 17 may object to the notice on various bases. If the parties are unable to resolve the objection between themselves, the objector may ask the carrier to refer the objection to the Telecommunications Industry Ombudsman (**TIO**). Following the making of an objection, the carrier must not engage in the contemplated activity under Division 3 of Schedule 3 unless and until:

(a) the objection is resolved by agreement between the parties;

(b) a request to refer the dispute to the TIO is not received within the time stipulated;

(c) the TIO deals with the objection without giving a direction to the carrier; or

(d) the TIO gives a direction to the carrier.

8 In mid-2018, MyPort sought to exercise the powers conferred by Division 3 of Schedule 3 to the Telco Act to install telecommunications facilities in each of Australia 108 and East Quays. It issued LAANs to persons it considered to be owners and occupiers of Australia 108 and East Quays. In the case of Australia 108, that included OPENetworks. The recipients of the LAANs objected to the notices and the objections were referred to the TIO.

9 OPENetworks considers that the relevant provisions of the Telco Act do not authorise MyPort to install the particular telecommunications facilities sought to be installed by MyPort at Australia 108 and East Quays. A significant aspect of the dispute concerns the question whether the facilities proposed to be installed by MyPort at Australia 108 and East Quays are low-impact facilities within the meaning of the Determination.

10 This proceeding (to which I will refer as the **Australia 108** **proceeding**) was commenced by OPENetworks on 19 January 2019 and concerns the Australia 108 building. In this proceeding, OPENetworks seeks a declaration that the LAAN issued by MyPort in respect of Australia 108 is invalid and an injunction restraining MyPort from carrying out the works contemplated by the LAAN. By application dated 26 February 2019, MyPort sought a temporary stay of the proceeding until the TIO had dealt with the objection made to the LAAN by OPENetworks. On 10 April 2019, I dismissed that application and ordered MyPort to pay OPENetworks’ costs of the application: see *OPENetworks Pty Ltd v MyPort Pty Ltd* [2019] FCA 486.

11 Proceeding VID 710 of 2019 (to which I will refer as the **East Quays** **proceeding**) was commenced by OPENetworks on 28 June 2019 and concerns the East Quays building. In that proceeding, OPENetworks seeks a declaration that the LAAN issued by MyPort in respect of East Quays is invalid and an injunction restraining MyPort from carrying out the works contemplated by the LAAN.

12 Proceeding VID 711 of 2019 (to which I will refer as the **TIO** **proceeding**) was also commenced by OPENetworks on 28 June 2019 and also concerns the East Quays building. In that proceeding, OPENetworks seeks review of a decision of the TIO concerning objections made by recipients of the LAAN issued by MyPort in respect of East Quays. The primary relief sought by OPENetworks is an order under s 16(1)(a) of the *Administrative Decisions (Judicial Review) Act* 1976 (Cth) (**ADJR Act**) quashing or setting aside the decision of the TIO. MyPort has been joined as a necessary party to that proceeding.

13 In circumstances described below, MyPort has now withdrawn the LAANs in respect of Australia 108 and East Quays, given an undertaking to OPENetworks and others that it will not serve any further LAANs in respect of those buildings and given an undertaking that it will not act on the TIO’s decision in respect of East Quays. On the basis that the subject matter of the dispute between the parties has been resolved by those actions, MyPort filed interlocutory applications on 23 August 2019 in each proceeding seeking orders that judgment be given against OPENetworks or that the proceeding be permanently stayed. In respect of the Australia 108 proceeding, MyPort seeks orders that OPENetworks pay MyPort’s costs of this interlocutory application and that there be no order as to the costs of the proceeding other than the costs ordered on 10 April 2019 (in relation to the application for a temporary stay of the proceeding). In respect of the East Quays and TIO proceedings, MyPort seeks orders that OPENetworks pay MyPort’s costs of the proceedings including the costs of this interlocutory application.

14 The parties remain in dispute as to the resolution of the three proceedings. There are three principal matters in dispute:

(a) First, while OPENetworks and MyPort agree that the Australia 108 and East Quays proceedings should now be dismissed, OPENetworks seeks to continue the TIO proceeding to set aside the decision of the TIO.

(b) Second, OPENetworks seeks, in connection with the dismissal of the Australia 108 and East Quays proceedings, that the undertakings previously given by MyPort to OPENetworks *inter partes* be formalised as undertakings to the Court. MyPort contends that that is unnecessary, alternatively that it is sufficient if its *inter partes* undertakings are noted in the orders of the Court. Ultimately, though, MyPort informed the Court through its Counsel that it was willing to give the undertakings to the Court if required.

