IN THE WESTERN AUSTRALIA GAS REVIEW BOARD

No. 1 of 2004

Re application for review of the decision by the Western Australia Independent Gas Pipelines Access Regulator published on 30 December 2003 to approve its own Access Arrangement for the Dampier to Bunbury National Gas Pipeline owned and operated by the Applicants

Application by:

EPIC ENERGY (WA) NOMINEES PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 081 609 289)

and

EPIC ENERGY (WA) TRANSMISSION PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 081 609 190) Applicants

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REASONS FOR DECISION ON APPLICATION BY WESTERN POWER CORPORATION FOR SECURITY FOR COSTS

Member : Mr R M Edel, Presiding Member
Date of Hearing: 30 September 2004
Date of Decision: 7 October 2004

Appearances:

Counsel for Western Power Corporation	Mr C B Edmonds SC and Mr N P Gentilli
Counsel for Epic Energy	Mr M Buss QC and Mr B Deleuil
Solicitors for Western Power Corporation	Jackson McDonald
Solicitors for Epic Energy	Malleson Stephens Jaques

Cases Referred to in Judgment:

1. *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3

2. *Seabird Corporation Ltd v. National Securities Exchanges Guarantee Corporation Ltd* (1989) 7ACLC 1263

3. *John Fairfax & Sons Ltd v. Police Tribunal of New South Wales* (1986) 5 NSWLR 465 and 476

4. *Logwon Pty Ltd v. Warringah Shire Council* (1993) 33 NSWLR 13 at p.16

5. *Grassby v. The Queen* (1989) 168 CLR 1 at p.16

6. *Reg v. Forbes; ex parte Bevan*;

7. *Marshall v. Watson* (1972) 124 CLR 640 at 649

8. *Magor and St Mellons RDC, the Newport Corp* [1952] AC 189 at 191

9. *Tokyo Mart Pty Ltd v. Campbell* (1988) 15 NSWLR 275 at 283

10. *Application By Epic Energy Australia Pty Ltd* [2002] ACompT 4

11. *The Australian Broadcasting Tribunal, ex parte 2HD (1980) 144 CLR 45 at 49*

12. *Bramwell v. Repatriation Commission* 158 ALR 623 at 636

13. *Re An Arbitration between Unione Stearinerie Lanza and Wiener* [1917] 2 KB 558

14. *Re Sterling; ex-parte Esanda Ltd* 30 ALR 77

15. *Dunkel v. Deputy Commissioner of Taxation (NSW)* 99 ALR 776

16. *Australian Securities Commission v. Bell* 104 ALR 125

17. *Rivermint Pty Ltd v. Bevillesta Pty Ltd* (1999) NSWConv R 55-900

Legislation Referred to in Judgment:

1. Gas Pipelines Access (Western Australia) Act 1998

2. National Third Party Access Code for Natural Gas Pipeline System

3. Interpretation Act 1984 (WA)

4. Administrative Appeals Tribunal Act 1975 (Cth)

5. Arbitration Act 1889 (England)

6. Income Tax Assessment Act 1936 (Cth)

7. Australian Securities Commission Act 1989 (Cth)

Background

1. By an application dated 22 September 2004 Western Power Corporation applied to the WA Gas Review Board for an order that these proceedings be stayed unless the applicants in proceedings no. 1 of 2004 provided security for costs on or before 1 October 2004 in the sum of $750,000.00 or such other sum as may be determined by the Board.

2. Proceeding no. 1 of 2004 constitutes an application by Epic Energy (WA) Nominees Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) and Epic Energy (WA) Transmission Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) (together referred to as **Epic**) pursuant to section 39(1) of Schedule 1 to the Gas Pipelines Access (Western Australia) Act 1998 (the **Law**) for review of the Regulator's decision to approve his own access arrangement in place of an access arrangement submitted for approval by Epic.

