JURISDICTION	**: WESTERN AUSTRALIAN GAS REVIEW BOARD**
LOCATION	**: PERTH**
CORAM	**: MR CKS MERRIAM, PRESIDING MEMBER** **: MR J KUEHNE, EXPERT MEMBER** **: MR D KIRK-BURNNAND, EXPERT MEMBER**
HEARD	**: 6 OCTOBER 2000**
DELIVERED	**: 6 OCTOBER 2000**
FILE NO/S	**: APPEALS 1 AND 2 OF 2000**
BETWEEN	**: ALINTAGAS NETWORKS PTY LTD**
	AND
	COORDINATOR OF ENERGY
AND BETWEEN	**: ALINTAGAS SALES PTY LTD**
	AND
	COORDINATOR OF ENERGY

Legislation:

Energy Coordination Act 1994
Gas Pipelines Access (Western Australia) Act 1998

Result:

Respondent's application to dismiss Applicants' applications for review dismissed.

Representation:

Counsel:

Applicants	:	Mr MJ Buss QC and Mr MT McKenna
Respondent	:	Mr GTW Tannin and Ms CL Bathurst

Solicitors:

Applicants	:	Hunt & Humphry
Respondent	:	Crown Solicitor for the State of Western Australia

Case(s) referred to in judgement(s):

Attorney General (NSW) v. Wentworth (1988) 14 NSWLR 481 at pp. 487-491.
Barzidah v. Minister for Immigration and Ethnic affairs (1997) 72 FCR 337 at p.341.
Sarich v. Federal Commissioner of Taxation (1978) 78 ATC 4,646 at 4,652.
X v. Minister for Immigration & Multicultural Affairs [2000] FCA 372 at [2].

Case(s) also cited:

Azevedo v. Secretary, Department of Primary Industries and Energy (1992) 106 ALR 683 at 696.
Burton v. President of the Shire of Bairnsdale (1908) 7 CLR 76 at p. 92.
Drake v. Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 at 589, 599.
Hospital Benefit Fund of Western Australia Inc v. Minister for Health, Housing and Community Services (1992) 111 ALR 1 at 11.
Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40.
Peruvian Guano Co v. Bockwoldt (1983) 23 Ch D 225 at p.230.
Project Blue Sky Inc v. Australian Broadcasting Authority (1978) 72 ALJR 841 at 860-861.
Searle Australia Pty Ltd v. Public Interest Advocacy Centre (1992) 108 ALR 163 at 166.
State Electricity Commission of Victoria v. Rabel [1998] 1 VR 102 at pp. 104-105.
TA Miller Limited v. Minister of Housing and Local Government [1968] 1 WLR 992 at 995.
Tasker v. Fullwood [1978] 1 NSWLR 20 at 23-24.
The Queen v. Gray; Ex parte Marsh (1985) 157 CLR 351 at pp.380-381.
Re Williams and Australian Electoral Commission and Ors (1995) 38 ALD 366 at 372-374.

ISSUES

1 The issues in this application are whether the applications for review are valid if they do not disclose the grounds for review in the application, whether the applications for review are vexatious if the applications disclose no grounds for review, and whether the applications for review may be amended.

APPLICATION

2 The present application to dismiss the applications for review is brought by the Respondent in the appeals (the Coordinator of Energy). On 19 September 2000 the Respondent handed up an outline of submissions at the start of the Preliminary Hearing.

RESPONDENT'S SUBMISSIONS

3 The Respondent's submissions in support of the application include:

- One of the essential prerequisites for a valid application for review must be that the applicant discloses the grounds for review in the application. Otherwise, the application is not an application for review.

- The jurisdiction to make a determination and to exercise those powers conferred by Section 11ZH of the Energy Coordination Act 1994 ("the EC Act") depends on whether that jurisdiction is properly invoked.

- In the absence of grounds for review in the application, there is no basis on which the Board's jurisdiction may be invoked to exercise the powers conferred by Section 11ZH(4), (9) and (11) of the EC Act within the prescribed limits of time provided by Section 11ZH(3).

