



Australian Competition and Consumer Commission v Tasmanian Ports Corporation Pty Ltd [2021] FCA 482

Declaratory Relief Concerning Misuse of Market Power Confirmed as Appropriate in Interest of Justice

Michael Hodge QC

June 2021

Background

The ACCC alleged that the state-owned corporation TasPorts breached section 46(1) of the *Competition and Consumer Act 2010* (Cth), by various conduct that it said was directed at the entry of Engage Marine into the towage and pilotage markets in northern Tasmania. All but one of the alleged contraventions were dismissed by consent. TasPorts admitted one contravention arising from its conduct of seeking to impose a Marine Precinct Tonnage Charge on Grange Resources after Grange Resources began acquiring towage and pilotage services from Engage. TasPorts had been the previous provider of services to Grange and had not sought to impose the charge whilst it was the provider.

An unusual feature of the case was that TasPorts was able to negotiate a settlement with the ACCC whereby it provided an 87B undertaking as to how it would deal with certain aspects of access to and investment in port infrastructure in the future and no pecuniary penalty would be imposed upon it.

What was the contravening conduct amounting to a contravention of s 46?

Section 46(1) has recently been significantly overhauled and this was the first case applying the new version of the section. The new section prohibits a corporation from engaging in conduct that would have the purpose, effect or likely effect of substantially lessening competition in a market in the corporation competes if the corporation also has substantial market power in that market or another market.

TasPorts admitted that it had substantial power in the market for managing and maintaining infrastructure in ports in Northern Tasmania. TasPorts also admitted that its conduct of seeking to impose the charge on Grange Resources had the "likely effect" of substantially lessening competition in the towage and pilotage markets for a limited period of time. The ACCC had also alleged that the same conduct had the purpose and effect of substantially lessening conduct but those allegations were dismissed. The admissions were sufficient to give rise to a breach of section 46(1) and the Court agreed that the declaratory relief proposed by both parties was appropriate in the circumstances.

Declaratory relief granted and public interest

The Court was mainly concerned with whether declaratory relief proposed would be appropriate and useful, when considering the public interest, even though no other relief was sought or granted in this case.

The Court considered a statement made in *Australian Competition & Consumer Commission v Eurong Beach Resort Ltd*,¹ that declaratory relief is of importance to public interest, as it educates the public by demonstrating contravening conduct by competitors in a market will not be condoned and the declaration will serve as a warning to the public.

The Court also considered a statement by the court in *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc*.² In *Tobacco Institute*, the Court considered it appropriate to make declarations that the appellant in that case had engaged in misleading conduct as the declaration validated the Court's conclusion and the litigation in that proceeding involved the public interest.³ ACCC v *Eurong* considered this statement should be followed in cases involving the public interest.⁴

The Court considered that the declaratory relief sought in this case was in the public interest as it assisted the ACCC in carrying out its duties under the Act, would deter corporations from contravening the Act, and served the purpose of informing the public about the requirements under the Act.

Michael Hodge QC (with Caryn Van Proctor and Daniel Preston) acted for TasPorts, instructed by Arnold Bloch Leibler.

¹ *Australian Competition & Consumer Commission v Eurong Beach Resort Ltd* [2005] FCA 1134 at [5] – [6] (per Kiefel J).

² *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc* (1993) 41 FCR 89 at pg. 94 (per Sheppard J).

³ *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc* (1993) 41 FCR 89 at pg. 94 (per Sheppard J).

⁴ *Australian Competition & Consumer Commission v Eurong Beach Resort Ltd* [2005] FCA 1134 at [5] – [6] (per Kiefel J).



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