H

[2004] FCA 211

2004 WL 505359

Phosphate Resources Limited (ABN 77 009 396 543)
Applicant
and
The Commonwealth of Australia First Respondent
William Leonard Taylor as Administrator of the Territory of Christmas Island
Second Respondent
Federal Court of Australia

24 September 2003, 11 March 2004. Perth

French J

Administrative Law - statutory interpretation - validity of administrative determination under Ordinance - declaratory relief - Christmas Island Territory - Administrator - determination of fees for supply of electricity - determination applying Western Australian regional tariff under Western Australian By-laws - By-laws of no effect in Christmas Island Territory - whether use of tariff derived from By-laws inconsistent with this application by Christmas Island Act - whether unauthorised purposes - parity with Western Australian users - reduction of greenhouse gas emissions - whether irrelevant considerations - whether failure to take into account relevant consideration - requirement that fee bear reasonable relationship to cost of supply - application dismissed

Counsel for the Applicant: Mr MH Zilko SC with Mr KJ Green

Solicitor for the Applicant: Troika Legal

Counsel for the Respondents: Mr PR Macliver

Solicitor for the Respondents: Australian Government Solicitor

Utilities and Services Ordinance 1996 s 3, s 4, s 5

Judiciary Act 1903 (Cth) s 39B

Electricity Corporation (Charges) By-laws 1996 (WA)

Christmas Island Act 1958 (Cth) s 7, s 9, s 8A

Phosphate Resources v The Commonwealth [2003] FCA 447 cited

French J

Introduction

1 On 22 September 1999, the Administrator of Christmas Island made a Determination setting the fees chargeable for users of electricity on the Island. He did so under the provisions of the Utilities and Services Ordinance 1996. Phosphate Resources Ltd ("Phosphate") is a major user of electricity on the Island. It instituted proceedings challenging the validity of the Determination on various grounds. A part of the proceedings has already been determined adversely to it. For the reasons that follow, the balance of its application is dismissed.

Factual and Procedural History

2 Phosphate is a company incorporated in Western Australia which operates a mine site on Christmas Island. It is supplied with electricity for that purpose by the Christmas Island Power Authority ("the Authority") which is responsible for the generation, distribution and regulation of the supply of electricity in the Territory. The Authority is part of the administration of the Territory. The statutory responsibility for the supply of electricity and the fixing of charges to users is vested in the Administrator of the Territory pursuant to ss 3 and 4 of the Utilities and Services Ordinance.

3 Pursuant to s 4 of the Ordinance the Administrator made a Determination for the supply of electricity which was published in the Government Gazette of the Territory on 22 September 1999. On 27 July 2001, Phosphate filed an application in this Court naming the Commonwealth and the Administrator as respondents. The application was made pursuant to s 39B(1) and (1A)(c) of the Judiciary Act 1903 (Cth). Phosphate sought a declaration that the Determination of 22 September 1999 was invalid and an order that mandamus issue to the Administrator requiring him to determine a fee in accordance with s 4 of the Ordinance.

4 A substituted application filed on 10 October 2002 sought a variety of declarations relating to the proper construction of the Ordinance. At the heart of the application was the contention that the Ordinance, as it stood when the Determination was made, required, as a condition of validity of the Determination, that the fee charged had a "reasonable relationship" to the cost of supplying electricity to a person liable to pay the fee. The fee charged to Phosphate was said not to bear the requisite relationship to the cost of supply. In particular it was said that the fees charged were based upon the fees for electricity supplied by a regional power system under the Electricity Corporation (Charges) By-laws 1996 (WA).

5 On 8 October 2002, orders were made including an order that:

> "The question whether the claims for the declarations sought in paragraphs 1 to 4 of the Substituted Application should be heard and determined separately and, if so, whether such relief should be granted be set down for hearing on 16 December 2002 at 10.15am."

6 This issue was heard on 16 December 2002. In the event, for reasons which I published on 13 May 2003, I dealt separately with the relief claimed in the first four declarations sought by Phosphate in its substituted application. The application was dismissed in respect of those claims for relief and a related motion for discovery was also dismissed - Phosphate Resources Ltd v The Commonwealth [2003] FCA 447.