3. On 16 April 2004 the Board, by consent, made orders in relation to proceeding 1 of 2004 that Western Power Corporation appear as a respondent and that the Economic Regulation Authority (**ERA**) also be granted leave to appear as a respondent. Additionally, orders were made by consent in relation to proceeding no. 3 of 2004 (in which Western Power Corporation is the applicant) that Epic appear as respondents and the ERA be granted leave also to appear as a respondent.

4. The hearing of proceeding no. 1 of 2004 has been listed for ten days commencing on 11 October 2004 with proceeding no. 3 listed also for ten days to commence on 1 November 2004.

Evidence

5. Western Power filed an affidavit of Neil Philip Gentilli sworn 23 September 2004. That affidavit stated, inter alia that:

   (a) Receivers and Managers and voluntary Administrators were appointed to Epic on 28 April 2004;

   (b) the Receivers of Epic are in the process of negotiating a sale of the Spic companies themselves (which own the Dampier to Bunbury Natural Gas Pipeline) to a consortium known as DAA;

   (c) if Epic is sold to DAA, DAA will not proceed with proceeding no. 1 of 2004.

6. Epic filed an affidavit of Marcel Jon Deleuil sworn 29 September 2004. Mr Deleuil's affidavit stated, inter alia that Western Power did not indicate to Epic that it intended to apply for security for costs in these proceedings until 21 September 2004.

7. There is no evidence before me from which I am able to draw any conclusions as to how likely it is that the sale will be completed and if so, when. In essence, one of two scenarios is likely by the time the hearings are concluded:

   (a) Epic has been sold (and will presumably no longer be in receivership or administration); or

   (b) Epic has not been sold, in which case it may still be in receivership and/or administration.

Submissions of the Parties

8. Western Power submitted, inter alia, that:

   (a) section 38(10) of the Law provides that the Gas Review Board may make such orders (if any) as to costs in respect of the proceeding as it thinks fit;

   (b) the power to award costs must of necessity carry with it the power to order security for costs;

   (c) the present case is distinguishable from the situation in *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3 in that Epic commenced the proceedings in order to overturn the decision of the Regulator and to obtain an access arrangement for the DBNGP which gives it greater financial returns. It is the only beneficiary of the appeal if successful;

   (d) once the plaintiff in legal proceedings is in receivership, it is appropriate that an order for security for costs be made against it: *Seabird Corporation Ltd v. National Securities Exchanges Guarantee Corporation Ltd* (1989) 7ACLC 1263.

9. In a supplementary outline of submissions Western Power further submitted that:

   (a) the powers of the Board in relation to these proceedings makes its functions closely analogous to a court;

   (b) a court or tribunal (such as the Board) which is endowed with a particular jurisdiction has inherent powers which are necessary to enable it to act effectively within that jurisdiction. A court must enjoy such powers in order to enforce its

rules of practice and to suppress any abuses of its process: *John Fairfax & Sons Ltd v. Police Tribunal of New South Wales* (1986) 5 NSWLR 465 and 476 and cases referred to therein;

(c) there is authority that a statutory body has implied rather than inherent powers: *Logwon Pty Ltd v. Warringah Shire Council* (1993) 33 NSWLR 13 at page 16;

(d) in circumstances where an order for costs might ultimately be rendered worthless because of the insolvency of the party ordered to pay costs, the power to order security is a necessary adjunct of the express power to order costs and arising from inherent or implied powers of the Tribunal to prevent abuse;

(e) there is no substance in the defence to the application based on Western Power's delay. Immediately it learnt that the conditional purchasers would not continue the appeal, the application for security was made;

(f) there is no suggestion that the banks who have reported the Receivers are unable to provide security for costs or that such an order would inhibit the prosecution of the of the appeal. The banks wish to obtain the benefits of proceeding with the appeal but without offering protection in the event of an adverse costs order against the applicants.

