Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

VDRZ and Innovation Australia [2017] AATA 123 (27 January 2017)

Division: GENERAL DIVISION

File Number(s): **2014/2186**

Re: **VDRZ**

APPLICANT

And **Innovation Australia**

RESPONDENT

DECISION

Tribunal: **Justice D Kerr, President**

Date: **27 January 2017**

Place: **Sydney**

1. The decision proposed by the parties following conciliation is consistent with s 34D of the *Administrative Appeals Tribunal Act 1975* and may be made without holding a hearing.
2. The decision under review, being the decisions of the Respondent of 1 April 2011 under the former s 39L of the *Industry Research and Development Act 1986* (Cth) as varied by the decision of the Respondent of 23 April 2014 under the former s 39S of that Act, is set aside and remitted for reconsideration to the Respondent.
3. The Respondent is not to reconsider the decision under review or make any further decision pursuant to former s 39L of the *Industry Research and*

Development Act 1986 (Cth), including response to the Commissioner of Taxation's request of 6 January 2010 for a certificate under that section, subject to the Commissioner withdrawing or having withdrawn that request.

.....[sgd].....

Justice D Kerr, President

Catchwords

CONCILIATION AGREEMENT – application of s 34D of the *Administrative Appeals Tribunal Act 1975* – conciliation – non-party invited to assist conciliation – agreement reached – consent orders proposed – decision in terms of agreement within the powers of the Tribunal – decision will resolve all matters in dispute – appropriate to make decision in terms proposed – value of non-adversarial dispute resolution procedures and practitioners highlighted

Legislation

Administrative Appeals Tribunal Act 1975: ss 34A, 34D, 35, 43
Industry Research and Development Act 1986: ss 39J, 39L, 39S

Cases

VDRZ and Innovation Australia [2016] AATA 729

REASONS FOR DECISION

Justice D Kerr, President

27 January 2017

1. This proceeding involves a dispute regarding the Applicant's entitlement to research and development tax concessions pursuant to s 39J of the *Industry Research and Development Act 1986* (Cth) (**the Act**). On 21 September 2016 I directed it be referred for conciliation pursuant to s 34A of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) (VDRZ and Innovation Australia [2016] AATA 729).

2. Although the Commissioner of Taxation (**the Commissioner**) was not a party, and had different and separate statutory functions to those of the Respondent under the legislative scheme, the Commissioner had been primarily the entity negotiating with the Applicant. Accordingly my directions envisioned that the conciliation would proceed with the benefit of the Commissioner's participation.

3. Pursuant to those directions conciliation was conducted by Senior Member Lazanas on 12 December 2016 in which agreement was reached between the parties to dispose of all of the matters in dispute.

4. The parties have since requested the Tribunal to make orders by consent to give effect to their agreement. Section 34D of the AAT Act governs that question.

5. The terms of s 34D are as follows:

> **Agreement about the terms of a decision etc**
> (1) If:
>
> > (a) in the course of an alternative dispute resolution process under this Division, agreement is reached between the parties or their representatives as to the terms of a decision of the Tribunal:
> >
> > > (i) in the proceeding; or

(ii) in relation to the part of the proceeding; or

(iii) in relation to the matter arising out of the proceeding;

that would be acceptable to the parties; and

(b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and

(c) 7 days pass after lodgment, and none of the parties has notified the Tribunal in writing that he or she wishes to withdraw from the agreement; and

(d) the Tribunal is satisfied that a decision in the terms of the agreement or consistent with those terms would be within the powers of the Tribunal;

the Tribunal may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant in the particular case.

(2) If the agreement reached is an agreement as to the terms of a decision of the Tribunal in the proceeding, the Tribunal may, without holding a hearing of the proceeding, make a decision in accordance with those terms.

(3) If the agreement relates to:

(a) a part of the proceeding; or

(b) a matter arising out of the proceeding;

the Tribunal may, in its decision in the proceeding, give effect to the terms of the agreement without dealing at the hearing of the proceeding with the part of the proceeding or the matter arising out of the proceeding, as the case may be, to which the agreement relates.

