QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Starkey v Northern SEQ Distributors Retail Authority t/as Unitywater* [2015] QCATA 179
PARTIES:	Brett David Starkey (Applicant/Appellant) v Northern SEQ Distributors Retail Authority t/as Unitywater (Respondent)
APPLICATION NUMBER:	APL183 -15
MATTER TYPE:	Appeals
HEARING DATE:	13 August 2015
HEARD AT:	Brisbane
DECISION OF:	**Justice Carmody** **Senior Member Stilgoe OAM**
DELIVERED ON:	8 December 2015
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal granted.** **2. Appeal is dismissed.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL - MINOR CIVIL DISPUTE – where the applicant was the developer of an estate – where the applicant installed certain water infrastructure – where the respondent distributor-retailer charged the applicant certain fees for access to water infrastructure – where the applicant refused to pay – where the *Water Supply (Safety and Reliability) Act* 2008 (Qld) provided a statutory power or discretion for the respondent to recover reasonable costs associated with delivering certain services – where the *South-East Queensland Water (Distribution and Retailer Restructuring) Act* 2009 (Qld) provided a broader charging power in respect of a range of services – whether the former Act operated to constrain the charging powers under the latter Act in respect of the provision of access to water supply infrastructure – whether the respondent was permitted to charge a profit

component on the provision of access to water supply infrastructure – whether the respondent should be granted leave to appeal – whether the appeal should be allowed.

Financial Accountability Act 2009 (Qld)
Financial and Performance Management Standard 2009 (Qld)
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 142
South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld), ss 7, 9, 11, 12, 43, 99AV, schedule 1
Water Supply (Safety and Reliability) Act 2008 (Qld) ss 4, 164, 165, 167, sch 3

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297
Lyons v Registrar of Trademarks (1984) 50 ALR 496
Mt Isa Mines Ltd v Federal Commissioner of Taxation (1976) ALR 10 629
Pickering v McArthur [2005] QCA 294
Ross v R (1979) 141 CLR 432
Wood v Riley (1867) LR 3 CP 26

APPEARANCES and REPRESENTATION (if any):

Applicant/Appellant:	D Starkey (self-represented)
Respondent:	B Moreton (agent of the respondent)

REASONS FOR DECISION

[1] The applicant and his family developed the Noosa Springs estate. He still owns a vacant block there. Neither water nor sewerage is connected but a water meter is installed. The respondent, a distributor retailer, charges him quarterly for water and sewerage.

[2] Bills are divided into two sections titled “water meter details” and “water and sewerage charges”. The applicant does not incur metered charges because he does not use water or sewerage services, but he is charged a fixed levy for “water access” and “sewerage access”.

[3] The applicant refuses to pay the fee as a matter of principle, and is currently $4,191.15 in arrears. The Tribunal ordered the applicant to pay the debt on 4 March 2015.

[4] The applicant has filed an application for leave to appeal and appeal the decision of the Tribunal. An appeal from a decision of the Tribunal in its minor civil disputes jurisdiction requires leave to appeal from the Appeal

Tribunal.[1] The applicant must establish that he has a reasonable argument that the original decision was infected by an error in need of correction to remedy substantial injustice. Mere disappointment with the original decision is insufficient to warrant appellate intervention.[2]

THE LAW

[5] The respondent is required by s 164 of *Water Supply (Safety and Reliability) Act* 2008 (Qld) (the ***"2008 Act"***) to ensure that:

1. all premises in a service area are able to be connected to the service provider's infrastructure for the area;
2. that the infrastructure can deal with the service requirements;
3. that the design of the infrastructure allows for a connection to the retail water service within the boundary; and
4. that the design of the infrastructure allows for a connection to the sewerage service at or within the boundary and at an invert level below ground level at which the drain or sewer laid at minimum grade is capable of servicing the premises.[3]

[6] Section 165 of the 2008 Act allows the respondent to recover the reasonable cost of complying with s 164 from a customer. The cost of connection, by contrast, is covered by s 167 of the 2008 Act. The applicant submits that he is a s 164 customer, and that under the 2008 Act he is required to pay the respondent the reasonable cost of the service in accordance with s 165. However, the applicant claims that s 165 precludes the respondent from imposing a profit component on the recovery of such costs.

[7] The respondent submitted that it was imposing a charge under s 11 of the *South-East Queensland Water (Distribution and Retail Restructuring) Act* 2009 (Qld) (the ***"2009 Act"***). This section establishes the functions of a distributor-retailer, which includes providing water and waste water services to customers and charging customers for those services.