10. Epic has admitted, inter alia:

(a) the Board does not have power to make an order for security for costs;

(b) there is no express power to make an order for security for security for costs;

(c) the Board does not have any power inherent in the courts of common law and since it is a Tribunal created by statute it can have no power, jurisdiction or authority other than those authorised by the Gas Pipelines Access (Western Australia) Act 1998 (**Act**) or the Law;

(d) the Board's decision in relation to the applications for review of the ERA's decision to approve its own access arrangement is administrative in character. The Board will resolve whether or not the Regulator, in approving his own access arrangement, acted in accordance with the National Third Party Access Code for Natural Gas Pipeline System (**Code**). The Board will not resolve any legal rights of or controversy between [my emphasis] the parties to the applications, namely Epic and Western Power;

(e) the Board does not have implied power to make an order for security for costs. The making of an order for security for costs is not an order "as to" costs in respect of the proceedings. The power conferred by section 38(10) of the Law is confined to making such orders (if any) as the Board thinks fit in respect of costs actually incurred by a party to proceedings before the Board;

(f) even if the Board does have implied power to make an order for security for security, the Board should not make such an order;

(g) the fact that a particular outcome of proceedings before the Board may be seen as conducive (or not conducive) to the commercial interests of the party would not ordinarily provide, of itself, a sufficient reason for making for making a costs order for or against that party: *Duke* (supra). Generally, the power to award costs should be reserved for cases where a party's participation in the proceedings before the Board materially and unnecessarily increases what would otherwise have been the costs of those proceedings: *Duke* (supra);

(h) decisions of the Board will often affect wider interests than those arising between the immediate parties to the particular proceedings;

(i) there has been inordinate and unexplained delay on the part of Western Power in requesting and making an application for an order for security for costs;

(j) Epic's application is due to commence on 11 October 2004 and is not trivial vexatious or oppressive. It is prima facie regular on its face. Further, the Regulator's decision has condemned Epic to insolvency;

(k) in any event, the Board does not have power to order a stay of proceedings, as sought by Western Power. There is no express or implied power to enforce any order as to costs made under section 38(10) and no express or implied power to order a stay if an order for security for costs is not complied with. The fact that the Board could not enforce any order for security made weighs in favour of the interpretation suggested above that the Board does not have power to order security for costs.

Power of the Board to Order Security for Costs

Express Power

11. It is clear from the Act and the Law that the WA Gas Review Board has no express power to make an order for security for costs. Similarly, the WA Gas Review Board has no express power under the Act or the Law or any other law to order a stay of proceedings.

12. The question then arises as to whether the Board has inherent power to order security for costs and/or a stay of proceedings or implied power to do the same.

Inherent Power to Order Security for Costs

13. In *Grassby v. The Queen* (1989) 168 CLR 1 at page 16 Dawson J said, in relation to a Magistrate's Court:

> *"Indeed, in my view, the nature of a Magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. A fortiori that must be the case when its functions are of an administrative character. In Reg v. Forbes; ex parte Bevan, Menzies J pointed out that:*
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> > *"Inherent jurisdiction is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as "inherent jurisdiction", which, as the name indicates, requires no authorising provision. Courts of unlimited jurisdiction have "inherent jurisdiction"".*
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> …
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> *However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise…Those implied powers in many instances serve a function similar to that served by the inherent powers*

exercised by a Superior Court but they are derived from a different source and are limited in their extent".

14. It is clear that the Gas Review Board, as creature of statute, has no inherent jurisdiction. However, it may well have implied powers. The fact that a Tribunal performs administrative functions is no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon the Tribunal: *Grassby* (supra) at page 17.

Implied Power to Grant Orders for Security for Costs

15. The next question for determination is whether the WA Gas Review Board has an implied power to order security for costs. As pointed out in *Grassby* this is essentially a question of statutory construction.

16. It appears that a power can be implied on one of two bases:

(a) from the words of a particular section or sections of the Act or the law themselves; or

(b) on the basis of the principle that a grant of power carries with it everything necessary for its exercise;

Grassby at page 16.