- The Applicants did not comply with Section 11ZH(2) of the EC Act in that no grounds for review were contained in the application. The jurisdiction of the Board has not been properly invoked. Accordingly, no valid application for review has been made within the prescribed time.

- The application for review should be dismissed as vexatious since the application discloses no grounds for review, and, accordingly, the application for review is unsustainable.

- No amendment of the application for review has been sought and none should be permitted because there is no provision in the EC Act to permit amendment of the application for review or to extend the time within which an application for review may be lodged.

- No amendment should be allowed because this would cause prejudice to the Respondent due to the strict time limit within which the application for review must be determined (Section 11ZH(3) and (4) of the EC Act).

- Unless an extension is granted within which an application for review may be lodged (and there is no power to do this), an amendment of the application for review ordered or allowed now would take the application out of time under Section 11ZH(2) of the EC Act.

APPLICANTS' SUBMISSIONS

4 The Applicants' submissions opposing the application include:

- The applications for review made by AlintaGas comply with Section 11ZH(2) of the EC Act; in particular:

  (a) each application is made by a person adversely affected by a decision by the Coordinator;
  (b) the relevant decision the subject of each application is the Coordinator's decision in relation to some of the conditions in the licences;
  (c) each application is in terms an application to the Board for a review of the relevant decisions; and
  (d) each application was made within 14 days after receiving notice in writing of the relevant decision from the Coordinator.

- Section 11ZH does not require that:

  (a) the application for review will be in any particular form (and there are no regulations under the Act prescribing any such form); or
  (b) the applicant for review specify any grounds for review in his application (and there are no regulations under the Act which require grounds of review to be specified).

- Unless the Board otherwise determines, the function of the Board is to hear the present applications for review de novo, and to reach a view for itself in relation to the relevant considerations imposed by the Coordinator, untrammelled by the view taken by the Coordinator.

- No provision of the Gas Pipelines Access (Western Australia) Act 1998 ('the GPA (WA) Act") or the EC Act requires an applicant for review to specify any grounds in his application.

- Further, no provision of the GPA (WA) Act or the EC Act specifies the form or contents of an application for review.

- An application for review will not be invalid if it fails to specify any grounds of review.

- If there is a statutory requirement that an applicant for review specify the grounds of review in his application, failure to comply with that requirement does not make the application invalid.

- The Board has power to require any party appearing before it to file with the Board and serve on the other party a written outline of its contentions and arguments in relation to an application for review; for example, in the case of the present applications, the Board may order each of the parties to file and serve such an outline in relation to the relevant conditions imposed by the Coordinator. See Sections 57, 58 and 59 of the GPA (WA) Act.

- Proceedings are properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

- There is no basis for any finding that the applications for review made by AlintaGas are vexatious.

- The authorities cited on behalf of the Coordinator in relation to the 'grounds of review' issued do not assist his case.

- For example, the provisions for review in the Migration Act 1958 (Cth) are materially different from the provisions for review in the EC Act.

RELEVANT STATUTORY PROVISIONS

5 Section 11ZH of the EC Act relevantly provides:

> "(2) A person adversely affected by a decision of the Coordinator-
>
> …
>
> (d) as to any term or condition of a licence
>
> …
>
> may apply to the Board for a review of the decision within 14 days after receiving notice in writing of the decision from the Coordinator.
>
> (3) The Board must make its determination on the review within 90 days after receiving the application for review.
>
> (4) The Board may extend, or further extend, the period referred to in subsection (3) by a period of 30 days if it considers that the matter cannot be dealt with properly without the extension either because of its complexity or because of other special circumstances.
>
> (5) If the Board extends the period, it must, before the end of the period, notify the applicant of the extension and the reasons for it.
>
> …
>
> (9) In proceedings under this section, 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 Coordinator.

…

(11) The Board may refuse to review a decision if it considers that the application for review is trivial or vexatious.

(12) A determination by the Board on the review of a decision has the same effect as if it were made by the Coordinator.