7 On 30 May 2003, directions were made by consent for the preparation of a statement of agreed facts and the filing of further affidavits and written submissions for the hearing of the balance of the application. On 23 July 2003, Phosphate was given leave to file a further substituted application and substituted statement of claim. Consequential directions were also given. A further substituted application and further substituted statement of claim were filed on 29 July 2003 and a substituted further amended defence filed on 14 August 2003. An agreed statement of facts had already been filed on 22 July 2003. The only evidentiary material additional to that relied upon at the resumed hearing of the application was an affidavit of Kenneth John Green exhibiting certain discovered documents and an affidavit of Willy See

Khiang Teo, a director of Phosphate who exhibited correspondence from the Commonwealth Department of Transport and Regional Services.

The Issues for Determination

8 As appears from the further substituted statement of claim the bases upon which Phosphate seeks to impugn the Administrator's Determination are as follows:

1. The Determination imposed fees based upon those fixed for a regional power system in Western Australia under the Electricity Corporation (Charges) By-laws. Those By-laws were said to be of no effect in the Territory by virtue of s 8A(4) of the Christmas Island Act 1958 (Cth) because the Utilities and Services Ordinance made inconsistent provision for the imposition of a fee under its own provisions.

2. The determinations made under s 4 of the Ordinance were to be made for the purpose of allowing the Administrator to recover some or all of the reasonable costs of supplying electricity to a person in the circumstances prevailing in the Territory in relation to the supply of electricity to that person. The Determination was said to have been made for other unauthorised purposes. These were said to be as follows:

> (a) the purpose of ensuring parity with the fees for electricity supplied by a regional power system under the Electricity Corporation (Charges) By-laws;
>
> (b) the purpose of compelling large users of electricity such as Phosphate to examine alternative options for power generation as part of an effort to minimise greenhouse gas emissions.

These unauthorised purposes were also characterised, in the further substituted statement of claim, as irrelevant considerations taken into account by the Administrator. The Administrator was also said to have failed to take into account the relevant consideration that the fees for the provision of electricity should bear a reasonable relationship to the cost of supplying electricity to a person liable to pay the fee or should be less than the cost of supplying electricity to the person.

9 The relief claimed in the further substituted application is a declaration that the Electricity Fees Determination No 1 of 1999 (CI) was invalid and of no legal effect.

Statutory Framework

10 The statutory framework relevant to this application was conveniently set out in the respondent's outline of submissions and I reproduce it here:

> "7. Section 7 of the Christmas Island Act 1958 (Cth) sets out which laws are enforced in the Territory, and provides that:
>
> > '7. On and after 1 July 1992, the laws in force in the Territory from time to time are:
> >
> > (a) Acts as in force from time to time in relation to the Territory on and after that day; and
> >
> > (b) Ordinances made on or after that day as in force from time to time; and
> >
> > (c) laws as in force in the Territory in accordance with section 8; and
> >
> > (d) Western Australian laws as in force in the Territory in accordance with section 8A.'
>
> 8. By s 9 of the Christmas Island Act, the Governor-General may make ordinances for the Territory as follows:
>
> > '9(1) Subject to this Act, the Governor-General may make Ordinances for the peace, order and good government of the Territory.
> >
> > (2) Notice of the making of an Ordinance shall be published in the Gazette, and an Ordinance shall, unless the contrary intention ap-

> pears in the Ordinance, come into operation on the date of publication of the notice.'

9. The application of Western Australian laws in the Territory is the subject of s 8A of the Christmas Island Act. Section 8A provides:

> '8A(1) Subject to this section, section 8G and Part IVA, the provisions of the law of Western Australia (whether made before or after this section's commencement) as in force in Western Australia from time to time are in force in the Territory.
>
> (2) To the extent that a law is in force in the Territory under subsection (1), it may be incorporated, amended, or repealed by an Ordinance or a law made under an Ordinance.
>
> (3) An Ordinance may suspend the operation in the Territory of a law in force in the Territory under subsection (1) for such period as is specified in the Ordinance.
>
> (4) To the extent that a law is in force in the Territory under subsection (1), it has no effect so far as it is inconsistent with the Constitution or an Act or Ordinance.
>
> (5) For the purposes of subsection (4), a law is consistent with the Constitution or an Act or Ordinance if the law is capable of operating concurrently with it.
>
> (6) In this section
>
> "provision of the law of Western Australia":
>
> (a) includes a principle or rule of common law or equity that is part of the law of Western Australia; and
>
> (b) does not include an Act or a provision of an Act.'

10. Subsection 4(1) of the Christmas Island Act defines 'Ordinance' as:

> '"Ordinance" means an Ordinance made under this Act.'