17. Before turning to the factors bearing on the proper construction of section 38(10) of the Law, I wish to briefly examine the authorities on the proper approach to the implication of powers into a statutory such as the Act or the Law.

18. In *Marshall v. Watson* (1972) 124 CLR 640 at 649, Stephen J said:

"Granted that there may seem to be lacking in the legislation powers which it might be thought the Legislature would have done well to include, it is no [part] of the judicial function to fill gaps disclosed in legislation; as Lord Simonds said in Magor and St Mellons RDC v. Newport Corp [1952] *AC 189 at 191, "if a gap is disclosed, the remedy lies in an amending Act" and not in a usurpation of the legislative function under the thin disguise of interpretation.*"

19. In *Tokyo Mart Pty Ltd v. Campbell* (1988) 15 NSWLR 275 at 283, Mahoney JA said:

"Legislative inadvertence may consist, inter alia, of either of two things. The draftsman may have failed to consider what should be provided in respect of a

> *particular matter and so failed to provide for it. In such a case, though it may be possible to conjecture what, had he adverted to it, he would have provided, the court may not, in my opinion, supply the deficiency. In the other case, the legislative inadvertence consists, not in a failure to address the problem and determine what should be done, but in the failure to provide in the instrument express words appropriate to give effect to it. In the second case, it may be possible for the court, in the process of construction, to remedy the omission."*

20. Section 3(1) of the Act provides that the phrase "Gas Pipelines Access Law" means:

    (a) the Law (as enacted or amended from time to time); and

    (b) the Code (as amended from time to time).

21. Section 9 of the Act provides that the Gas Pipelines Access Law applies as a law of Western Australia.

22. It would therefore appear that the Interpretation Act 1984 (WA) applies to the interpretation of the Act and the Law.

23. Section 50(1) of the Interpretation Act provides that:

> *"Where a written law confers upon a person power to do or enforce a doing of any Act or thing, all such powers shall also be deemed to be conferred on the person as are reasonably necessary to enable him to do or to enforce the doing of the act or thing."*

24. The term "*written law*" is defined to mean all Acts for the time being in force and all subsidiary legislation for the time being in force. The term "*Acts*" is defined, relevantly, in the Interpretation Act to mean any Act or Ordinance passed by the Parliament of Western Australia, such Act or Ordinance having been ascended to by or on behalf of Her Majesty.

25. I was not referred to section 50 by the parties during the course of submissions and therefore not referred to any cases on the proper construction of section 50. In the brief time available to me, I have not been able to discover any reported decisions on the proper construction of section 50. However, it appears to be a statutory enactment of the common law rule that a tribunal invested with statutory power may do all things reasonably necessary for the effective exercise of powers expressly conferred on the Tribunal.

26. It is to be noted that section 50(1) expressly refers to the power to enforce the doing of any act or thing. However, I do not regard section 50(1) as granting to the Board an entirely

new power of enforcement of any orders that it might make. Rather, in my view, section 50(1) means that where a written law confers upon a person express power to enforce the doing of any act or thing, then all such powers shall also be deemed to be conferred on that person as are reasonably necessary to enable him to enforce the doing of the act or thing. Again, this does not appear to significantly alter the common law position.

Factors Bearing Upon the Proper Construction of the Act and Law

27. In the preamble to the Act, it is stated that the various Australian States and Territories, together with the Commonwealth of Australia, agreed in November 1997 to the enactment of legislation in the Commonwealth and those States and Territories so that a uniform national framework applies for third party access to all gas pipelines that:

    (a) facilitates the development and operation of a national market for natural gas; and

    (b) prevents abuse of monopoly power; and

    (c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and

    (d) provides rights of access to natural gas pipelines on conditions that are fair and reasonable for the owners and operators of gas transmission and distribution pipelines and persons wishing to use the services of those pipelines; and

    (e) provides for resolution of disputes.