(4) Variation or revocation of decision The Tribunal may vary or revoke so much of a decision as it made in accordance with subsection (2) or (3) if:

(a) the parties, or their representatives, reach agreement on the variation or revocation; and

(b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and

(c) the variation or revocation appears appropriate to the Tribunal; and

(d) in the case of a variation — the Tribunal is satisfied that it would have been within the powers of the Tribunal to have made the decision as varied.

6. I am satisfied that the procedural requirements of s 34D have been complied with. The documentation required has been lodged with the Tribunal and 7 days have passed since that time without notice of withdrawal.

7. The decision that the parties have requested is:[1]

> ...that the Tribunal makes the orders set out [in] the Minutes of Consent Orders attached to the Application.

8. The fundamental requirement under s 34D(1)(d) is that "a decision in the terms of the agreement or consistent with those terms would be within power".

9. The parties have separately filed written submissions each to the effect that the decision they have jointly proposed is of a kind which would be within the Tribunal's power to make.

10. On behalf of the Applicant Ms Stern SC and Ms Broadfoot submits:

> 7. The requirement under s 34D(1)(d) is that the Tribunal must be satisfied that a decision in the terms of the agreement or consistent with those terms would be within power. This invites consideration of the terms of the proposed decision. In this case the proposed decision is in two parts. The first part is as follows:
>
> > "1. The decision under review, being the decisions of the Respondent of 1 April 2011 under former section 39L of the *Industry Research and Development Act 1986* (Cth) as varied by the decision of the Respondent of 23 April 2014 under former section 39S of that Act, is set aside and remitted for reconsideration to the Respondent.
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> 8. That part of the decision contemplates the setting aside of the decision made by the Respondent that is the subject of the application. The parties are agreed that such a

[1] Respondent's submissions, [1.2] and also Applicant's submissions regarding request for decision, [1].

decision would be within power as a consequence of s 43(1)(c) of the AAT Act, which contemplates that the Tribunal may set aside a decision under review and remit the matter for reconsideration.

9. The second part of the proposed decision is as follows:

> "2. The Respondent is not to reconsider the decision under review or make any further decision pursuant to former section 39L of the *Industry Research and Development Act 1986* (Cth), including response to the Commissioner of Taxation's request of 6 January 2010 for a certificate under that section, subject to the Commissioner withdrawing or having withdrawn that request."

10. That part of the decision is in the nature of a direction of the Tribunal and is accordingly also a decision that would be authorized by s 43(1)(c), sub-paragraph (ii) of which contemplates the making of directions when a decision is remitted.

11. The decision therefore "would be within the powers of the Tribunal" and is therefore a decision of a kind contemplated by s 34D(1)d). As to para 2.9 of the Respondent's submission, which states that it is a "matter for the Tribunal to determine" that the Orders dispose of the proceeding in a manner that leaves the Respondent with no duty to re-exercise the power conferred under s 39L of the *Industry Research and Development Act* it is submitted that the test of proposed Order 2 makes it abundantly clear that the Respondent is not obliged to re-exercise the power. Whether the Respondent would ordinarily be required to do so, as suggested by the Respondent's submissions, is respectfully submitted to be a matter that does not need to be determined.

11. On behalf of the Respondent Ms Allars SC submits:[2]

2.1 Pursuant to s 34D(1)(d) the Tribunal needs to be satisfied that a decision in the terms of the agreement, or consistent with its terms, is within the Tribunal's powers.

2.2 The relevant powers of the Tribunal to make final orders are set out in sub-paragraphs (a), (b) and (c) of s 43(1) of the *AAT Act*, each being premised on the Tribunal having "all the powers and discretions" of Innovation Australia. It is not proposed that the powers to affirm or vary in sub-paragraphs (a) and (b) respectively are to be exercised. Pursuant to s 43(1)(c) the Tribunal may make a decision "setting aside the decision under review and: (i) making a decision in substitution for the decision so set aside; or (ii) remitting the matter for

[2] Citations omitted.

reconsideration in accordance with any directions or recommendations of the [AAT]". It is proposed that power be exercised under s 43(1)(c)(ii).

