Case note: *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd* [2017] NSWSC 765

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In the recent decision in *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd*,[1] Hammershchlag J of the Supreme Court of New South Wales refused to refer an action commenced in the Court to arbitration pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW) (the **Act**).

The case arose in the context of two "Reference Service Agreements" between AGL Energy Limited (**AGL**) and Jemena Gas Networks (NSW) Ltd (**Jemena**) (the **Agreements**). The consecutive – and near identical – agreements were imposed pursuant to an Access Agreement authorised by the Australian Energy Regulator pursuant to the *National Gas (New South Wales) Act 2008* (NSW). The Agreements obliged Jemena to provide details of gas meter readings to AGL so that AGL could bill its retail customers.

The underlying dispute between the parties concerned AGL's claims for losses allegedly arising from Jemena's failure to complete meter reading on time and from Jemena's failure to advise AGL of the quantity of gas taken at each delivery point within the time periods provided for in the Agreements.

Following a period of negotiation, on 28 March 2017, Jemena purported to refer the dispute to arbitration pursuant to cl 30.5(a) of the Agreements. Clause 30.5(a) provided that:

> "*In the event that discussions under clause 30.4 fail to resolve the Dispute, each Party expressly agrees to endeavour to settle the Dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) before having recourse to arbitration or litigation*."

On 12 May 2017, AGL commenced proceedings in the New South Wales Supreme Court against Jemena. In response, on 22 May 2017, Jemena filed a motion pursuant to s 8(1) of the Act seeking to refer the matter to arbitration. AGL argued that the Court could not refer the matter to arbitration because cl 30.5(a) was not an arbitration agreement within the meaning of s 7(1) of the Act. This section provides that:

> "*An 'arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*"

In the course of reaching his decision, Hammershchlag J observed – citing the High Court's decision in *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service*[2] – that s

[1] *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd* [2017] NSWSC 765.

[2] *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 301, 325-326.

7(1) of the Act requires there be a "*binding provision for compulsory arbitration, whether as a consequence of an election by a party or otherwise*."[3]

Jemena's principal argument was that by expressly restricting the parties' recourse to arbitration until *after mediation,* cl 30.5(a) necessarily implied that the parties will have recourse to arbitration.[4] In support of this argument it relied upon the decision of the Victorian Court of Appeal in *Manningham City Council v Dura (Australia) Constructions Pty Ltd* (***Manningham***)[5] and the Queensland Court of Appeal in *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2002] 2 Qd R 514 (***Mulgrave***).[6] *Manningham* and *Mulgrave* concerned contracts which made provision for disputes to be referred to "arbitration or litigation". In both cases, it was held that the contracts under consideration contained arbitration agreements and an election for arbitration by one party would prevail over an election for litigation by the other (even if the election for arbitration came second).[7]

Justice Hammershchlag distinguished these decisions on the basis that:

> "*In contrast to the contracts under consideration in Manningham and Mulgrave, there is no "critical" provision in the Agreement for either party to refer the dispute to arbitration or litigation, let alone any indication that arbitration has primacy.*
>
> *[...]*
>
> *Absent provision for referral, the basis upon which the Court both in Manningham and Mulgrave gave primacy to arbitration falls away. One is left only with an inhibition on recourse to arbitration or litigation with no provision, let alone a clear one, that in certain events the parties must arbitrate rather than litigate.*"[8]

A further point of distinction recognised by His Honour in the course of reaching his decision was that in *Manningham* and *Mulgrave* the broader context of the respective agreements promoted a finding that there were agreements to arbitrate.[9] For example, in *Manningham,* an additional clause stated that "*if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may […] refer such dispute to arbitration or litigation*." The contract under examination in *Mulgrave* contained a similarly supportive clause.

In concluding, His Honour observed that the cl 30.5(a) of the Agreements between AGL and Jemena would have trouble operating as an arbitration clause as it would have to be read as allowing a 'first past the post' system for the commencement of either arbitration or litigation or, alternatively, allow a party to commence arbitration subsequent to the commencement of

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[3] *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd* [2017] NSWSC 765, [22].

[4] *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd* [2017] NSWSC 765, [25].

[5] *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] 3 VR 13.

[6] *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2002] 2 Qd R 514.

[7] *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] 3 VR 13, [3] (Winneke P), [12] – [13] (Phillips JA) and [28] and [32] – [33] (Buchanan JA); *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2002] 2 Qd R 514, [8] (McPherson JA) and [73] (Jones J).

[8] *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd* [2017] NSWSC 765, [41] and [43].

[9] *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd* [2017] NSWSC 765, [33] – [38].

litigation and for the arbitration process to prevail.[10] His Honour found both outcomes to be unsatisfactory.[11]

This decision, at first glance, may be seen as going against the pro-arbitration approach that prevails in Australian Courts. However, as this note has sought to demonstrate, each prima facie arbitration clause must be closely examined to determine whether the parties have expressed an intention to refer disputes arising between them to arbitration. As the decisions in *Manningham* and *Mulgrave* show, if the parties have expressed such an intention, the Courts will honour it.

From a practical standpoint, Hammershchlag J's decision serves as a reminder to parties that they need to actively turn their minds to whether any potential disputes are best resolved by arbitration, litigation or some other dispute resolution method. The use of untested boilerplate language clauses can cause further disputes and may not hold up before a Court if a dispute escalates to that level.

[10] *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd* [2017] NSWSC 765, [43].

[11] *AGL Energy Limited v Jemena Gas Networks (NSW) Ltd* [2017] NSWSC 765, [43].