11. Subsections 3, 4 and 5 of the Utilities and Services Ordinance relevantly provides (sic):

> '3. The Administrator may make provision for the supply and use of any of the following utilities and services:
>
> (a) water;
>
> (b) electricity ...
>
> 4(1) There is imposed on a person a fee in relation to:
>
> (a) the provision, by the Administrator, of a utility to the person; or
>
> (b) the use, by the person, of a service provided by the Administrator;
>
> being the fee determined by the Administrator, from time to time, to be the fee applicable to the utility or service.
>
> (2) A determination is of no effect in relation to any particular fee unless:

(a) notice of the fee is published in the Gazette; and

(b) the fee bears a reasonable relationship to the cost of supplying the utility or service to a person liable to pay the fee, or is less than the cost of supplying the utility or service to the person.

(3) A determination may, in relation to a utility or service that is supplied in different localities or in different circumstances, fix different fees.

(4) The amount of a fee is a debt due to the Commonwealth.

5. A notice under subsection 4(2) must specify a date, not being a date earlier than the date of publication of the notice, as the date on which the fee commences to apply, and may:

(a) specify the manner in which a fee is to be paid; and

(b) specify a date or period before the end of which a fee must be paid.

...'

12. On 1 January 1999, the Western Australian Electricity Corporation (Charges) By-laws 1996 (WA) were amended by the Electricity Corporation (Charges) Amendment By-laws (No 2) 1998 (WA). Included in the amendments were amendments to the tariffs set out in Schedule 2. As and from 1 January 1999 the charges for low/medium voltage supplied in regional power systems were as follows:

'Division 2 - Regional Power Systems

TARIFF L2

General Supply

Low/Medium Voltage Tariff

This tariff is available for low/medium voltage supply, except where the consumer uses more than 822 units per day and supply is undertaken under the provisions of a contract.

A fixed charge at the rate of 24.31 cents per day.

Plus all metered consumption at the rate of -

"15.98 cents per unit for the first 822 units per day.

20.00 cents per unit per day for all units in excess of 822 units per day*.

* Where a calculation of consumption at the end of the financial year reveals that a particular consumer exceeded 822 units on a day or days but, when averaged over that year, the amount payable would be less than the amount already paid (due to fluctuating electricity usage), the Electricity Corporation shall refund any extra amount paid by the consumer during that financial year.""

The Facts

11 Phosphate is a company incorporated in Western Australia which has operated a mine site in the Territory and which intends to continue to operate a mine site in the Territory in the foreseeable future.

12 The Authority, which forms part of the administration of the Territory, is responsible for the generation, distribution and regulation of the supply of electricity to the Territory including to Phosphate. The statutory responsibility for the supply of electricity and the fixing of charges to users is vested in the Administrator of the Territory under ss 3 and 4 of the Utilities and Services Ordinance. Mr Taylor was appointed as the Administrator under s 6 of the Administration Ordinance 1968 (CI) and has acted as such at all material times. As already noted he made the impugned Determination of electricity fees on 22 September 1999.

13 Between 11 October 1999 and 11 February 2000, Phosphate was supplied with electricity by the Administrator through the Authority. It received accounts for that electricity from the Territory. The accounts were prepared in accordance with the fees contained in the determination and totalled $447,031.20. Phosphate paid $333,733.90 to the Commonwealth in respect of the accounts. The Commonwealth has commenced proceedings in the District Court of Western Australia to recover the outstanding amount of the accounts totalling $113,297.30 together with interest on that amount.

14 In an Explanatory Statement tabled in Parliament at the time that the Determination was made and annexed to the statement of agreed facts, it was said:

> "The fees for the provision of electricity in the Territory are based on the fees for electricity supplied by a regional power system under the Electricity Corporation (Charges) By-laws 1996 (WA) (CI). The fees are less than the cost of supply."

In their defence, the respondents said that the allegedly irrelevant considerations of applying the same fees as those applied to a regional power system under the Western Australian By-laws and compelling large users of electricity to examine alternative options for power generation were not irrelevant. In that context they admitted that the Administrator took into account the policy of applying Western Power regional tariffs to Christmas Island and that Western Power tariffs for regional areas are set out in the Western Australian By-laws. They denied that he took into account a policy of compelling large users of electricity to examine alternative options for power generation to minimise greenhouse gas emissions. However they said that the new tariffs for regional areas introduced by Western Power on 1 January 1999 were themselves in part based upon a policy of increasing charges to large consumers of electricity as part of a national campaign to reduce greenhouse gas emissions.

15 Prior to the making of the Determination in September 1999, Mr Horsford of the Authority sent a memorandum to the Administrator on 2 June 1999 concerning the electricity tariff proposed. The purpose of the memorandum was said to be thus:

> "Implement tariff increases in line with Western Australian regional areas as gazetted December 1998."