CRITICAL ISSUES

[8] The key question for the determination of the tribunal below was whether the power to impose a charge under s 11 of the 2009 Act was limited by s 165 of the 2008 Act or not. The tribunal found that[4]:

> It beggars belief that any such organisation should have not only an appropriate way for charging for its customers' use of infrastructure services, but also some degree of an apportion of charge which can then be distributed, as pursuant to the Act it must be, to the constituent Councils. And presumably also provide for its sustainable future both in terms of

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1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 142(3)(a)(i).
2 *Pickering v McArthur* [2005] QCA 294, [3].
3 *Water Supply (Safety and Reliability) Act* 2008 (Qld).
4 Transcript page 1-17, lines 27.

further infrastructure, but also environmental considerations as well have to be taken into account.

[9] That is a common sense approach. The task for the appeals tribunal, however, is to determine whether it is a legally correct approach. As to this three questions arise:

1. Is the duty to charge a reasonable cost under s 165 of the 2008 Act modified by the charging power under the 2009 Act*?*
2. Can "reasonable cost" include a component of profit?
3. Did the respondent include a profit in the calculation of its charge?

Is the duty to charge a reasonable cost under s 165 of the 2008 Act modified by the charging power under the 2009 Act?

[10] Analysing the relationship between s 165 of the 2008 Act and ss 11, 12, 99AV(2) of the 2009 Act requires the separation of the powers vested within respondent by the respective statutes, from the name used to describe an aggregation of monetary exactions in rendering the account.

Construction of the charging and recovery powers

[11] The 2008 act provides that the service provider '*may recover from a customer the reasonable cost of complying with s 164 for the customer's premises*'.[5]

[12] The respondent argues that s 164 is a charge for connection, and that the respondent is entitled to recover a profit component from the respondent under s 11 of the 2009 Act. This submission is patently false, as s 167 of the 2008 Act provides the legislative facility for the respondent to recover the costs of connection, not s 165.

[13] The use of "may" in s 165 indicates that the legislation is conferring a permissive or discretionary statutory power on the service provider. The phrase "reasonable cost" imposes an internal constraint or limitation on the exercise of such statutory power.

[14] Section 164 of the 2008 Act relevantly prescribes that the service provider must, to the greatest practicable extent, provide the services described in [5].

[15] The relevant provisions appear limited to the design, capacity and maintenance of water and sewerage supply infrastructure. That is, they require the water service provider to ensure that a premises can be connected with adequate water and sewerage infrastructure. It does not deal with the actual connection of the relevant premises with the required water and sewerage infrastructure, or the actual supply of water services.

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5 *Water Supply (Safety and Reliability) Act* 2008 (Qld), s 165.

[16] This interpretation of s 164 of the 2008 Act is supported by the Explanatory Memorandum to the *Water Supply (Safety and Reliability) Bill*, which provides that:

> *Clause 164* is relocated from the Water Act to the Bill as the Bill now provides for service provider[6] regulation. It requires that, within a service area, a service provider must ensure that all premises *can be connected to its water supply and/or sewerage services* and that *its infrastructure can deal with the service requirements of the premises*. The design of the service provider's infrastructure must allow for a connection point which must be located within the boundary of premises. (emphasis added)

[17] Therefore, s 165 of the 2008 Act vests the service provider with a *power*, not a *duty*, to recover the "reasonable costs" of meeting the infrastructure requirements prescribed under s 164. Further, the "reasonable costs" requirement applies only to the exercise of power under s 165 to recover infrastructure-related costs incurred under s 164.

[18] In contrast, s 11 of the 2009 Act prescribes that a function of the distributor-retailer is to provide water and wastewater services to customers, and charge customers for the delivery of such services. To this end, the distributor-retailer has the power to fix charges and other terms for services and other facilities it supplies.[7]

[19] The 2008 Act and 2009 Act have a uniform definition of "water service". It is defined exhaustively in Schedule 3 of the 2008 Act to mean:

> (a) water harvesting or collection, including, for example, water storages, groundwater extraction or replenishment and river water extraction; or
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> (b) the transmission of water; or
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> (c) the reticulation of water; or
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> (d) drainage, other than stormwater drainage; or
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> (e) water treatment or recycling.

[20] Significantly, "water service" is not defined to mean or include the *design*, *maintenance*, *capacity*, or *construction* of infrastructure used to deliver water services. That "water service" and infrastructure are separate concepts under the relevant legislation is reflected in the second exclusory component of the definition of "water service" and the differential use of the terms throughout the 2008 Act.

[21] Therefore, s 165 of the 2008 Act, which allows for the recovery of costs relating to the *design*, *maintenance* and *capacity* (among other things) of infrastructure used for the *delivery* of water services, and ss 11 and 12 of the 2009 Act (which allows for the imposition of a fixed *charge* for the *actual delivery* of water services) have different functions and are subject to distinct and separable conditions.

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6 See *South-East Queensland Water (Distribution and Retail Restructuring) Act* 2009 (Qld), s 7, sch 1; *Water Supply (Safety and Reliability) Act* 2008 (Qld), s 4, sch 3.

