

# SUPREME COURT OF QUEENSLAND

CITATION: *Xstrata Queensland Ltd v Santos Ltd & Ors; Santos Ltd & Ors v Xstrata Queensland Ltd* [2005] QSC 358

PARTIES: **XSTRATA QUEENSLAND LIMITED**  
(ACN 009 814 019)  
(applicant)  
v  
**SANTOS LIMITED; SANTOS PETROLEUM PTY LTD; SANTOS AUSTRALIAN HYDROCARBONS PTY LTD; VAMGAS PTY LTD; ORIGIN ENERGY RESOURCES LIMITED; ORIGIN ENERGY CSG LIMITED; DELHI PETROLEUM PTY LTD**  
(respondents)  
  
**SANTOS LIMITED; SANTOS PETROLEUM PTY LTD; SANTOS AUSTRALIAN HYDROCARBONS PTY LTD; VAMGAS PTY LTD; ORIGIN ENERGY RESOURCES LIMITED; ORIGIN ENERGY CSG LIMITED; DELHI PETROLEUM PTY LTD**  
(applicants)  
v  
**XSTRATA QUEENSLAND LIMITED**  
(ACN 009 814 019)  
(respondent)

FILE NO/S: BS 7604 of 2005  
BS 7672 of 2005

DIVISION: Trial

PROCEEDING: Applications for costs

ORIGINATING COURT: Brisbane

DELIVERED ON: 5 December 2005

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: McMurdo J

ORDER: **1. Xstrata Queensland Ltd (“Xstrata”) pay the costs of each of the applications by Incitec Pivot Pty Ltd and Queensland Alumina Ltd on a standard basis**  
**2. In the applications by Queensland Power Trading Corporation, BHP Petroleum (Victoria) Pty Ltd, Qenos Pty Ltd, Pelican Point Power Ltd, Energex Retail Pty Ltd, Comalco Aluminium Ltd, Origin Energy Retail Ltd, Origin Energy CSG Marketing**

**Pty Ltd, Oil Company of Australia (Moura) Pty Ltd, Osborne Cogeneration Pty Ltd, The Australian Gas Light Company, AGL Wholesale Gas (SA) Pty Ltd, OneSteel Ltd, OneSteel Manufacturing Pty Ltd, Arrow Energy NL, BlueScope Steel Ltd, TRUenergy Pty Ltd, Ecogen Energy Pty Ltd and Queensland Nitrates Pty Ltd against Xstrata, there will be no order as to costs**

- 3. In the applications by BHP Billiton Petroleum (Bass Strait) Pty Ltd, BHP Billiton Ltd, BHP Billiton Minerals Pty Ltd, Esso Australia Resources Pty Ltd, Esso Australia Pty Ltd, Energex Retail Pty Ltd, Origin Energy Retail Ltd, Origin Energy (Victoria) Pty Ltd, Origin Energy LPG Ltd, The Australian Gas Light Company, AGL Energy Sales and Marketing Ltd, AGL Wholesale Gas (SA) Pty Ltd and TRUenergy Pty Ltd against Santos Limited, Santos Petroleum Pty Ltd, Santos Australian Hydrocarbons Pty Ltd, Vamgas Pty Ltd, Origin Energy Resources Limited, Origin Energy CSG Limited and Delhi Petroleum Pty Ltd (“The Producers”), the applicants pay one half of the Producers’ costs of that application on a standard basis**
- 4. There be no order for costs of the application by Gascor Pty Ltd against the Producers**
- 5. There will be no order for costs against or in favour of CS Energy Limited and BP Refinery (Bulwer Island) Pty Ltd**

**CATCHWORDS:** PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – OTHER CASES – where the parties to an arbitration each, separately, applied to the court to issue subpoenas to third parties under s 47 of the *Commercial Arbitration Act* 1990 (Qld) – where the majority of the subpoenaed third parties objected to the production of documents pursuant to the subpoenas on several bases – where the court rejected substantial arguments on the bases that the dispute was not a true arbitration – where the court ordered that certain subpoenas be set aside – where the court ordered that certain subpoenas be varied because of their oppressive nature – where the court ordered that a confidentiality regime be put in place different from that suggested by one party to the arbitration – whether the parties to the arbitration ought to bear the costs of the applications to have the subpoenas set aside