(13) A reference in Part 6, Division 2 of the ***Gas Pipelines Access (Western Australia) Act 1998*** to proceedings before the Board includes a reference to proceedings under this section."

6 Sections 57, 58 and 59 of the GPA (WA) Act relevantly provide:

"57

(1) Subject to the Gas Pipelines Access (Western Australia) Law and any determination of the Board, proceedings before the Board are to be conducted by way of a fresh hearing and for that purpose the Board may receive evidence given orally or, if the Board determines, by affidavit.

(2) The Board-

(a) is not bound by the rules of evidence and may inform itself as it thinks fit; and

(b) must act according to equity, good conscience and the substantial merits of the case and without regard to technicalities and forms.

(3) Questions of law or procedure arising before the Board are to be determined by the presiding member and other questions by unanimous or majority decision of the members.

58.

(1) The Board may, for the purposes of proceedings before the Board:

(a) by summons signed on behalf of the Board by a member of the Board require the attendance of a person before the Board;

(b) by summons signed on behalf of the Board by a member of the Board require the production before the Board of any relevant books, papers or documents;

(c) inspect any books, papers or documents produced before it and retain them for such reasonable period as it thinks fit and make copies of any of them or any of their contents;

(d) require any person to make an oath or affirmation to answer truly all questions put by a member of the Board, or by any person appearing before the Board, relating to a matter before the Board; or

(e) require any person appearing before the Board to answer any relevant questions put by a member of the Board or by a person appearing before the Board.

…

59.

(1) The Board may-

…

(c) refer a matter to an expert for report and accept the expert's report in evidence.

…

(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.

…"

HISTORY

7 By applications for review dated and lodged on 14 July 2000 the Applicants stated, inter alia:

"6. The [transmission and distribution] Licences disclosed that the Coordinator had decided to include, *inter alia*, the following terms and conditions in the Licences [which were then identified by clause number].

7. [Each Applicant] is a person adversely affected by the decisions described in paragraph 6.

8. For the reason set out in paragraph 7, [each Applicant] applies for a review of the Coordinator's decision to include in the Licences the terms and conditions identified in paragraph 6."

8 On 19 September 2000, at the start of the preliminary hearing, the parties indicated that the Respondent did not wish to press his earlier submission that the

applications for review were out of time, but did wish to press new submissions, an outline of which was then handed up to the Board, that the applications for review be dismissed for failing to disclose the grounds of review.

CONSIDERATIONS

9 Section 11ZH(2) of the EC Act does not specify that the application for review must state the grounds for review. No other provision of the EC Act requires that an application for review under Section 11ZH(2) disclose the grounds for review.

10 There are no relevant regulations relating to the procedure of the Board and there is no established procedure of the Board.

11 By comparison, Section 38(2) of Schedule 1 to the GPA (WA) Act provides:

> "The application [for review under Section 38(1)] must be made, in accordance with this Part and any applicable law governing the practice and procedure of the relevant appeals body, within 14 days after the decision is made."

Section 39(3) of Schedule 1 to the GPA (WA) Act provides:

> "An application under sub-section (1) must give details of the grounds for making the application."

Section 29(1)(c) of the Administrative Appeals Tribunals Act 1975 provides:

> "An application to the Tribunal for a review of a decision…except if paragraph (ca) or (cb) applies – must contain a statement of the reasons for the application."

As to the Income Tax Assessment Act 1936 of the Commonwealth, in *Sarich v. Federal Commissioner of Taxation* (1978) 78 ATC 4,646 at 4,652 the Court stated:

> "Section 190(a) of the Act provides that:
>
> > "Upon every reference to the Board of Review or appeal to a Court the taxpayer shall be limited to the grounds stated in his objection."
>
> Section 185 requires that an objection must be in writing and must state "fully and in detail the grounds" on which the taxpayer relies."

Section 476(1) of the Migration Act 1958 provides:

> "Subject to sub-section (2), an application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds [which are then specified]."