(c) Third, the parties disagree as to the costs consequences of the dismissal of the proceedings.

15 Each of those matters is addressed below.

## History of the proceedings

16 The legal framework under Division 3 of Schedule 3 of the Telco Act, pursuant to which a licensed carrier can be empowered to enter onto land and install telecommunications facilities in certain circumstances, is described in my earlier reasons in *OPENetworks Pty Ltd v MyPort Pty Ltd* [2019] FCA 486 (at [26] – [45]).

17 In purported compliance with that framework, MyPort issued a number of LAANs in relation to each of Australia 108 and East Quays.

### Initial LAANs and Proceeding QUD 498 of 2018

18 Between 23 May and 28 June 2018, MyPort issued LAANs in relation to East Quays and Australia 108. OPENetworks received a LAAN in respect of Australia 108 but not in respect of East Quays.

19 On or about 18 July 2018, OPENetworks commenced proceedings in the Brisbane registry of the Federal Court in relation to those LAANs (proceeding number QUD 498 of 2018).

20 On 20 July 2018, MyPort’s solicitors wrote to OPENetworks’ solicitors withdrawing those LAANs. Similar letters were sent to the TIO.

21 On or about 12 October 2018, proceeding QUD 498 was, by consent, discontinued with no order as to costs.

### Subsequent LAANs

22 On or about 31 July 2018, MyPort issued new LAANs in relation to East Quays and Australia 108. Again, OPENetworks received a LAAN in respect of Australia 108 but not in respect of East Quays.

23 On or about 9 August 2018, the recipients of the LAANs served objections on MyPort. Consultations took place between the parties in respect of the objections to the LAANs. Ultimately, the recipients requested MyPort to refer the objections to the TIO pursuant to the Telco Code and MyPort did so on 9 October 2018.

### The Australia 108 LAANs

24 On 7 January 2019, the solicitors for OPENetworks wrote to the solicitors for MyPort stating additional grounds upon which OPENetworks contended that the LAAN issued to it in respect of Australia 108 was invalid, demanding that MyPort withdraw the LAAN and threatening to commence legal proceedings if that did not occur.

25 On 25 January 2019, the solicitors for MyPort wrote to the solicitors for OPENetworks expressing the view that the proper forum for determination of the objections to the LAANs relating to Australia 108, including the grounds concerning the validity of the LAANs, was through the TIO.

26 On 31 January 2019, OPENetworks commenced the Australia 108 proceedings.

27 On 6 February 2019, the solicitors for OPENetworks wrote to the TIO advising that OPENetworks had commenced the Australia 108 proceedings and suggested that the TIO defer its consideration of the objections until the proceedings were determined. Further correspondence ensued between the TIO and each of the parties. In short, OPENetworks submitted to the TIO that the appropriate course was for the TIO to defer considering the objections, while MyPort asked the TIO to continue.

28 On 1 March 2019, the TIO wrote to the solicitors for MyPort, OPENetworks and the Australia 108 owner’s corporation (which had also been given a LAAN) stating that the TIO proposed deferring its consideration of the objections until the outcome of the Australia 108 proceeding because that outcome was likely to be relevant to the consideration of the objections. The TIO invited the parties to provide any further information before a final decision was made.

29 As noted earlier, on 19 March 2019 I heard an application by MyPort for a stay of the Australia 108 proceeding until the TIO had made a determination on the objections. On 10 April 2019, I dismissed that application and ordered MyPort to pay OPENetworks costs of the application. On 17 April 2019, the matter was listed for trial commencing on 7 October 2019 and associated timetabling orders were made for giving discovery and for filing evidence and submissions in advance of trial.

30 On 21 May 2019, MyPort delivered a defence in the proceeding in which it defended the validity of the LAAN issued to OPENetworks. On 21 May and 17 June 2019, the parties exchanged requests for further particulars and OPENetworks answered the request delivered to it on 17 June 2019. The parties did not make discovery but several versions of a Redfern Schedule setting out categories for disclosure were exchanged in June 2019.

### The East Quays LAAN

31 On or about 18 September 2018, OPENetworks wrote to MyPort requesting an undertaking from MyPort that it would not rely on the East Quays LAAN. OPENetworks also stated its view that it was an owner and occupier of relevant land at East Quays and MyPort was required to serve a LAAN on OPENetworks in respect of East Quays. That position was not accepted by MyPort.