28. One of the functions of the Western Australian Gas Review Board established under section 50 of the Act is to hear applications for review of the Regulator's decision brought pursuant to section 39 of the Law.

29. By section 57(2), the Board is not bound by the rules of evidence and may inform itself as it thinks fit and must act according to equity, good conscience and the substantial merits of the case and without regard to technicalities and forms.

30. Pursuant to section 59(2), the Board must give the parties to proceedings reasonable notice of the time and place of the proceedings. Pursuant to section 59(4), subject to the Gas Pipelines Access (Western Australia) Law, a party must be allowed a reasonable opportunity to call or give evidence, to examine or cross examine witnesses and to make submissions to the Board.

31. By section 38(9) of the Law, in proceedings under section 38 or (by virtue of section 39(6)) in proceedings under section 39, the Board may make an order affirming or setting aside or

varying immediately or as from a specified future date, the decision under review and, for the purposes of the review, may exercise the same powers with respect to the subject matter of the decision as may be exercised with respect to that subject matter by the person who made the decision.

32. By section 38(10) of the Law, the Board may make such orders (if any) as to costs in respect of the proceeding as it thinks fit.

33. By section 38(11) of Schedule 1, the Board may refuse to review a decision if it considers that the application for review is trivial or vexatious.

34. By section 38(12) of Schedule 1, a determination by the Board on the review of a decision has the same effect as if it were made by the person who made the decision.

35. By section 39(1), the following persons may apply to the Board for a review of the Regulator's decision to approve its own access arrangement in place of an access arrangement submitted for approval by a service provider:

    (a) the service provider;

    (b) a person who made a submission to the ERA on the access arrangement submitted by the service provider or drafted by the ERA and whose interests are adversely affected by the decision.

36. Pursuant to section 39(2), an application for review under section 39:

    (a) may be made only on the grounds, to be established by the applicant:

        (i) of an error in the relevant Regulator's finding of facts; or

        (ii) that the exercise of the relevant Regulator's discretion was incorrect or was unreasonable having regard to all the circumstances; or

        (iii) that the occasion for exercising the discretion did not arise; and

    (b) in the case of an application under subsection (1), may not raise any matter that was not raised in submissions to the relevant Regulator before the decision was made.

37. Section 39(5) states that the Gas Review Board, in reviewing a decision under this section, must not consider any matter other than the matters enumerated at section 39(5)(a) to (f) inclusive.

38. The Board does not have any express power to enforce any orders that it makes under section 38(10) of the Law for the payment of costs. Further, there is no express power to order a stay of proceedings.

39. It can be seen from the provisions of the Act and Law set out above that the task to be performed by the Board is a form of limited merits review. As has previously pointed out by the Australian Competition Tribunal, such merits review is for the purpose of the correction of error: *Application By Epic Energy Australia Pty Ltd* [2002] ACompT 4.

40. It is clear that the task undertaken by the Gas Review Board is administrative in nature. An application for review can be brought by a service provider or by a person who made a submission to the Regulator on the access arrangement and whose interests are adversely affected by the decision.

41. An application for review may or may not involve a respondent to those proceedings.

42. In *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3, the Australian Competition Tribunal considered the nature of the power to award costs under section 38(10) of the Law. It had been urged upon the Tribunal that the principles applicable in the case of inter partes litigation should also apply to an application under section 38(1) of the Law for review of a decision by the relevant Minister that the provisions of the Code should apply to a particular pipeline. It was submitted before the Tribunal that the principles applicable to inter partes litigation should apply to the effect that, absent special circumstances and subject to the exercise of the Tribunal's discretion, costs should ordinarily follow the event.