By way of background it was then stated:

> "Current CIPA policy applies Western Power Regional tariffs to Christmas Island. Christmas Island has adopted tariffs and charges from the Energy Corporations (Powers) Act (WA) (CI) with the first rates coming into effect on January 1st 1994. This resulted in an 18% reduction to domestic customers and 30% reduction to business and commercial customers. Our records show CIP was invoiced at the 23 cents per unit rate however they issued an objection and in June 94 the Commonwealth in conjunction with AGS settled on a reduced rate of 19 cents."

16 The memorandum went on to point out that on 1 January 1999, Western Power had introduced new tariffs for regional areas. If the new Western Power tariffs were to be applied on Christmas Island their impact on Phosphate's accounts based on the previous twelve months consumption would be an additional $330,000 representing a 36% increase on the existing rate. The proposed implementation of the new tariffs was said to be in line with current policy. Due to the introduction of Western Power tariffs and the consequent reduction in charges in January 1994 this represented only a 4% increase over the 1993 consumption charge. Mr Horsford prepared a further memorandum, dated 29 July 1999, which was almost identical. Its addressee was Maureen Ellis from the

Commonwealth Department of Transport and Regional Services.

17 On 30 July 1999, Ms Ellis sent a fax to Mr Horsford annexing a brief to the Minister for Regional Services, Territories and Local Government about Phosphate's refusal to meet Christmas Island power charges. In that memorandum it was said:

> "Western Australian commercial rates for electricity have recently been increased, the first rise since 1994. Christmas Island rates were increased from 1 July 1999. The increase applies to large consumers only with an annual account in excess of $50,000 per year [only PRL, the Shire and the Supermarket]. The new charges are based on 'an environmentally friendly' policy of 'the more electricity used the more expensive it is'. The objective is to encourage major users to examine other options for power generation and is apparently part of the national effort to contain greenhouse gas emissions."

There was a number of other discovered documents exhibited to Mr Green's affidavit which seem to have only marginal relevance to the issues raised in the case.

18 Mr Teo's affidavit exhibited a letter dated 26 April 2000 with an attachment from the Commonwealth Department of Transport and Regional Services. The letter referred to a meeting between Mr Teo and the Minister in Canberra on 8 March 2000. The background to the application of the electricity tariffs on Christmas Island was said to be set out in the Attachment to that letter. That Attachment included the following statements:

> "Christmas Island Power Authority (CIPA) applies Western Power regional tariffs on Christmas Island and has done since 1 January 1994 under the Energy Corporations (Powers) Act (WA) (CI). The move to Western Power regional tariffs came as part of the Law Reform process that commenced in 1992 to ensure Christmas Island customers realised the same rights and obligations as others in WA....
>
> Tariff structures in regional areas changed considerably in WA on 1 January 1999 and customers including Phosphate Resources Ltd (PRL) to be affected by the new tariff structure were consulted individually by CIPA in April 1999.
>
> The increase applies to large consumers only with an annual account in excess of $50,000. The new charges are based on an environmentally friendly policy, the objective being to encourage large users to examine alternative options for power generation and is part of a national effort to minimise greenhouse gas emissions."

19 On the basis of these materials, I am prepared to find that the Determination was made in pursuit of a policy of applying, on Christmas Island, the fees for electricity charged to consumers in Western Australia who were supplied by a regional power system under the Electricity Corporation (Charges) By-laws. I also find that the Determination, in its application to large consumers, including Phosphate, adopted the Western Power fee structure in the knowledge that it was partly fixed with a view to encouraging large consumers to examine alternative options for power generation as part of an effort to minimise greenhouse gas emissions. I do not accept that there was a purpose of compelling large users so to act. I find also, having regard to the Explanatory Statement, that the Administrator in fixing the fees had regard to their relationship to the cost of supply.

20 By way of completion of the agreed factual background the Utilities and Services Ordinance was amended by the Utilities and Services Ordinance 2001 (No 1) (CI). Among other things the amendment deleted the requirement that the fee bear a reasonable relationship to the cost of supplying the utility or service to a person liable to pay the fee. The Determination made on 22 September 1999, which is the subject of these proceedings, was revoked on 6 August 2001.