32 On or about 17 January 2019, OPENetworks wrote to MyPort requesting that MyPort withdraw the East Quays LAAN. On or about 22 January 2019, the solicitors for MyPort wrote to the solicitors for OPENetworks refusing to withdraw the LAAN. OPENetworks did not commence proceedings in respect of the East Quays LAAN at that time.

33 On 7 June 2019, the TIO made a decision in relation to the objections to the East Quays LAAN. The TIO decided that it had jurisdiction in respect of the objections because the activities proposed in the LAAN were low-impact facilities as defined by the Determination. The TIO resolved the objections by allowing MyPort to proceed with the installation of facilities and gave directions as to the period in which such activities should commence and be completed.

34 A few days later, on 13 June 2019, MyPort made a without prejudice offer to OPENetworks to withdraw all LAANs that had been given in respect of Australia 108 and not to serve any further LAANs in respect of that building. MyPort proposed that the Australia 108 proceeding be dismissed with no order as to costs and that the parties agree to bear their own costs of the proceeding including the costs of the stay application. OPENetworks did not accept that offer.

35 On 26 June 2019, OPENetworks advised MyPort of its intention to commence proceedings in relation to East Quays, including seeking judicial review of the TIO decision. OPENetworks foreshadowed that it would seek interlocutory relief staying the operation of the TIO decision pending the determination of the proceedings. OPENetworks sought an undertaking from MyPort by 12pm on 28 June 2019 not to act upon the TIO decision in the interim to avoid the need for urgent interlocutory relief.

36 On 28 June 2019, OPENetworks commenced the East Quays and TIO proceedings.

37 During the morning of 28 June 2019, while the filing of the East Quays and TIO proceedings was occurring, MyPort made a further offer to OPENetworks in an effort to resolve the disputes in respect of the Australia 108 and East Quays LAANs. MyPort reiterated its previous offer in respect of Australia 108 and extended that offer to the East Quays LAAN (both to withdraw the LAAN and not serve further LAANs in respect of East Quays). MyPort also sought an undertaking that OPENetworks would not pursue or support a review of the TIO decision. The offer was made on a without prejudice basis.

38 Also on 28 June 2019, MyPort informed OPENetworks that it did not agree to give an undertaking not to act upon the TIO decision in respect of East Quays. The reasons for the refusal were that OPENetworks had not proffered a cross-undertaking as to damages and that MyPort considered that OPENetworks’ application for review of the TIO decision would fail. Later on 28 June 2019, OPENetworks proffered the usual undertaking as to damages and again requested that MyPort provide an undertaking not to act upon the TIO decision in respect of East Quays.

39 On 1 July 2019, MyPort restated its 28 June 2019 offer to resolve all disputes with OPENetworks on an open basis.

40 On 2 July 2019, MyPort again refused to give an undertaking to OPENetworks not to act upon the TIO decision in respect of East Quays. Later that day, OPENetworks served the East Quays and TIO proceedings on MyPort. Following service of the proceedings, MyPort gave an undertaking not to act upon the TIO decision in respect of East Quays until the day after the first case management hearing in the proceedings. MyPort sought a counter-proposal from OPENetworks to resolve all proceedings.

### Further settlement offers

41 On 19 July 2019, OPENetworks rejected MyPort’s offer of settlement and proposed instead that MyPort consent to orders granting the relief sought by OPENetworks in each of the proceedings and that MyPort pay OPENetworks’ costs of each proceeding.

42 On 23 July 2019, MyPort rejected OPENetworks’ proposal and made a new offer to settle all proceedings on the following terms: MyPort would withdraw all LAANs relating to Australia 108 and would undertake not to issue further LAANs in respect of that building; MyPort would not act on the TIO decision with respect to East Quays and would undertake not to issue further LAANs in respect of that building; MyPort would pay the sum of $40,000 to OPENetworks on account of costs, and the parties would otherwise agree to bear their own costs of the proceedings; the proceedings would be discontinued with no further order as to costs.

43 On 24 July 2019, OPENetworks rejected MyPort’s offer. OPENetworks reiterated its proposal that MyPort consent to orders granting the relief sought by OPENetworks in each proceeding, but offered to fix OPENetworks’ costs in the Australia 108 proceeding at $160,000, in the East Quays proceeding at $25,000 and in the TIO proceeding at $45,000.

