

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

**REASONS FOR DECISION CONCERNING APPLICATION
OF PARLIAMENTARY PRIVILEGE TO DOCUMENTS**

Member : Mr RM Edel, Presiding Member
Dr F Harman, Member
Mr EA Woodley, Member
Date of Hearing: 15 October 2004
Date of Decision: 18 October 2004

Appearances:

Counsel for Western Power Corporation	Mr WS Martin QC and Mr P Walton
Counsel for Epic Energy	Mr C L Zelestis QC
Solicitors for Western Power Corporation	Jackson McDonald
Solicitors for Epic Energy	Mallesons Stephen Jaques

Cases Referred to in Judgment:

1. *Prebble v Television New Zealand* [1995] 1 AC 321
2. *Amann Aviation Pty Ltd v The Commonwealth* (1988) 19 FCR 223
3. *Hamsher v Swift* (1992) 33 FCR 545
4. *R v Richards; ex parte Fitzpatrick and Browne* [1955] 92 CLR 157 at 163-164
5. *Laurance v Katter* (1996) 141 ALR 448 at 481

6. Mees v Roads Corporation [2003] 128 FCR 418
7. Erglis v Buckley [2004] QCA 223
8. Comalco Ltd v Australian Broadcasting Corporation (1983) 50 ACTR 1 at 5
9. Henning v Australian Consolidated Press Ltd [1982] 2 NSWLR 374
10. Re Findlay [1985] 1 AC 318 at 326-328
11. R v Home Secretary, Ex parte Hindley [2001] AC 410
12. R v Home Secretary; Ex parte Brind [1991] AC 696 at 754-756
13. R v Home Secretary (2002) QB 129 at 144-148
14. Pepper v Hart (1993) AC 593 at 638

Legislation Referred to in Judgment:

1. Parliamentary Privileges Act 1891 (WA)
2. English Bill of Rights 1689
3. Parliamentary Privileges Act 1987 (Cth), section 16

Background

1. During the course of its submissions to the Board on 12 October 2004, Epic Energy (WA) Nominees Pty Ltd (Receivers & Managers Appointed) (Administrators Appointed) and Epic Energy (WA) Transmission Pty Ltd (Receivers & Managers Appointed) (Administrators Appointed) (together referred to as **Epic**) referred to a statement made on 10 March 1998 by the then Minister for Energy to the Western Australian Legislative Assembly.
2. Western Power objected to the introduction of the Ministerial statement on the basis that it constituted a breach of parliamentary privilege. Section 1 of the Parliamentary Privileges Act 1891 (WA) provides:

“The Legislative Council and the Legislative Assembly of Western Australia respectively, and the Committees and Members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities and powers as, and the privileges, immunities, and powers of the said Council and Assembly, and of the

Committees and Members thereof, respectively, are hereby defined to be the same as are, at the time of the passing of this Act, or shall hereafter for the time being be, held, enjoyed and exercised by the Commons House of Parliament of Great Britain and Ireland and by the Committees and Members thereof, so far as the same are not inconsistent with the said recited Act or this Act, whether such privileges, immunities or powers are or shall be held, possessed, or enjoyed by custom, statute or otherwise. Provided always, that with respect to the powers hereinafter more particularly defined by this Act, the provisions of this Act shall prevail.”

3. It was common ground amongst the parties that this section enshrined the privilege of freedom of speech contained in Article 9 of the English Bill of Rights 1689. (There was some doubt as to whether the correct date is 1688 or 1689, but that is not material for present purposes.) Article 9 provides that:

“The freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court of place out of Parliament.”

4. Counsel for Western Power submitted that the privilege extended to extracts from Hansard that Epic Energy had included in its bundle of documents that it wished to place before the Board for the purpose of these proceedings, and to the tender of two reports on the sale of the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**) that were presented to Parliament (**the Reports**).
5. Counsel for Epic outlined the purpose for which the material consisting of statements to Parliament or reports presented to Parliament (**the Parliamentary Material**) was to be used by Epic. Counsel for Epic stated:

“We say the public interest arises from the decisions which the Minister made in conducting a sale under legislative authority. We don’t say the public interest lies merely in what the Minister asserted the public interest to be. We go to what the Minister said, because it explains the decisions he made and the reasons he made the decisions, but it is the decisions which reflect the public interest – I put this, I hope, very clearly in opening, that the Minister decided where the balance would lie in achieving the objectives which the Minister, through the Committee, framed for the sale, and so that involved a decision on competing public interests.”

6. Counsel proceeded with his explanation:

“It’s the Minister explaining to the Parliament what his decision was. So there are a couple of things that follow from that. The first is that we are not seeking to use the Minister’s statement as itself a direct statement of the public interest. We are using it as an explanation of a decision which involved a decision about matters of policy and public interest, and secondly of course, even if we can’t go to the Hansard material which we do seek to go to, one can draw inferences as to the public interest decision that was made from the very fact of what was done and what we’ve already put in.