**COUNSEL:** G A Thompson SC, with J D McKenna SC for the applicant in BS 7604 of 2005 and the respondent in BS 7672 of 2005, Xstrata Queensland Ltd

P L O'Shea SC, with P A Freeburn SC and S E Brown for the respondents in BS 7604 of 2005 and the applicants in BS 7672 of 2005, Santos Ltd, Santos Petroleum Pty Ltd, Santos Australian Hydrocarbons Pty Ltd, Vamgas Pty Ltd, Origin Energy Resources Ltd, Origin Energy CSG Ltd and Delhi Petroleum Pty Ltd

W Sofronoff QC, SG, with A M Pomerence for the applicant in BS 7604 of 2005, Queensland Power Trading Corporation

P H Morrison QC, with G D Sheahan for the applicants in BS 7604 of 2005, BHP Petroleum (Victoria) Pty Ltd and Qenos Pty Ltd and the applicants in BS 7672 of 2005, BHP Billiton Petroleum (Bass Strait) Pty Ltd, BHP Billiton Ltd, BHP Billiton Minerals Pty Ltd, Esso Australia Resources Pty Ltd and Esso Australia Pty Ltd

D J S Jackson QC, with D G Clothier for the applicant in BS 7604 of 2005, Pelican Point Power Ltd

J C Bell QC for the applicants in BS 7604 of 2005, Energex Retail Pty Ltd and Comalco Aluminium Ltd and the applicant in BS 7672 of 2005, Energex Retail Pty Ltd

S W Couper QC for the applicant in BS 7604 of 2005, Queensland Alumina Ltd

J K Bond SC for the applicant in BS 7604 of 2005, Incitec Pivot Ltd

P V Ambrose SC, with A S Kitchin for the applicants in BS 7604 of 2005, Origin Energy Retail Ltd, Origin Energy CSG Marketing Pty Ltd, Oil Company of Australia (Moura) Pty Ltd and Osborne Cogeneration Pty Ltd and the applicants in BS 7672 of 2005, Origin Energy Retail Ltd, Origin Energy (Victoria) Pty Ltd and Origin Energy LPG Ltd

P J Flanagan SC, with R J Anderson, for the applicants in BS 7604 of 2005, The Australian Gas Light Company, AGL Wholesale Gas (SA) Pty Ltd, OneSteel Ltd and OneSteel Manufacturing Pty Ltd and the applicants in BS 7672 of 2005, The Australian Gas Light Company, AGL Energy Sales and Marketing Ltd and AGL Wholesale Gas (SA) Pty Ltd

R M Derrington SC for the applicant in BS 7604 of 2005, Arrow Energy NL

S G O'Bryan SC for the applicant in BS 7672 of 2005, Gascor Pty Ltd

K A Barlow for the applicant in BS 7604 of 2005, BlueScope Steel Ltd

S R Horgan for the applicants in BS 7604 of 2005, TRUenergy Pty Ltd and Ecogen Energy Pty Ltd and the

applicant in BS 7672 of 2005, TRUenergy Pty Ltd

M R Hodge for the applicant in BS 7604 of 2005, Queensland Nitrates Pty Ltd

I R Bloemendal (*sol*) for the applicant in BS 7604 of 2005, Queensland Gas Company Ltd

P B Hickey (*sol*) for CS Energy Ltd in BS 7604 of 2005

D B Starkoff (*sol*) for BP Refinery (Bulwer Island) Pty Ltd in BS 7604 of 2005

M R Dillman (*sol*) for Wambo Power Ventures Pty Ltd and Braemer Power Station in BS 7604 of 2005

SOLICITORS:

Mallesons Stephen Jaques for the applicant in BS 7604 of 2005 and the respondent in BS 7672 of 2005, Xstrata Queensland Ltd

Minter Ellison for the respondents in BS 7604 of 2005 and the applicants in BS 7672 of 2005, Santos Ltd, Santos Petroleum Pty Ltd, Santos Australian Hydrocarbons Pty Ltd, Vamgas Pty Ltd, Origin Energy Resources Ltd, Origin Energy CSG Ltd and Delhi Petroleum Pty Ltd