7 *South-East Queensland Water (Distribution and Retail Restructuring) Act* 2009 (Qld), s12(1)(f).

[22] This construction is supported by the fact that the relevant service providers under the 2008 Act and the 2009 Act may be different entities. It would be unreasonable, therefore, to construe s 165 of the 2008 Act, which would constrain one entity, to confine the charging powers of another under the 2009 Act. The force of this reasoning is not diminished because in this case, and in a variety other cases, the service providers under both Acts happen to be the same entities.

[23] Accordingly, s 165 of the 2008 Act does not, expressly or by implication, limit the incidence or quantum of service charges imposed under ss 11 and 12 of the 2009 Act.

The significance of the name of the account

[24] The 2009 Act prescribes that an account rendered to the customer must include an entry called 'distribution and retail'.[8] The entry 'distribution and retail' must include the amount charged for:

1. Water services and wastewater services; and
2. Being able to be provided with the service (called a 'fixed access charge').[9]

[25] Being "able" to be provided with a water service might include: (a) the infrastructure required to facilitate the distribution of water throughout the water network and to the relevant premises; (b) the reticulation of water through the water network and to the relevant premises; and (c) the necessary organisational and administrative architecture required to facilitate the administration of water services throughout Queensland.

[26] Such an expansive interpretation of the concept of "able", however, is problematic insofar as it appears to create redundancies. The reticulation of water throughout the water network and to the relevant premises is encompassed within the broad definition of "water services".

[27] The concept of "water services", defined in Schedule 3 the 2008 Act, and explored at [20] of this decision, is changeable in nature. Each potential meaning is connected by the disjunctive "or". This indicates that, in a particular context, the phrase "water services" could mean one, more than one, or all of the prescribed definitions.

[28] It is impossible to articulate the intrinsic criteria of the phrase "water services" divorced from the statutory and practical context within which it is employed. Although this outcome is plainly undesirable, as it diminishes the certainty and predictability of the water supply legislative framework, it is a necessary corollary of the definitional content Parliament has elected to ascribe to the rubric "water services".

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8 Ibid, s 99AV(1)(e).
9 Ibid, ss 99AV(2)(a)-(b).

[29] The existence of textual redundancies prefigures the exercise of caution in construing s 99AV(2) of the 2009 Act. The Appeal Tribunal must elect between:

1. preferring a construction which makes the entries contemplated by ss 99AV(2)(a) and (b) mutually exclusive; or
2. preferring a construction which causes the entries contemplated by ss 99AV(2)(a) and (b) to intersect.

[30] The former might be secured by reading down the meaning of "able" in s 99AV(2)(b) of the 2009 Act, or by adopting a more narrow meaning of "water service" than its broadest permissible parameters outlined in Schedule 3 of the 2008 Act.

[31] The latter object might be secured by interpreting the adjective "able" consonantly with its definition described in [25], and construing "water service" to possess each of the potential meanings articulated in Schedule 3 of the 2008 Act.

[32] The nature and function of s 99AV(2) of the 2009 Act militates in favour of adopting a mutually exclusive construction. Section 99AV(2) is intended to communicate to consumers the basis for certain statutory and non-statutory charges, fees, and levies relating to the usage of water. This communicative function would be undermined by adopting a construction which would cause charges, fees and levies to be subsumed within both categories. Furthermore, adopting a non-mutually exclusive construction may permit the regulatory authority responsible for administering the relevant water distribution and retail system to impose the iterated fees, charges or levies twice, which could not have been the intention of Parliament.

[33] There are strong self-evident policy reasons for preferring a construction which ensures that ss 99AV(2)(a) and (b) are mutually exclusive.

[34] The Appeal Tribunal should start from the "not unduly pedantic" position that the words used in the statute possess their natural and ordinary meaning.[10]

[35] A construction should be preferred which eschews imposing artificial constraints on the language of s 99AV(2). It is not necessary to truncate or confine the natural and ordinary meaning of the adjective "able" in s 99AV(2)(b) if the phrase "water services" in s 99AV(2)(a) is not assigned the full potential plenary of meanings prescribed under Schedule 3 of the 2008 Act. Indeed, Parliament has provided for precisely such a construction by disjunctively connecting the potential meanings of "water supply" prescribed in Schedule 3.

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[10] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 304.

[36] The Appeal Tribunal should ascribe to "water supply" in s 99AV(2)(a) a meaning that does not intrude on the domain of s 99AV(2)(b). Accordingly, the phrase "water service" in ss 99AV(2)(a) should not be construed to include the reticulation of water throughout the water supply network, or the organisational architecture required to provide water services.

