



Aurizon Network Pty Ltd v Queensland Competition Authority & Ors [2018] QSC 246

Judgment Notes
29 Oct 2018

On Tuesday, Justice Jackson handed down his decision on Aurizon Network's judicial review proceedings against the Queensland Competition Authority.

Background

Aurizon Network operates the rail network that transports coal from various mines in Central Queensland to a number of ports on the east coast. Access to the network is regulated by an access undertaking, approved by the Queensland Competition Authority. In December 2017, the Authority issued a draft decision in respect of a draft access undertaking submitted by Aurizon Network for the network (known as UT5). A few days after release of the draft decision, it was announced that the then Chair of the Authority, Professor Roy Green, had been appointed as Chair of the Port of Newcastle.

Aurizon Network sought judicial review in respect of the draft decision, on the basis that Professor Green's role at the Port of Newcastle gave rise to an apprehension of bias. Aurizon argued that the Authority's decision on the draft access undertaking had the capacity to affect the extent of investment in the central Queensland coal network, which in turn could lead to reduced throughput on the Queensland network, and that this could lead to an increase in production of coal producers in the Hunter Valley coal network, which producers export through the Port of Newcastle.

The proceedings were commenced in April 2018. In July 2018, Jackson J permitted a number of coal producers who use Aurizon Network's rail network to be joined as parties to the proceeding. His Honour set the matter down for an early hearing in October 2018, because of the significance of the subject matter of the case to the Queensland economy.

The Authority opposed the application on the basis that the informed lay observer would have no apprehension of bias. The Authority also opposed the application on the basis that the draft decision had no statutory effect, and that Professor Green was no longer a member of the Authority so that when a decision ultimately was made, it would not be made by the person who had the connection with Port of Newcastle.

Judgment

On Tuesday, Justice Jackson dismissed Aurizon Network's application. His Honour's judgment contains significant discussion of the level of information that would be available to the hypothetical lay observer when assessing the alleged apprehension of bias. The information would include the fact that thermal coal is not substitutable for metallurgical coal; that only 25 to 30% of the coal exported via the Central Queensland coal network was thermal coal; that approximately 80% of coal exported via the Port of Newcastle is thermal coal; that decisions by coal producers about

whether to increase or decrease production were affected by a wide range of circumstances and cost structures; and that there were other competitive sources for supply for thermal coal outside the Hunter Valley.

Overall, Justice Jackson found that the connection sought to be made between the Authority's draft decision on UT5 and the Port of Newcastle was "too tenuous or theoretical" to give rise to an apprehension of bias.

The judgment can be read [here](#).

Counsel

Members of Level Twenty Seven Chambers acted for each of the parties involved.

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