43. The Tribunal said at page 2:

> *"The Tribunal's decision is administrative in character. It does not resolve any legal rights of, or controversy between, AGL and Duke. Nor is the focus of the Tribunal's enquiry upon the narrow commercial interests of particular persons. The decision is concerned with the wider question of whether the coverage criteria are met, so as to justify regulation of the pipeline in aid of the promotion of competition in relevant markets. "Any person" may initiate the administrative process which culminates in the Tribunal's decision. As the proceedings before the Tribunal are not, either in substance or in form, inter partes litigation, there is no particular reason for applying principles developed in connection with such litigation to proceedings before the Tribunal.*
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> *Further, the words "if any" in section 38(10) make it plain that in proceedings before the Tribunal, there is no presumption that orders as to costs will be made at*

all. Whether the Tribunal makes any, and if so, what, order as to costs is entirely within the discretion of the Tribunal. The costs discretion should be exercised having regard to the subject matter, scope and purpose of the statute: are The Australian Broadcasting Tribunal, ex parte 2HD (1980) 144 CLR 45 at 49; Oshlack (supra) at page 81.

Whether the statutory criteria for coverage of a pipeline are met will often be, as the present case illustrates, a matter on which there can be different points of view and legitimate differences of opinion. It is important that the Tribunal be acquainted with all factors which are potentially relevant to its determination. Responsible intervention by interested parties who have a worthwhile contribution to make ought not be discouraged by fear of adverse costs orders. The review process benefits from such participation. Nor should a pipeline operator be discouraged from exercising its statutory right of review by fear that costs orders may be made against it if unsuccessful, potentially in favour of multiple parties. For these reasons, the adoption of a general rule applicable in the case of inter partes litigation to the proceedings before the Tribunal would not be conducive to the effective discharge by the Tribunal of its statutory functions.

Costs orders should only be made in proceedings before the Tribunal where there are circumstances which justify the making of an order. The fact that a particular outcome of proceedings before the Tribunal may be seen as conducive (or not conducive) to the commercial interests of a party, would not ordinarily provide, of itself, a sufficient reason for making a costs order for (or against) that party. In principle, the power to award costs should be exercise sparingly, and not so as to discourage participation in the review process. Generally the power to award costs should be reserved for cases where a party's participation in the proceedings before the Tribunal materially and unnecessarily increases what would otherwise have been the costs of those proceedings."

44. In my view, those observations also have general application to an application for review under s39(1) of the Law. Although Epic seeks to prosecute this application for review for its own commercial benefit and Western Power seeks to oppose it (presumably) for its own commercial benefit, the proceedings are not, either in substance or in form, inter partes litigation. The proceedings constitute an application by Epic for review of a decision made by the Regulator. Interested parties may intervene (if granted leave) on the basis that they have an interest in the outcome and may be able to assist the Board by ensuring that all relevant material and arguments are placed before it. The Board, if it finds any or all of the

appeal grounds are made out, may affirm or set aside or vary the Regulator's decision. Accordingly, the principles applicable to inter partes litigation should not necessarily apply to applications for review of a decision under s39(1) of the Law.

45. This consideration, coupled with the remarks made in *Duke* about the importance of not discouraging or frustrating the exercise of statutory rights of review, suggests that it is not clear that Parliament would have intended (had it dealt with the matter expressly) that the Board should have the power to order security for costs or to order a stay of proceedings if such security was not provided.

46. A further factor to be considered is the fact that the relevant authorities suggest that it is unlikely that a power to order a stay of proceedings can be implied: *Grassby*; *Bramwell v. Repatriation Commission* 158 ALR 623 at 636.

47. In *Bramwell*, the Federal Court decided that the Administrative Appeals Tribunal lacked any implied power under the Administrative Appeals Tribunal Act 1975 (Cth) to prevent there being an abuse of process. In *Grassby*, the High Court decided that a magistrate engaged in the conduct of committal proceedings, involving as they do the exercise of administrative and not judicial functions, had no implied (or inherent) power to stay those proceedings as an abuse of process.