44 On 26 July 2019, MyPort rejected OPENetworks’ offer and informed OPENetworks that it intended, by no later than 4pm on 29 July 2019:

(a) in respect of the Australia 108 development, to withdraw all of the LAANs that it had served; and

(b) in respect of the East Quays development, to provide an undertaking that it would not act upon the TIO decision.

45 On 29 July 2019, MyPort gave written notice to the TIO and the recipients of LAANs issued in respect of Australia 108 (which included OPENetworks) that it withdrew the LAANs with immediate effect and that it undertook not to serve any further LAANs in respect of Australia 108. MyPort also requested the TIO to discontinue its determination of the objections to the LAANs. MyPort also gave notice to the TIO and the recipients of the LAAN in respect of East Quays that it would not act upon the TIO decision to install telecommunications facilities at East Quays pursuant to the LAAN and it undertook not to serve any further LAANs in respect of East Quays. With the notification, MyPort also enclosed a Deed Poll executed by MyPort in favour of the body corporate for East Quays and OPENetworks by which MyPort gave an undertaking that it would not act upon the TIO decision in order to install telecommunications facilities at East Quays whether pursuant to the LAAN or otherwise.

46 On 30 July 2019, OPENetworks wrote to MyPort stating that OPENetworks considered there was utility in conducting the proceedings so as to resolve the issue in dispute, but if MyPort considered that the proceedings had become hypothetical and unnecessary, it was incumbent on MyPort to make an application to the Court.

47 On 16 August 2019, MyPort served offers of compromise in each proceeding pursuant to Part 25 of the *Federal Court Rules* 2011 (Cth). The offers were made on an open basis. In respect of the Australia 108 proceeding, MyPort offered to compromise the proceeding on the basis that the proceeding be permanently stayed, MyPort pay OPENetworks’ costs of the proceeding on a standard basis up to 11am on the second business day after the offer was served and that there be no further or other order in respect of costs. In respect of the East Quays and TIO proceedings, MyPort offered to compromise the proceedings on the basis that the proceedings be permanently stayed and there be no order as to costs.

48 On 23 August 2019, MyPort issued applications in each proceeding seeking orders that judgment be given against OPENetworks or that the proceeding be permanently stayed. In respect of the Australia 108 proceeding, MyPort sought orders that OPENetworks pay MyPort’s costs of the application, but otherwise there be no order for costs of the proceeding other than the costs ordered on 10 April 2019 (in relation to the application for a temporary stay of the proceeding). In respect of the East Quays and TIO proceedings, MyPort sought orders that OPENetworks pay MyPort’s costs of the proceedings including the costs of the application.

## Dismissal of the proceedings

49 OPENetworks and MyPort now agree that the Australia 108 and East Quays proceedings should be dismissed because MyPort’s undertakings have resolved the dispute between the parties that was the subject matter of those proceedings. However, OPENetworks seeks to continue the TIO proceeding to set aside the decision of the TIO relating to the East Quays LAAN.

50 MyPort submitted that the TIO proceeding should be dismissed because relief by way of judicial review under the ADJR Act is not granted in relation to a controversy that has become moot or where the grant of relief would be of no consequence. MyPort said that its undertakings not to act upon the TIO decision or issue further LAANs in respect of East Quays had rendered the TIO decision moot.

51 OPENetworks submitted that the TIO decision remained an operative decision at law, notwithstanding MyPort’s undertaking not to act upon it, and the Court has power to set aside an operative administrative decision vitiated by jurisdictional and other legal errors. OPENetworks said that the TIO decision is currently the “last say” on the lawfulness of MyPort’s proposed activities and it was appropriate for the proceeding to be continued so that that question could be determined by the Court.

52 There is a real question whether the Court has power to continue and determine the TIO proceeding in the present circumstances, where MyPort has given an undertaking not to act upon the TIO decision. An order in the nature of certiorari, quashing or setting aside an administrative decision, is not available in respect of a decision that no longer has legal effect: *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [25]. There is a real question whether the TIO decision continues to have legal effect. Under the regulatory framework underpinning Division 3 of Schedule 3 to the Telco Act, a decision of the TIO is only binding on the carrier that wishes to install telecommunications facilities on land and has issued a LAAN in respect of the proposed installation. If objections to the LAAN are referred to the TIO, the carrier cannot proceed with the installation until the TIO has determined the objections; if the TIO decides to give directions to the carrier about the installation, the carrier must comply with those directions if it wishes to proceed with the installation. A decision of the TIO has no other or independent operation. Accordingly, in circumstances where the carrier (in this case MyPort) has given an undertaking that it will not act on the TIO decision to install telecommunications facilities, it is difficult to see that the TIO decision continues to have any legal effect.