Clayton Utz for the applicant in BS 7604 of 2005, Queensland Power Trading Corporation

Blake Dawson Waldron for the applicants in BS 7604 of 2005, BHP Petroleum (Victoria) Pty Ltd and Qenos Pty Ltd and the applicants in BS 7672 of 2005, BHP Billiton Petroleum (Bass Strait) Pty Ltd, BHP Billiton Ltd, BHP Billiton Minerals Pty Ltd, Esso Australia Resources Pty Ltd and Esso Australia Pty Ltd

Freehills for the applicant in BS 7604 of 2005, Pelican Point Power Ltd

Deacons for the applicants in BS 7604 of 2005, Energex Retail Pty Ltd and Comalco Aluminium Ltd and the applicant in BS 7672 of 2005, Energex Retail Pty Ltd

Corrs Chambers Westgarth for the applicant in BS 7604 of 2005, Queensland Alumina Ltd

Clayton Utz for the applicant in BS 7604 of 2005, Incitec Pivot Ltd

Clayton Utz for the applicants in BS 7604 of 2005, Origin Energy Retail Ltd, Origin Energy CSG Marketing Pty Ltd, Oil Company of Australia (Moura) Pty Ltd and Osborne Cogeneration Pty Ltd and the applicants in BS 7672 of 2005, Origin Energy Retail Ltd, Origin Energy (Victoria) Pty Ltd and Origin Energy LPG Ltd

Baker & McKenzie for the applicants in BS 7604 of 2005, The Australian Gas Light Company, AGL Wholesale Gas

(SA) Pty Ltd, OneSteel Ltd and OneSteel Manufacturing Pty Ltd and the applicants in BS 7672 of 2005, The Australian Gas Light Company, AGL Energy Sales and Marketing Ltd and AGL Wholesale Gas (SA) Pty Ltd

Hopgood Ganim for the applicant in BS 7604 of 2005, Arrow Energy NL

Maddocks Lawyers for the applicant in BS 7672 of 2005, Gascor Pty Ltd

Clayton Utz for the applicant in BS 7604 of 2005, BlueScope Steel Ltd

Baker & McKenzie for the applicants in BS 7604 of 2005, TRUenergy Pty Ltd and Ecogen Energy Pty Ltd and the applicant in BS 7672 of 2005, TRUenergy Pty Ltd

McCullough Robertson for the applicant in BS 7604 of 2005, Queensland Nitrates Pty Ltd

Clayton Utz for the applicant in BS 7604 of 2005, Queensland Gas Company Ltd

Clayton Utz for CS Energy Ltd in BS 7604 of 2005

Corrs Chamber Westgarth for BP Refinery (Bulwer Island) Pty Ltd in BS 7604 of 2005

BCI Law for Wambo Power Ventures Pty Ltd and Braemar Power Station in BS 7604 of 2005

- [1] **McMURDO J:** On 7 November 2005 I made orders to set aside, in whole or in part, each of the subpoenas in question. I asked for written submissions as to the costs of each application. These are my reasons for the orders for costs.
- [2] The costs in question are the costs of prosecuting or defending an application. The costs of any recipient which applied in relation to its subpoena are its costs as a litigant. They are not within its costs of responding properly to the subpoena, within r 418, for which I have already ordered. The arguments of the applicants challenged the effect of the subpoenas themselves, even in so far as they sought orders for conditions of access to documents to be included.

### **Xstrata subpoenas**

- [3] The applications by Incitec Pivot Pty Ltd and Queensland Alumina Ltd were wholly successful: the subpoenas were set aside. It is the case that these applicants also argued some matters which were rejected, such as that this is not an arbitration. But that should not deprive those applicants of a costs order which ordinarily would follow an event in which each applicant has been wholly successful although it is a substantial reason for denying indemnity costs. Xstrata should pay the costs of each of these applications on a standard basis.