...

We are not seeking to use what the Minister said as direct evidence of the public interest. We are simply seeking it to explain decisions which he had made earlier.”

(see pages 133 – 135 of the Transcript, 12 October 2004).

7. One of Epic’s central submissions in these proceedings relates to the reasons that the State of Western Australia sold the DBNGP and what the State was seeking to achieve in that sale. Epic seeks to rely on the statements and material presented to Parliament in support of that submission.
8. With the agreement of all of the parties, the Board wrote to the Speaker of the Legislative Assembly and the President of the Legislative Council setting out the background, describing the nature of the objection taken and the issues arising, and enclosing the relevant materials, including copies of the documents in question, an extract of the relevant portion of the transcript, and a copy of Western Power’s submissions in support of its objection.
9. Parliament responded by a letter dated 14 October 2004 sent by Mr Peter McHugh, the Clerk of the Legislative Assembly, on behalf of the Speaker of the Legislative Assembly. Mr McHugh’s letter stated, inter alia, that:

“The Speaker is of the clear view that it would not be lawful for any statement made in the course of the proceedings in the Legislative Assembly to be tendered in evidence to the Western Australian Gas Review Board for any purpose other than to establish the fact that a statement was made. It could not be used, for example, as evidence of the view of the Member who spoke, nor could it be used to contrast with or support statements made by others or even that same Member on another occasion.

Parliamentary Privilege in Western Australian is identical to that which applies from time to time in the House of Commons of the United Kingdom Parliament as the Western Power submission, referred to earlier, outlined.

For all practical purposes, the enunciation of the law of privilege on this matter which is contained in section 16 of the Parliamentary Privileges Act 1987 (Cth) can be regarded as the situation which applies in Western Australia. The statement in section 16(3) is referred to with approval in Prebble v Television New Zealand [1995] 1 AC 321.”

10. The letter went on to make it clear that no waiver of any Parliamentary privilege found to exist would be possible.

Issues

11. Section 16(3) of the Parliamentary Privileges Act 1987 (Cth) provides:

“In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;*
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or*
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.”*

12. Although the Parliamentary Privileges Act 1987 applies only to the Commonwealth Parliament and the Parliamentary Privileges Act 1891 (WA) does not contain any words equivalent to section 16(3), it has been held by the Privy Council that section 16(3) is declaratory of the effect of Article 9 of the Bill of Rights 1689 and that section 16(3) contains the true principle to be applied: Prebble v Television New Zealand (supra).
13. The same has been held in Australia. In Amann Aviation Pty Ltd v The Commonwealth (1988) 19 FCR 223, Beaumont J said (at 231):

“The purpose and effect of section 16 of the Act is, as section 16(1) states, to avoid any doubts which might otherwise have arisen. The provisions of section 16(3), in

my view, are, in substance, declaratory of the position in England and in Australia before the enactment of the Act.”

14. It is clear that it is for the Board to decide whether Parliamentary privilege applies to the documents in question in this case: *Hamsher v Swift* (1992) 33 FCR 545.
15. However, it should also be noted that the privileges of judging the contempt and committing by general warrant where a contempt is found to have been committed are decisions to be made by the Parliament, not the courts: *R v Richards; ex parte Fitzpatrick and Browne* [1955] 92 CLR 157 at 163-164.
16. Where a warrant is produced to a court, it would be regarded by the court as conclusive of what it states, namely, that a breach of privilege had been committed and that the House, acting upon that view, had directed that the persons concerned should be committed. Ordinarily, it would not be possible to go behind that warrant: *R v Richards; ex parte Fitzpatrick and Browne* (supra) at page 164. If the Speaker’s warrant is upon its face consistent with a breach of an acknowledged privilege, it is conclusive, notwithstanding that the breach of privilege is stated in general terms: *R v Richards; ex parte Fitzpatrick and Browne* at page 164.
17. Epic submitted that the proposition that section 16(3) is declaratory of the common law has been doubted in Australia, and drew the Board’s attention to *Laurance v Katter* (1996) 141 ALR 448 at 481 and *Mees v Roads Corporation* [2003] 128 FCR 418. However, in *Laurance* of the two judges casting doubt on section 16(3), one was of the view that the section did not operate with respect to the conduct of defamation suits by reason of its improper interference with constitutional freedoms to criticise and otherwise discuss political matters. The criticism did not appear to address the issue whether section 16 contained an accurate summary of the privilege. The President of the Court was of the view that section 16(3) was valid.
18. In our view, section 16 of the Parliamentary Privilege Act 1987 (Cth) appears to be accepted as a proper statement of the content of parliamentary privilege in Western Australia.
19. In this context, it is important to note the letter from Mr McHugh dated 14 October 2004. Whilst in these proceedings and for the purpose of determining this application it is for this Board to decide whether the privilege applies or not, the letter would appear to be evidence of Parliament’s view of the content of that privilege and confirms that in the view of the

Speaker of the Legislative Assembly, section 16 “*can be regarded as the situation which applies in Western Australia*”.