48. There is nothing in the Act or the Law that would lead me to a different conclusion in relation to the Western Australian Gas Review Board.

49. The researches of counsel and my own enquiries have failed to reveal any reported decision where a statutory tribunal has been found to have an implied power to order security for costs.

50. However, there are cases dealing with the question of whether an arbitrator has implied power to order security for costs on the basis that he has been granted an express power under statute to make costs orders in relation to the arbitral proceedings before him. In *Re An Arbitration between Unione Stearinerie Lanza and Wiener* [1917] 2 KB 558, the question arose as to whether an arbitrator had power to order a party to an arbitration to give security for the costs of the other party to the arbitration. Although the reference to arbitration was contained in an agreement between the parties, the Arbitration Act 1889 (England) applied to the conduct of the arbitration. Section 2 of that Act gave the arbitrator complete discretion as to whether any order for costs should be made and if so, in what manner those costs or any part thereof should be paid. The arbitrator also had power to tax or settle the amount of costs to be paid. Further, the statute provided that the parties to the

arbitration were to submit to be examined by the arbitrators, produce books, documents and so forth within their power, and do all other things which during the proceedings the arbitrators or umpire may require.

51. It was held by the court that these sections did not give the arbitrator any implied power to order security for costs.

52. Although the position of the Board is different to that of an arbitrator, the powers of each in relation to the ability to make orders as to costs seems similar. Again, this consideration tends to weigh against an implication of a power in the Board to order security for costs.

53. Although there are no reported cases which deal with whether statutory tribunals have the power to order security for costs on the basis of an implied power, there are many cases dealing with the more general topic of implication of powers by statutory tribunals. It is important to note that each such case turns on its own facts. Whether a power can be implied on the basis that it is reasonably necessary for the exercise of powers expressly given to the tribunal will depend upon the construction of the particular statute. However, it is possible to gain some insight as to how Courts have approached the issue of whether certain powers are considered to be reasonably necessary for the exercise of powers expressly given to tribunals by examining examples of such cases:

(a) A magistrate performing an administrative function in conducting committal proceedings does not have power to order a stay of proceedings in order to avoid an abuse of process: *Grassby* (supra).

(b) The Administrative Appeals Tribunal does not have power to avoid an abuse of process by ordering a stay of proceedings: *Bramwell* (supra).

(c) In *Re Sterling; ex-parte Esanda Ltd* 30 ALR 77, the Federal Court of Australia was called upon to decide whether it had any implied power to set aside a bankruptcy notice where it was not given any express power to do so under the Bankruptcy Act 1966 (Cth). Pursuant to s41(6A) of the Bankruptcy Act, the Court had power to extend the time for compliance with the requirements of a bankruptcy notice where an application had been filed to set aside the bankruptcy notice. The Court held that the power expressly conferred on it in s41(6A) to extend the time for compliance with the requirements of a bankruptcy notice where an application had been filed to set it aside carried with it the power to set aside the notice itself on the basis that the grant of an express power by Parliament carried with it the power necessary for its performance or execution.

(d) In *Dunkel v. Deputy Commissioner of Taxation (NSW)* 99 ALR 776, the question arose as to whether an officer employed by the Deputy Commissioner of Taxation could conduct an examination under the Income Tax Assessment Act 1936 (Cth) whilst there was present, without the consent of the applicant, counsel for the Deputy Commissioner who was present in order to give advice on any claims for legal professional privilege that might be claimed over documents. The Deputy Commissioner of Taxation had express power pursuant to section 264(1)(b) of the Income Tax Assessment Act to require any person to attend and give evidence before him or any officer authorised by him in that behalf and to produce all books, documents and other papers in his custody or under his control relating thereto. It was held by the Court that:

(i) a statutory power of this kind should be construed as impliedly authorising everything which can fairly be regarded as incidental or consequential to the power itself;

(ii) the doctrine is not to be applied narrowly;

(iii) the Deputy Commissioner was entitled to conduct the examination in the presence of an officer duly authorised by him for that purpose and further to be represented by counsel at that hearing.