- [4] Each of the other Xstrata subpoenas was the subject of a successful challenge as to part of it, on the basis that by its terms it was oppressive. The submissions relating to that point did not take up most of the four day hearing. And Xstrata says that by correspondence from its solicitors, prior to the hearing, it had indicated that it was willing to restrict the ambit of its subpoenas. It argues that “if the only issue had been the width of the subpoenas in the respects as varied by the court, it is likely that issue could have been entirely or substantially resolved without troubling the court at all, as exemplified by the proposed consent order with BP Refinery (Bulwer Island) Pty Ltd”. Xstrata’s solicitors did send correspondence to that effect prior to the hearing: it is exhibited to a further affidavit of Mr McDonnell sworn on 14 November 2005. But the correspondence did not propose the variation of the subpoena in any case. Instead it proposed discussions with a view to limiting the documents to be produced.
- [5] The need for the court’s orders to vary the subpoenas came from the terms of the subpoenas which Xstrata had procured and which, by its argument, it sought to defend. Each recipient had to apply to have those parts which made the subpoena oppressive deleted, and it was proper for each applicant to pursue its application in that respect.
- [6] However, the applications were made on the basis of many other arguments which were unsuccessful. It is sufficient to say that at least half of the four day hearing was concerned with them. The outcome of those arguments has been that Xstrata has succeeded in requiring the production of documents from each of these applicants. A just but impractical outcome could be that Xstrata pays the costs involving those parts of the applications on which it has failed but that it have its costs in relation to issues on which it has succeeded. That would not be a practical outcome because of the difficulties of assessment. The two sets of costs ought be that much different from each other. In my conclusion, it is appropriate that there be no order for costs on any of the applications involving Xstrata (save for the two applications already mentioned). That fairly corresponds with the outcome for which each side can claim to have had substantial success.
- [7] Some applicants against Xstrata require some specific mention. One is Pelican Point Power Limited, because it did not advance or adopt the submission that there is no arbitration. The argument of that question occupied a considerable time. But this applicant did lead the argument that a subpoena should be limited to documents which are directly relevant, a submission which at least some others adopted. I do not see that this applicant’s non adoption of the no arbitration argument should warrant a different outcome. The submissions in relation to whether this was an arbitration also had a relevance for other issues in which this applicant was involved, such as the question of whether the nature of this arbitration involved a public interest for which the process of a subpoena was appropriate.
- [8] Energex Retail Pty Ltd and Comalco Aluminium Ltd say that they were not involved in the no arbitration argument. When counsel were asked whether they wished to be heard on this question, which had been argued by Enertrade, counsel for Pelican Point expressly disavowed it, but counsel for Energex said “we don’t want to say anything further on this ground”. It seems that counsel for Energex was also intending to disavow the argument. If so, its position is still not significantly different.

- [9] I mention also Queensland Nitrates Pty Ltd. It has submitted that the no arbitration argument was not adopted in its oral argument. However, it was adopted, although in general terms, within its written argument. Again its position is not materially different.
- [10] CS Energy appeared, but made no application or submission. There will be no order in its favour or against it. The same applies to BP Refinery (Bulwer Island) Pty Ltd, which made no application, yet seeks some costs of a solicitor's attendance.

### **Producers' subpoenas**

- [11] I turn then to the applications against the Producers. None has been wholly successful. The subpoenas have been varied to delete the necessity to produce invoices for the first six months of supply (except where within July 1996 to January 1997). That (and one other relatively minor) change were not because the inclusion of such invoices made the subpoena oppressive. It was because of the view I took as to the apparent irrelevance of those documents. The position of the Producers then is markedly different from that of Xstrata where orders of much greater effect were made. The variation of the subpoenas in the sense just mentioned does not represent substantial success for any applicant.
- [12] The Producers submit that they have succeeded on every point which was argued. That is incorrect in one important respect, which is the order regulating access to the documents. The Producers sought orders which would have permitted the experts to see the documents. That is a matter of substantial concern to all applicants. I adopted the Xstrata proposal in that respect, leaving it to the parties in the arbitration to persuade the arbitrators that a particular document, having regard to the relative likelihood of its being probative, as well to other matters, should be shown to an expert. The success of the applicants on this important point has to be recognised in the outcome on costs. (The point is not of the same significance for the application against Xstrata because of its different proposal for access, notwithstanding that the proposal was offered only during the hearing.) The fair outcome is that each applicant against the Producers should pay one half of the Producers' costs of that application upon a standard basis.
- [13] From that I except Gascor Pty Ltd, because it enjoyed more success. A large part of its subpoena was deleted. In recognition of this, there will be no order for costs upon its application.