53 In the present case, however, it is not necessary to resolve the question whether the Court has power to continue and determine the TIO proceeding. I am satisfied that the Court should not do so in the exercise of its discretion. It is well established that the Court has a discretion to refuse relief under s 16(1) of the ADJR Act notwithstanding that the statutory preconditions for a grant of relief are satisfied: *Lamb v Moss* (1983) 49 ALR 533. The Court will generally decline to grant relief where events have overtaken proceedings so as to render the issue before the court moot: *Civil Aviation Safety Authority v Administrative Appeals Tribunal* [2001] FCA 1319; see also *Mayne Nickless Ltd v Transport Workers Union of Australia* [1998] FCA 984.

54 In light of the undertakings given by MyPort, including through the deed poll, there is no realistic possibility of MyPort acting upon the TIO decision. In those circumstances, the TIO decision is spent from a practical perspective.

55 I do not accept OPENetworks’ submission that the TIO decision is currently the “last say” on the lawfulness of MyPort’s proposed activities. While in the present case the TIO determined that it had jurisdiction over the objections to the LAANs issued by MyPort and determined that the LAANs were lawful, the TIO cannot determine its own jurisdiction, or the lawfulness of the LAANs, conclusively. Those matters can only be determined by the courts.

56 It is understandable that, given the history of the matter and particularly the underlying dispute between OPENetworks and MyPort concerning the lawfulness of MyPort’s proposed activities, OPENetworks seeks a decision by the Court about that issue. From OPENetworks’ perspective, a decision of the Court would have precedential value for future LAANs that may be issued by MyPort. However, therein lies the problem. The object of the proceeding would not be to resolve a dispute that exists today because that dispute has been resolved through undertakings given by MyPort. Rather, the object would be to anticipate and resolve a potential future dispute. Doing so would be akin to resolving a hypothetical question, because there is no longer a present dispute between the parties and the nature of any future dispute is not known.

57 I am also conscious that the issues arising in the TIO proceeding would involve the exploration of factual matters relating to the telecommunications facilities proposed to be installed by MyPort and legal matters requiring the construction of the Telco Act and regulatory instruments issued pursuant to that Act. I do not accept OPENetworks’ submission that the issues are “clear” (which I take to mean straightforward). There would be no effective contradictor in the proceeding. Acting in accordance with the principles stated in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, the TIO would take no part in the proceeding. Having given undertakings not to act upon the TIO decision, MyPort could not be expected to participate further in the proceeding.

58 In all the circumstances, in my view the appropriate course is to dismiss the TIO proceeding in the exercise of the Court’s discretion.

## Undertakings to the Court

59 OPENetworks seeks to formalise, as undertakings to the Court, those undertakings previously given by MyPort to OPENetworks *inter partes*. MyPort submitted that it is sufficient if its *inter partes* undertakings are noted in the orders of the Court but, if the Court considers it necessary, it is willing to give the undertakings sought by OPENetworks to the Court. OPENetworks submitted that MyPort’s *inter partes* undertakings, given unilaterally and without consideration, may not be enforceable by OPENetworks as contractual promises. While OPENetworks may be able to rely on principles of estoppel, it was preferable that the undertakings be given to the Court which would enable OPENetworks to take steps to restrain a breach.

60 There has been no agreement between the parties to resolve the three proceedings. The parties’ attempts to negotiate a settlement failed with the parties remaining apart on both the question of the costs of the proceedings and the form of undertakings to be given by MyPort. The failure to agree a settlement caused MyPort to act unilaterally, withdrawing the Australia 108 LAANs and undertaking not to act on the TIO decision in respect of East Quays and not to issue further LAANs in respect of Australia 108 or East Quays. OPENetworks has not accepted the undertakings as a basis for resolving the proceedings.

61 In the circumstances, I do not think it is satisfactory for the Court to dismiss the proceedings and merely note the *inter partes* undertakings that have been given by MyPort. While the Court may be asked to note an undertaking given by one party to another in an order that otherwise resolves a proceeding, that is usually done in the context of an agreed settlement where the undertaking is a binding promise between the parties as part of a settlement agreement. The parties seek an acknowledgement of the undertaking as a shorthand means of explaining the basis of the order (see the discussion of White J in *Srotyr v Clissold* [2015] NSWSC 1770, although in *Cain v Glass (No 1)*, NSW Court of Appeal, 3 October 1985, unreported, Kirby P refused to note an undertaking in those circumstances). In the present case, there is no agreed settlement. MyPort has filed an application effectively seeking the dismissal of the proceedings on the basis of the undertakings it has given. Although it is difficult to envisage that MyPort would not abide by the *inter partes* undertaking as it is the basis on which the present application has been made to the Court, I accept OPENetworks’ submission that the *inter partes* undertaking may not be enforceable by OPENetworks as a contractual promise. In those circumstances, in my view it is appropriate that the undertakings be given to the Court and MyPort, through its counsel, has agreed to do so.