20. If section 16(3) of the Parliamentary Privileges Act 1987 (Cth) is declaratory of the effect of Article 9 of the Bill of Rights 1689, then the principles in section 16 can be applied as a proper statement of the privilege in Western Australia.
21. The next issue is whether in light of the content of Article 9 of the Bill of Rights 1689, Epic can rely on the Parliamentary material.
22. In *Hamsher v Swift* (1992) 33 FCR 545, an issue arose as to whether applicants seeking review of decisions and conduct of the Minister for Immigration and his agents could rely upon a statement made by the Minister to the Commonwealth Senate concerning the applicants. The applicants sought to use the Ministerial statement as evidence of a decision made on 6 October 1989 and also sought to use it to support a characterisation of the Minister’s disposition of their application for permanent residence as a deferral rather than a refusal of those applications.
23. The Federal Court held (at page 564) that:
 - (a) to use the Minister’s statement to the Senate to support a characterisation of the Minister’s disposition of the applicant’s application for permanent residence as a deferral rather than a refusal of those applications would involve the use of evidence of the Minister’s statement to the House for the purpose of establishing his intention or otherwise inviting the drawing of inferences from the proceedings in the Parliament of which that statement formed a part; and
 - (b) such a use of the statement is prohibited by section 16(3)(b) and (c).
24. The Court also held that use of the Minister’s statement to establish an inference that the Minister made a decision on the date of the statement to the Senate would contravene section 16(3)(c).
25. The authorities make it clear that the restriction contained in Article 9 of the Bill of Rights 1689 does not prevent the admission of evidence as to what was said in the Parliament but does prevent the substance of what is said in Parliament being the subject of any submission or inference: *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1 at 5.

26. The privilege contained in Article 9 will prevent any enquiry into the motives and intentions of Members of Parliament in relation to anything they said or did in Parliament: Henning v Australian Consolidated Press Ltd [1982] 2 NSWLR 374.
27. Epic referred to a number of decisions which it submitted demonstrated that Article 9 had been held not to prohibit consideration of Parliamentary statements as to the nature and scope of Government policy, where judicial review is sought of ministerial or administrative action and Government policy is relevant to the conduct or decision under review: In re Findlay [1985] 1 AC 318 at 326-328; R v Home Secretary, Ex parte Hindley [2001] AC 410. Epic also referred to decisions which it submitted demonstrated that Article 9 had been held not to prohibit consideration of a Minister's statement to Parliament as to reasons for administrative action: R v Home Secretary; Ex parte Brind [1991] AC 696 at 754-756; R v Home Secretary (2002) QB 129 at 144-148; Pepper v Hart (1993) AC 593 at 638. However, some of those decisions appeared to go no further than demonstrating that regard may be had to Hansard in order to assist in the task of statutory interpretation.
28. It should also be noted that all of the cases on which Epic rely in this regard are decisions of English courts and not binding on the Board. There were no Australian authorities cited in support of these propositions and it may be that there is some divergence between Australia and the United Kingdom on the issue.

Decision

29. It is clear from statements made by Epic's counsel that it wishes to rely upon the Ministerial statements and Hansard material to explain decisions made by the Minister about matters of policy and public interest. That would appear to involve one or more of the following matters:
- (a) reliance on the truth, motive or intention of anything forming part of the proceedings in Parliament;
 - (b) establishing the credibility, motive or intention of any person; or
 - (c) inviting the drawing of inferences or conclusions wholly or partly from anything forming part of the proceedings in Parliament.
30. In our view, similar reasoning applies to the Reports presented to the Parliament mentioned above. Further, it should be noted that section 16(2) of the Commonwealth Parliamentary Privileges Act has the effect of including documents presented or submitted to Parliament

within the ambit of the privilege. As stated above, the Speaker of the Legislative Assembly is of the view that section 16 of the Parliamentary Privileges Act 1987 (Cth) accurately summarises the ambit of Article 9 of the Bill of Rights 1689 in Western Australia. This would appear to include section 16(2).

31. As such, use of the Parliamentary material is likely to constitute a breach of Parliamentary privilege and the documents will therefore not be considered by the Board in these proceedings.

Dated the day of 2004

MR RM EDEL
PRESIDING MEMBER

DR F HARMAN
MEMBER

MR EA WOODLEY
MEMBER

WESTERN AUSTRALIAN GAS REVIEW BOARD
APPEAL NO 1 OF 2004