(e) In *Australian Securities Commission v. Bell* 104 ALR 125, it was held that the power under section 22(1) of the Australian Securities Commission Act 1989 (Cth) for an inspector employed by the Australian Securities Commission to give directions about who may be present during an examination included a power to terminate the right of a particular lawyer to be present in cases where there were grounds for terminating that right.

(f) By way of contrast, in *Rivermint Pty Ltd v. Bevillesta Pty Ltd* (1999) NSWConv R 55-900, the Commercial Tribunal of NSW was held to have jurisdiction to make an order for security for costs. However, the basis on which it was found to have such jurisdiction was section 18(3) of the Tribunal Act which provided that the Chairman of the Commercial Tribunal had the same power as was conferred by the District Court Act on a District Court judge. Accordingly, the Tribunal looked to the District Court Rules to define its jurisdiction to order security for costs and found, on that basis, that it had such a power.

54. It can be seen from the cases mentioned above that where a power has been implied, that power is closely connected to the exercise of the power expressly granted to the Court or tribunal in question. In other words, these cases appear to fall within the second category of legislative inadvertence referred to by Mahoney JA in *Tokyo Mart Pty Ltd v. Campbell* above – that is, the legislative inadvertence in those cases appears to consist not in a failure to address the problem and determine what should be done, but in the failure to provide in the instrument express words appropriate to give effect to it.

Decision

55. Having taken the matters set out above into account, I am unable to imply in the language of section 38(10) of the Law a power to order security for costs.

56. Further, in my view, it is not reasonably necessary for the effective exercise of the Board's power to make an order as to costs under section 38(10) that the Board also have power to order security for costs. Having regard to the nature of the Western Australian Gas Review Board, its powers, the nature of the review to be undertaken by it pursuant to section 38 and section 39 and the other observations set out above, it does not seem to me that the power to award security for costs is reasonably necessary to enable the Board to make an order for costs.

57. The Board is quite able to make orders for costs without having a power to make orders for the provision of security for costs.

58. Further, it appears to me that the Western Australian Gas Review Board does not have any power to order a stay of proceedings pending the provision of any security for costs, as sought by Western Power.

59. That is not to say, however, that a power to order security for costs and express powers to enforce the orders of the Board through the imposition of a stay or proceedings or some other mechanism would not be convenient. However, in my view, if Parliament had intended that the Gas Review Board should have such power, it would have expressly provided for it and would have expressly made provision for the Board to order a stay or some other method of enforcing such an order.

60. In the circumstances, I have come to the view that there is insufficient justification for implying a power to award security for costs. It seems to me that the lack of express power to order security for costs or a stay of proceedings is an example of the first type of legislative inadvertence referred to by Mahoney JA in *Tokyo Mart Pty Ltd v. Campbell* (supra). That is, it appears that Parliament has not given consideration to what should be

provided in relation to applicants for review who may be unable to meet any costs orders that might ultimately be made against them and has also not given consideration to the issue of enforcement of any orders that might be made by the Board through a stay of proceedings or some other mechanism. In the present case, the gap left by Parliament's failure to give consideration to these matters and to make any express provision for them is simply too large to be remedied by the implication of a power to award security for costs and/or to grant a stay of proceedings or some other mechanism for enforcing the Board's orders.

Merits of Application for Security for Costs

61. The conclusion I have reached above that the Western Australian Gas Review Board does not have the power to order security for costs makes it unnecessary for me to consider the merits of Western Power's application.

Orders

62. Accordingly, for the reasons set out above, Western Power's application for security for costs dated 22 September 2004 is dismissed.

Dated the day of 2004

RM EDEL
PRESIDING MEMBER
WESTERN AUSTRALIAN GAS REVIEW BOARD
APPEAL NO 1 OF 2004