62 There remains a question as to the form of the undertakings. In respect of the Australia 108 proceeding, the form of undertaking proposed by OPENetworks is that MyPort not act upon the LAAN given to OPENetworks and not serve any further LAANs in respect of Australia 108. There was some disagreement between the parties as to whether MyPort’s withdrawal of the LAAN rendered the first undertaking unnecessary. While the first undertaking may not be necessary, in my view it appropriately reflects the basis on which MyPort’s application has been brought and, as already noted, MyPort is willing to give the undertaking.

63 In respect of the East Quays proceeding, the form of undertaking proposed by OPENetworks is that MyPort not act upon the LAAN given to the body corporate for East Quays, not act upon the TIO decision in respect of that LAAN and not serve any further LAANs in respect of East Quays. Again, there was some disagreement between the parties as to whether the first undertaking was necessary given that the LAAN had been referred to the TIO and the TIO had made a decision. MyPort submitted that the LAAN had merged with the TIO decision. Having regard to the regulatory framework under which the LAAN was served and the TIO made its decision, I do not think that the doctrine of merger is applicable to the TIO decision. Whether or not the first undertaking is necessary, in my view it appropriately reflects the basis on which MyPort’s application has been brought and MyPort is willing to give the undertaking.

## Costs of the proceedings

64 As noted earlier, by its applications MyPort seeks the following costs orders:

(a) in respect of the Australia 108 proceeding, MyPort seeks orders that OPENetworks pay MyPort’s costs of the present application, but otherwise there be no order for costs of the proceeding other than the costs ordered on 10 April 2019 (in relation to the application for a temporary stay of the proceeding); and

(b) in respect of the East Quays and TIO proceedings, MyPort seeks orders that OPENetworks pay MyPort’s costs of the proceedings including the costs of the present application.

65 OPENetworks seeks orders that MyPort pay OPENetworks’ costs of each proceeding.

66 Under s 43 of the *Federal Court of Australia Act* 1976 (Cth), the Court has a broad discretion to award costs in a proceeding: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd (No 2)* (2015) 235 FCR 366 at [4]. The discretion must be exercised judicially and not arbitrarily or capriciously and in a manner that relates to the litigation in question: *Summers v Repatriation Commission (No 2)* [2015] FCAFC 64 at [13] – [14].

67 In these proceedings, there has been no hearing on the merits. However, that does not deprive the Court of power to order costs. In *Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin* (1977) 186 CLR 622, McHugh J observed (at 624, citations omitted):

In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they have avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.

68 Where a defendant changes its position so as to give the plaintiff substantively what it sought in the proceeding and thereby renders the proceeding futile, the Court may award costs in favour of the plaintiff: *ACI Operations Pty Ltd v Berri Limited (No 2)* [2005] VSC 55 at [28] and [29]. As observed by Kaye J in *Garwolin Nominees Pty Ltd v Statewide Building Society* [1984] VR 469 at 472, it would be unjust if the plaintiff were denied his or her costs incurred in achieving the relief sought by the commencement of the proceeding. Similarly, in *ONE.TEL Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548, Burchett J stated (at [6]):

In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the court’s discretion otherwise than by an award of costs to the successful party. It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs.

### The Australia 108 proceeding

69 In my view, the Australia 108 proceeding typifies the case in which the respondent, MyPort, has changed its position in a manner that gives to the applicant, OPENetworks, substantively the relief it sought by the commencement of the proceeding. The evidence shows that, prior to instituting proceedings, OPENetworks informed MyPort of its legal complaints about the LAAN served in respect of Australia 108 and sought an undertaking from MyPort to withdraw the LAAN. When MyPort refused, OPENetworks commenced the proceeding. MyPort defended the proceeding, which was then listed for trial. MyPort subsequently changed its position. On 29 July 2019, MyPort gave written notice to OPENetworks of the withdrawal of the LAANs in respect of Australia 108 and gave an undertaking not to serve any further LAANs in respect of Australia 108. It subsequently made this application to dismiss or stay the proceeding. In the circumstances, it would be unjust if OPENetworks was not entitled to receive the costs incurred in bringing the proceeding.