2.3 The Orders are within the Tribunal's power under s 43(1)(c)(ii) of the *AAT Act*. By Order 1 the Tribunal sets aside the Decision and remits the matter for reconsideration. By Order 2 the Tribunal exercises its discretion to make a direction.

2.4 Former s 39L of the *IR&D Act* relevantly provides:

> *(1) The Board may, and shall if requested in writing by the Commissioner to do so, give to the Commissioner a certificate stating whether particular activities that have been or are being carried on by or on behalf of a person were or are research and development activities.*

2.5 Section 39L(1) impliedly confers upon the Commissioner power to make a request to Innovation Australia to issue a certificate. This is a power that may be exercised from time to time as occasion requires, without the Commissioner having any duty to make a request. The Commissioner has implied power to rescind or withdraw a request he has made under s 39L.

2.6 A request made by the Commissioner under s 39L enlivens a duty of Innovation Australia to issue a certificate with respect to particular activities. That duty is coupled with a power to issue the certificate. If the Commissioner withdraws the request before Innovation Australia has performed that duty, then the duty lapses. In the present case the Commissioner made a request on 6 January 2010 to Innovation Australia to issue a certificate under s 39L As acknowledged in Order 2, the Commissioner proposes to withdraw the Request, so that the duty lapses.

2.7 The word "may" in the opening words of s 39L(1) indicates that Innovation Australia also has a general discretionary power under s 39L to issue a certificate. The power may be exercised from time to time.4 There is no necessity for an eligible company seeking to establish an R&D claim to make an application for a certificate. Indeed there is no provision for such an application to be made. Eligible companies are required to self assess. In exercising power under s 39L Innovation Australia acts of its own motion or acts in response to a request made by the Commissioner. If the Commissioner makes a request and then withdraws it before Innovation Australia has issued a certificate, Innovation Australia is not thereby derived of power to issue a certificate. It no longer has a duty to issue a certificate, but continues to have power to issue one.

> 2.8 Ordinarily when the Tribunal makes an order remitting a matter for reconsideration, the decision-maker has a duty to reconsider, by re-exercising the relevant power.5 However Order 2 is intended to reverse any duty of Innovation Australia flowing from Order 1.
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> 2.9 The Respondent therefore understands that once the Tribunal makes Orders 1 and 2, the Respondent will not re-exercise the power under s 39L. In accordance with its duty to assist the Tribunal, the Respondent submits that it is a matter for the Tribunal to determine that the Orders so expressed dispose of the proceeding in a manner that leaves the Respondent with no duty to re-exercise the power.

12. The Tribunal must determine the question of power for itself. The consent of the parties is insufficient. However, I am satisfied on the basis of counsels' submissions that the question should be answered affirmatively. I am satisfied of the correctness of Ms Stern's submissions at [7] and [8] and Ms Allars' submissions at [2.3] to [2.8] inclusive. I adopt the reasoning as expressed in those paragraphs as that of the Tribunal.

13. There is force in Ms Stern's submission that it is strictly unnecessary for the Tribunal to decide the additional question posed in [2.9] of Ms Allars' submissions, but in the event that that contention is incorrect, I am also satisfied that the decision proposed will dispose of the proceeding in a manner that leaves the Respondent with no duty to exercise the power in s 39L(1) of the Act assuming the Commissioner will withdraw his request as proposed order 2 anticipates.

14. I am satisfied that the terms of s 39L(1) expressly distinguish between a (single) specific circumstance in which the Respondent must exercise the power (that is, when requested in writing to do so by the Commissioner) from all other circumstances. In the latter instances the Respondent may exercise, or refrain from exercising the power, having regard to the purposes of the provision read in the context of the statutory scheme in which it is embedded.