Section 478 of the Migration Act 1958 provides:

"An application under Section 476 or 477 must:

(a) be made in such a manner as is specified in the Rules of Court made under the *'Federal Court of Australia Act 1976;"*

Order 54B rule 2 of the Federal Court Rules provides:

"(1) An application to review a judicially-reviewable decision under the Migration Act 1958 must be in accordance with Form 56.

…

(3) If the grounds of the application include an allegation of fraud, bad faith or actual bias, the applicant must set out in the application particulars of the fraud, bad faith or actual bias relied on."

Form 56 of the Federal Court Rules requires information to be specified as follows:

"The applicant is aggrieved by the *(decision or conduct or proposed conduct or failure)* because –

…

1.
2.
etc

The grounds of the application are –

1.
2.
etc

(Particulars of fraud or bad faith if alleged (Order 54 rule 2))

OR

(Particulars of fraud, bad faith or actual bias if alleged (Order 54B rule 2))"

12 The Respondent has cited *'X' v. Minister of Immigration & Multicultural Affairs [2000]* FCA 362 at [2] and, by way of comparison, *Barzidah v. Minister for Immigration and Ethnic Affairs* (1997) 72 FCR 337 at p. 341. Both cases related to the Migration Act 1958. In 'X' the Court noted that the application specified no grounds of review. However, as there had been no application to dismiss the application as incompetent, the Court treated it as a valid application within time. In *Barzidah* the Court stated:

> "I would conclude that all section 478(1)(a) requires is that there be lodged with the Court within the relevant time an initiating process by way of an application recognisable as such in accordance with O54 of the *Federal Court Rules*. In my view the fact that the application did not set out grounds but merely referred to the grounds as "to be later advised" or for that matter did not set out the relief claimed, would not operate to invalidate the application. There would still have been an application brought to the court in the manner specified in the Rules of Court. It cannot be thought that Parliament intended that there be such slavish compliance with the F*ederal Court Rules* that an applicant appealing a decision of the Refugee Review Tribunal, unable to obtain legal aid, could be defeated by a mere technicality."

13 No provision in the EC Act and no provision in the GPA (WA) Act requires the Applicants to specify their grounds for review in their applications for review under Section 11ZH(2) of the EC Act. Further, there is no specific form prescribed for an application under Section 11ZH(2) of the EC Act and the grounds for review are not limited by inclusion or exclusion.

14 In direct contrast, Section 39(3) of Schedule 1 to the GPA (WA) Act requires an application under Section 39(1) to give details of the grounds and Section 39(2) limits the grounds.

15 Compare also *Sarich v. Federal Commissioner of Taxation* (1978) 78 ATC 4,646 at 4,652, a case under the Income Tax Assessment Act 1936.

16 I consider that there is no requirement for the applications for review under Section 11ZH(2) of the EC Act to specify the grounds for review.

17 Accordingly, I do not need to consider further the Respondent's submissions that the jurisdiction of the Board has not been properly invoked and that no valid applications for review have been made within time.

18 As to whether the applications for review are vexatious, both parties have referred me to the following passage in *Attorney General v. Wentworth* (1988) 14 NSWLR 481 at 491:

> "[Proceedings] are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless."

19 I do not accept the Respondent's submission that, as the applications for review do not set out the grounds, they are "manifestly groundless" and therefore vexatious. Further, the other authorities to which the Respondent has referred do not persuade me that the applications for review are vexatious, whether in the terms of Section 11ZH(11) of the EC Act or otherwise.

20 I do not need to consider further the Respondent's submissions that the applications for review may not be amended.

CONCLUSION

21 I find:

1. there is no requirement for the applications for review to specify the grounds for review;

2. the jurisdiction of the Board has been properly invoked;

3. valid applications for review have been made within time;

4. the applications for review are not vexatious on the basis that they disclose no grounds for review;

5. in view of the above findings I am not required to determine the issue as to amendment of the applications for review.

22 Accordingly, the Respondent's application should be dismissed.

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CKS MERRIAM
PRESIDING MEMBER