[37] This construction has the effect of dissolving the issues raised in the present appeal. Section 165 of the 2008 Act, to the extent that it does operate to limit the amount chargeable for the services identified in s 164 of that Act, does not constrain the prescribed charging powers relating to the reticulation of water or the organisational architecture required for the administration of the water supply system.

[38] Accordingly, even on the construction contended for by the applicant,[11] s 165 does not have the effect of constraining all of the charges aggregated under the rubric "fixed access charge". Therefore, on the applicant's argument, the respondent is entitled to charge a profit component on certain charges subsumed within the "fixed access charge", but not other infrastructure-related charges.

[39] The applicant has not adduced evidence tending to establish that a profit has been improperly charged on the components of the "fixed access charge" which s 165 of the 2008 Act purportedly limits. Accordingly, even if the Appeal Tribunal were to accept the legal position advanced by the applicant, the applicant has failed to discharge its onus of proof to the required civil standard.

Later Section Prevails over the Former

[40] If the Appeal Tribunal is incorrect in its interpretation of s 165 of the 2008 Act and ss 11, 12 and 99AV(2) of the 2009 Act, the Appeal Tribunal would be of the view that the provisions of the Act which was later in time, namely the 2009 Act, should impliedly override the former Act, namely the 2008 Act, to the extent of any inconsistency.[12]

[41] Therefore, ss 11 and 12 of the 2009 Act should not be constrained by s 165 of the 2008 Act.

THE ELEMENTS OF REASONABLE COST

[42] "Cost" is not defined in the Act. The dictionary definition is: the price paid to acquire, produce, accomplish, or maintain anything.[13]

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11 Which has, for the abovementioned reasons, been rejected in this decision.

12 *Wood v Riley* (1867) LR 3 CP 26; *Mt Isa Mines Ltd v Federal Commissioner of Taxation* (1976) ALR 10 629, 639; *Ross v R* (1979) 141 CLR 432, 440; *Lyons v Registrar of Trademarks* (1984) 50 ALR 496, 508.

13 https://0-www.macquariedictionary.com.au.catalogue.sclqld.org.au/features/word/search/?word=cost&search_word_type=Dictionary

[43] The respondent has the power to fix its charges for providing water and waste water services[14]. It must not distribute any of its profits unless the distribution has been approved in a way provided for under its participation agreement.[15]

[44] Section 99AV of the 2009 Act sets out what must be stated in an account. It must include an entry called "distribution and retail"[16]. That entry must include the amount charged for water services and waste water services and being able to be provided with the service (called a fixed access charge)[17]. Therefore, the charge in the bill for access is directly referable to the cost referred to in s 165 of the 2008 Act.

[45] The respondent is a statutory body under the *Financial Accountability Act* 2009 (Qld). Therefore, the power to impose a charge is further regulated by the *Financial and Performance Management Standard* 2009 (Qld) ('The Standard'). Section 18 of the Standard requires Unitywater to consider whether:

1. the users have the capacity to pay for the goods or services;
2. the users have a choice whether to accept the goods or services;
3. the goods or services are available from a supplier other than a department or statutory body;
4. supplying the goods or services is required or permitted by legislation;
5. the goods or services are supplied for the benefit of the general public or for the benefit only of users who do not have the capacity to pay;
6. the administrative costs of charging and collecting the charges are more than, or may be more than, the revenue collected;
7. an agreement exists between the department or statutory body and users about charging for the goods or services;
8. charging for the goods or services improves, or may improve, resource allocation through more economical use of the goods or services;
9. other factors exist that the accountable officer or statutory body considers relevant.

[46] Obviously, Unitywater has a broad discretion about what it will charge. Mr Starkey's argument that it should be limited to the cost of providing the service to him cannot be sustained.

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14 *South-East Queensland Water (Distribution and Retail Restructuring) Act* 2009 (Qld), s 12(f).

15 Ibid, s 43.

16 Ibid, s 99 AV(1)(e).

17 Ibid, s 99AV(2).

FINDINGS

[47] The Appeal Tribunal finds the applicant possesses a reasonably arguable case that the respondent's charging powers should be limited to the reasonable cost of providing the services under s 164 of the 2008 Act.

[48] The Appeal Tribunal further finds that, if there is an error of the type described by the applicant, that the applicant has sustained a substantial injustice by reason of the error of the original decision-maker.

[49] Accordingly, the Appeal Tribunal grants leave to appeal against the decision of the original decision-maker.

[50] However, the Appeal Tribunal finds that there was no legal, factual or discretionary error infecting the decision of the original decision-maker. This is because, on proper construction, s 165 of the 2008 Act does not constrain the charging powers prescribed under ss 11 and 12 of the 2009 Act.

[51] Therefore, the appeal should be dismissed.

ORDERS

[52] It is the decision of the Appeal Tribunal that:

1. Leave to appeal is granted.
2. Appeal is dismissed.