70 A question arises whether the costs order in favour of OPENetworks should be limited in any respect by reason of the offers of settlement made by MyPort or the offer of compromise served on 16 August 2019. In my view, none of MyPort’s settlement offers recognised OPENetworks’ entitlement to costs in the proceeding. The offer of 23 July 2019 only offered $40,000 by way of costs in circumstances where OPENetworks already had a costs order in its favour in respect of the application for a temporary stay of the proceeding. In my view, it was reasonable for OPENetworks to reject that offer.

71 By its offer of compromise served on 16 August 2019, MyPort offered to compromise the proceeding on the basis that:

(a) the proceeding be permanently stayed;

(b) MyPort pay OPENetworks’ costs of the proceeding on the standard basis up until 11am on the second business day after the offer is served, to be taxed in absence of agreement; and

(c) there be no further or other order in respect of costs.

72 The offer of compromise was made under Part 25 of the *Federal Court Rules* 2011 (Cth). Rule 25.14(1) provides that if an offer is made by a respondent and is not accepted by an applicant, and the applicant obtains a judgment that is less favourable than the terms of the offer:

(a) the applicant is not entitled to any costs after 11am on the second business day after the offer was served; and

(b) the respondent is entitled to an order that the applicant pay the respondent’s costs after that time on an indemnity basis.

73 Strictly, the orders which I propose to make in the proceeding are not less favourable to OPENetworks than the terms of the offer of compromise. The orders for costs that I propose to make are the same as the orders proposed in the offer. I will also require MyPort to give an undertaking to the Court in similar terms to the undertaking given *inter partes*, which was not part of the offer of compromise. For those reasons, I will not make an order for costs as contemplated by rule 25.14(1).

74 However, the position reached between the parties following the service of the offer of compromise is that MyPort had offered everything that OPENetworks could reasonably seek out of the proceeding. MyPort had given undertakings that in all likelihood could have been accepted by OPENetworks as part of a settlement (and the undertakings would have been enforceable as part of a settlement agreement) and had otherwise offered to resolve the proceeding by payment of OPENetworks’ costs to 11 am on 20 August 2019 (the second business day after the offer of compromise was served). In my view, acting consistently with the overarching purpose as required by s 37N of the *Federal Court of Australia Act* 1976 (Cth), OPENetworks ought to have taken steps to settle the proceeding on the basis proposed, thereby saving the costs of a contested hearing. In the circumstances, I think it would be just to order that MyPort pay OPENetworks’ costs of the proceeding to 20 August 2019 and that OPENetworks pay MyPort’s costs of and incidental to the application to dismiss the Australia 108 proceeding.

### The East Quays and TIO proceedings

75 The history of the East Quays and TIO proceedings is different to the Australia 108 proceeding. The initial history of events was the same. MyPort served a LAAN in respect of East Quays at the same time as Australia 108, at the end of July 2018. In September 2018, OPENetworks requested an undertaking from MyPort that it would not rely on the East Quays LAAN, and in January 2019 OPENetworks requested an undertaking from MyPort to withdraw the LAAN. However, unlike in the case of Australia 108, OPENetworks did not commence any proceeding in respect of the East Quays LAAN at that time. The evidence suggests that OPENetworks did not initially commence proceedings for two reasons. First, MyPort did not serve a LAAN on OPENetworks in respect of East Quays. Second, after OPENetworks commenced proceedings in respect of the Australia 108 LAANs, the TIO indicated that it would not progress its consideration of the objections to those LAANs until the Court proceedings were determined. OPENetworks formed the view that the TIO would act in the same manner in respect of the East Quays LAAN. As events turned out, the TIO progressed the objections to the East Quays LAAN and made a decision on 9 June 2019.

76 The question that arises in respect of the East Quays and TIO proceedings is whether it was reasonable for OPENetworks to commence those proceedings at the time they were commenced and whether OPENetworks has achieved the relief it sought by those proceedings by reason of MyPort’s change in position (through giving the undertakings).

77 Events moved relatively quickly from 26 June 2019. On that date, OPENetworks advised MyPort of its intention to commence the proceedings in relation to East Quays, and foreshadowed that it would seek interlocutory relief staying the operation of the TIO decision. OPENetworks sought an undertaking from MyPort by 12pm on 28 June 2019 not to act upon the TIO decision in the interim to avoid the need for urgent interlocutory relief.