Whether the Determination was Repugnant to Section 8A(4) of the Christmas Island Act 1958 (Cth)

21 Section 8A(1) of the Christmas Island Act applies the law of Western Australia to the Christmas Island Territory. That application is subject to the provisions of s 8A(4). One of the effects of that pro-

vision is that a Western Australian law in force in the Territory has no effect so far as it is inconsistent with an Ordinance. It is common ground between the parties that the Electricity Corporation (Charges) By-laws has no effect in the Territory. There are two good reasons for that conclusion. First, the By-laws do not appear to be capable of application to the Territory because they provide for the imposition of tariffs by reference to specified geographical regions of Western Australia. So there are different rates imposed depending upon whether consumers are supplied from the South West interconnected system, the Pilbara power system or a regional system. And even if the By-laws were capable, when properly construed, of being applied to Christmas Island they would be of no effect. The mechanism specified for Christmas Island for the fixing of electricity and other utility and service charges is defined by the Ordinance by reference, inter alia, to the Administrator. The Ordinance cannot operate concurrently with the Western Australian By-laws. It is exhaustive in its application and covers the field for fixing electricity and other utility and service prices.

22 It is common ground therefore that the Western Australia By-laws have no effect. Phosphate however argues that a determination under the Utilities and Services Ordinance cannot apply the regional rates prescribed under the Western Australian By-laws. For to do so, it is said, is inconsistent with the disapplication of the By-laws by operation of s 8A(4) of the Christmas Island Act. This is, of course, upon the assumption that it is the operation of that section that renders the Western Australian By-laws inapplicable.

23 The kindest thing that could be said of this argument, is that it lacks merit. The discretion conferred by the Utilities and Services Ordinance is not confined so as to exclude from the Administrator's consideration a fee derived from a tariff scale in Western Australia. That would, of course, leave open the administrative law grounds for review which are otherwise relied upon. However, there is no merit in the argument based on so-called repugnancy.

Whether the Determination Was Made For a Purpose Not Authorised by the Ordinance

24 Section 4 of the Ordinance confers a broad discretion on the Administrator to determine the fees applicable to utilities or services. That discretion is constrained by the requirement that it bear a reasonable relationship to the cost of supply. But that constraint does not define the only purpose for which the fees may be determined.

25 Phosphate submits that on a proper construction the purpose of the Ordinance is to allow the Administrator to recover some or all of the reasonable costs of supplying electricity to a person in the circumstances prevailing in the Territory. I do not accept that submission.

26 There is nothing to prevent the Administrator, in making the determination, from having regard to other criteria not inconsistent with the requirement of a reasonable relationship between the fee and the cost of supply. The endeavour to apply a tariff on Christmas Island which puts its users on the same or a similar footing as users in regional Western Australia is understandable as a matter of public policy. The laws of Christmas Island were reformed just over a decade ago to eliminate the confusing mish-mash of Australian laws and ordinances and laws applicable to the former colony of Singapore (as at 1958) of which Christmas Island was once a part. The laws of the Island are by and large the laws of Western Australia. The Island is, of course, also subject to the laws of the Commonwealth. The territorial court system has effectively been replaced by the Western Australian judicial system. The Western Australian courts have been given jurisdictions in the Territory equivalent to their jurisdictions within Western Australia. The desire to apply utility charges based on those applicable in regional Western Australia might be seen as consistent with a general policy of parity between the residents of Christmas Island and the residents of Western Australia.

27 Whether the parity approach is the correct or preferable one may be a matter for debate. It cannot be said, however, to conflict with the provisions of the Ordinance or with its purposes. The position might be different if the selection of a Western Australian tariff were shown to be capricious or arbitrary or to have involved a failure to have regard to the requirement for a reasonable relationship between the fees charged and the cost of supply. But that is not this case. The unauthorised purpose ground, based on the application of the Western Australian regional tariff, cannot succeed.

28 The same arguments in general arise out of the second aspect of the ground relevant to greenhouse gas emissions. Assuming that the reduction of greenhouse gas emissions was expressly taken into account as a factor in forming the selection of the tariff for large users of electricity on the Island, it is a legitimate public policy objective which is not precluded from consideration by the express terms of the Ordinance or by any implied constraint or purpose.

The Irrelevant Considerations Ground

29 This ground is really the unauthorised purposes ground in different guise and fails for the same reason.

Failure to Take into Account a Relevant Consideration

30 In my opinion the evidence does not establish that the Administrator failed to take into account the requirement that the fee to be determined bear a reasonable relationship to the cost of supply. The fact that this was taken into account is reflected in the Explanatory Statement. This ground also fails.

Conclusion

31 None of the grounds upon which relief is claimed in this case is made out. The application will be dismissed with costs.

1. The application is dismissed.

2. The applicant is to pay the respondents' costs of the application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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