15. The scheme in which the provision is embedded provides for favourable tax treatment of research and development. Much of the scheme is set out in the Act. However, that Act is not fully self-executing. The assessment of tax liability remains in the hands of the Commissioner. Thus the statutory scheme in which s 39(L) is located also involves decisions of the Commissioner and the purposes of the revenue. It goes without saying that the Respondent's separate and distinct statutory duties cannot be directed or

constrained by the Commissioner. However, in the present circumstances - in which a decision to not exercise the power is necessary to facilitate the settlement of complex proceedings in this Tribunal on terms which are acceptable **both** to the Respondent and the Commissioner - the Tribunal is satisfied that it would not be contrary to the Respondent's statutory duty for Respondent to agree to refrain from the further exercise of that power. Having entered into that agreement I am satisfied that the Respondent will not have a duty to further exercise the power in s 39L(1) of the Act assuming the Commissioner withdraws his currently operative request.

16. As to the overall appropriateness of giving effect to the parties' agreement (see the concluding words of s34D (1) of the AAT Act) I am content to adopt the submission advanced on behalf of the Applicant:[3]

> …The word "appropriate" is of broad import and enables a wide variety of considerations to be taken into account. The decision sought in this case is appropriate because it is submitted that the Tribunal should assist parties to settle their disputes where possible. It is self-evident that it is desirable that proceedings should be settled. The AAT Act expressly recognises this with the entirety of Division 3 of Part IV of that Act being titled "Alternative Dispute Resolution Processes" and s 34A(3) expressly requiring parties to a proceeding referred to an alternative dispute resolution process to act in good faith. The Tribunal should especially encourage settlement in cases such as the present, where the burden on the Tribunal's resources will be considerable if the matter proceeds and where well-resourced litigants represented by experienced legal practitioners have reached agreement as to the terms of a decision to be made. The agreement has been reached after very detailed evidence from each party has been filed, as well as detailed statements of facts, issues and contentions. Each party has had the opportunity to consider the strengths and weaknesses of its case and that of the other party, and the costs of proceeding. Assisted by the conciliation directed by the Tribunal, for which the parties are grateful, an agreement has been able to be achieved. Consequently it is submitted that the Tribunal should conclude that it is appropriate to make a decision that enables the parties' dispute to be settled. Accordingly the requirements of s 34D(1) are met.

17. The Commissioner has provided the Tribunal with submissions to the same effect. Although the Commissioner is not a party, in circumstances in which the Commissioner

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[3] Applicant's submissions regarding request for decision, [12].

was invited to, and did, assist by participating in the conciliation I am satisfied that the Tribunal may take the Commissioner's submissions into account on a limited basis. That basis upon which I do so is that the Commissioner's submissions are relevant to the parties' common contention that an outcome on the terms proposed will effect a final settlement of all matters in dispute in these proceedings. There being nothing before the Tribunal to suggest the contrary, I so find.

18. Having regard to the findings I have made in respect of the matters the Tribunal must be satisfied of if it is to approve the terms of the proposed decision without the requirement of a hearing pursuant to s 34D of the AAT Act I am satisfied accordingly that I may lawfully make the decision and it is appropriate to do so.

19. The resolution of this matter in this manner has highlighted not only the value of the provisions of the AAT Act that authorise the Tribunal to refer a review to conciliation, but also the skills of the members and conference registrars of the AAT who practice non-adversarial dispute resolution on its behalf. That this agreement could be achieved through conciliation notwithstanding the complex legal and factual issues which otherwise would have required a scheduled three weeks of hearing is to the credit of the parties (and the Commissioner), their legal representatives, and the conciliator, Senior Member Lazanas, who facilitated the outcome.

20. Decisions accordingly.

.....[sgd].....

I certify that the preceding 20 (twenty)
paragraphs are a true copy of the reasons for
the decision herein of Justice D Kerr, President

Associate

Dated 27 January 2017