78 OPENetworks commenced the East Quays and TIO proceedings on 28 June 2019. MyPort criticised that action because the papers were filed in the Federal Court before the expiry of the deadline of 12pm on 28 June 2019. In my view, that criticism has no material bearing on the issues. MyPort did not give the undertaking sought by OPENetworks. Instead, it made an offer to resolve all of the disputes in respect of Australia 108 and East Quays by withdrawing the LAANs and not serving any further LAANs. However, the offer said nothing about the legal costs incurred by OPENetworks in the Australia 108 proceeding and, at that time, it was not certain that a compromise would be reached on the basis of the offer. OPENetworks was at risk of MyPort deciding to act upon the TIO decision in respect of East Quays. In my view, it was reasonable for OPENetworks to commence the East Quays and TIO proceedings at that time, seeking to restrain MyPort from acting on the TIO decision. Proceedings could have been forestalled if MyPort gave an interim undertaking, pending further discussion, not to act upon the East Quays LAAN or TIO decision. MyPort refused to do so. An interim undertaking was not given until proceedings were served on MyPort and an unlimited undertaking was not given until 29 July 2019.

79 In the circumstances, I consider that it is just for OPENetworks to receive its costs of the East Quays and TIO proceedings for substantially the same reasons as in respect of the Australia 108 proceeding. Prior to the commencement of the East Quays and TIO proceedings, MyPort knew that OPENetworks disputed its legal entitlement to install telecommunications facilities in the East Quays building. MyPort had refused to withdraw the East Quays LAAN in January 2019. MyPort was a respondent to the Australia 108 proceeding in which the same issues were raised and had been defending that proceeding. During the first half of 2019, MyPort progressed the East Quays LAAN through a dispute resolution process conducted by the TIO, ultimately gaining a favourable decision from the TIO. When faced with the threat of proceedings in respect of the East Quays LAANs, MyPort offered no undertaking that would have prevented the need for the proceedings to be commenced, and indeed refused such an undertaking. Subsequently, MyPort changed its position, providing OPENetworks with the relief that it sought through the proceedings.

80 A question arises whether the costs order in favour of OPENetworks should be limited in any respect by reason of any offer of settlement made by MyPort or the offers of compromise served on 16 August 2019. In my view, none of MyPort’s settlement offers, nor the offer of compromise, recognised OPENetworks’ entitlement to costs in the East Quays and TIO proceedings and therefore it was reasonable for OPENetworks to reject the offers.

81 There remains a question whether OPENetworks should receive its costs of and incidental to MyPort’s application to dismiss the East Quays and TIO proceedings. The position of the parties on the dismissal application differs to some extent from the Australia 108 proceeding. On the one hand, MyPort had not offered to pay OPENetworks’ costs of the proceedings, thus requiring a hearing to resolve that matter. On the other hand, OPENetworks unsuccessfully opposed MyPort’s application to dismiss the TIO proceeding. Balancing the various considerations, I consider that a just result would be that MyPort pay OPENetworks’ costs of the East Quays and TIO proceedings until 20 August 2019 (a few days before the dismissal application was served) and that each party bear their own costs of the dismissal application in the East Quays and TIO proceedings.

### Separating the costs of the dismissal application

82 For the reasons expressed above, I consider it just that OPENetworks pay MyPort’s costs of the dismissal application in the Australia 108 proceeding and that each party bear their own costs of the dismissal application in the East Quays and TIO proceedings. I am conscious, though, that there was a single hearing for the dismissal application in each proceeding and that it would be difficult for the parties to separate the costs of the application in each proceeding. Making separate costs orders for the dismissal application in each proceeding is likely to cause further disputation between the parties, which is best avoided by making a single order in respect of the dismissal applications. Taking account of all the considerations referred to above, I will order that OPENetworks pay one half of MyPort’s costs of the dismissal applications in each of the Australia 108, East Quays and TIO proceedings.

## Conclusion

83 In conclusion, upon the undertakings that have been given to the Court by MyPort in the Australia 108 and East Quays proceedings, I will dismiss each of the Australia 108, East Quays and TIO proceedings and make the following costs orders in each proceeding:

(a) MyPort pay OPENetworks’ costs of the proceeding until 20 August 2019; and

(b) OPENetworks pay one half of MyPort’s costs of the interlocutory application dated 23 August 2019.

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| I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Bryan. |

Associate:

Dated: 14 October 2019