IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **NG 626 of 1997**

BETWEEN: **MARK SPENCER**
APPLICANT

AND: **SECRETARY, DEPARTMENT OF SOCIAL SECURITY**
RESPONDENT

JUDGES: **HEEREY, MADGWICK AND MERKEL JJ**

DATE: **1 MAY 1998**

PLACE: **SYDNEY**

CORRIGENDUM

On the page containing minutes of orders:

1. Insert the following paragraph after order 1:

   "2. The order of Tamberlin J on 21 July 1997 be set aside and the decision of the Administrative Appeals Tribunal made on 17 May 1996 affirmed."

2. Renumber the final order on that page as paragraph "3".

Claire Harris

Associate to Justice Merkel

19 May 1998

FEDERAL COURT OF AUSTRALIA

STATUTORY INTERPRETATION – Whether registration with the Industry Research and Development Board under s 39J *Industry Research and Development Act* 1986 (Cth) in November 1996 is vitiated by the *Industry Research and Development Amendment Act* 1996 – objects of the Acts – retrospective effect of the *Industry Research and Development Amendment Act* 1996 – application of principles of statutory interpretation

Industry Research and Development Act 1986 (Cth) ss 3, 39J
Industry Research and Development Amendment Act 1996 (Cth) s 2
Income Tax Assessment Act 1936 (Cth) s 73B(10)
Acts Interpretation Act 1901 (Cth) ss 8, 15AA

Lauri v Renad [1892] 3 Ch 402 cited
Reid v Reid (1886) 31 Ch D 402 – followed
Coleman v The Shell Company of Australia Limited (1943) 45 SR (NSW) 27 – cited
Commonwealth of Australia v ACI Operations Pty Limited [1998] HCA 20 – cited
Zainal bin Hashim v Government of Malaysia [1980] AC 734 – cited
Wijesuriya v Amit [1966] AC 372 followed

BORAL WINDOWS AND ORS v
INDUSTRY RESEARCH & DEVELOPMENT BOARD AND ORS

NG 704 of 1996

HILL J
SYDNEY

6 MAY 1998

GENERAL

DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NG 704 of 1996**

BETWEEN: **BORAL WINDOWS PTY LIMITED (ACN 004 223 009)**
FIRST APPLICANT

GAS CORPORATION OF QUEENSLAND LIMITED
(ACN 009 760 883)
SECOND APPLICANT

ALLEN TAYLOR & COMPANY LIMITED (ACN 000 003 056)
THIRD APPLICANT

AND: **INDUSTRY RESEARCH & DEVELOPMENT BOARD**
FIRST RESPONDENT

THE TAX CONCESSION COMMITTEE
SECOND RESPONDENT

THE SECRETARY, DEPARTMENT OF INDUSTRY SCIENCE
& TOURISM
THIRD RESPONDENT

COMMONWEALTH OF AUSTRALIA
FOURTH RESPONDENT

JUDGE: **HILL J**

DATE OF ORDER: **6 MAY 1998**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The question reserved for decision:

   > "Whether the Second Applicant's registration under Section 39J, as communicated by letter dated 25 November 1996, is vitiated by the *Industry Research and Development Amendment Act* 1996"

   be answered in the affirmative.

2. The Second Applicant to pay the Respondent's costs of the separate issue reserved by the Court.

NEW SOUTH WALES DISTRICT REGISTRY **NG 704 of 1996**

BETWEEN: **BORAL WINDOWS PTY LIMITED (ACN 004 223 009)**
FIRST APPLICANT

GAS CORPORATION OF QUEENSLAND LIMITED
(ACN 009 760 883)
SECOND APPLICANT

ALLEN TAYLOR & COMPANY LIMITED (CAN 000 003 056)
THIRD APPLICANT

AND: **INDUSTRY RESEARCH & DEVELOPMENT BOARD**
FIRST RESPONDENT

THE TAX CONCESSION COMMITTEE
SECOND RESPONDENT

THE SECRETARY, DEPARTMENT OF INDUSTRY SCIENCE
& TOURISM
THIRD RESPONDENT

COMMONWEALTH OF AUSTRALIA
FOURTH RESPONDENT

JUDGE: **HILL J**

DATE: **6 MAY 1998**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

Gas Corporation of Queensland Limited ("Gas Corp") is the second of three applicants who seek judicial review relying upon the *Administrative Decisions (Judicial Review) Act* 1977 together with consequential relief. It is claimed that the First Respondent, Industry Research and Development Board and the Second Respondent, Tax Concession Committee failed to determine the application by Gas Corp for registration under Part IIIA of the *Industry Research and Development Act* 1986, (the "1986 IRD Act") in respect of the year of income ended 30 June 1993 within a reasonable time.

It is conceded by the respondents that Gas Corp lodged with the First Respondent an application for registration pursuant to s 39J of the 1986 IRD Act on about 14 March 1995 in respect of the 1992-93 year of income and that on 25 November 1996 the Industry Research and Development Board registered that application in respect of the 1992-93 year of income. However, after the date of registration, Parliament enacted the *Industry Research and Development Amendment Act* 1996 ("the 1996 IRD Act") which the respondents contend had the consequence that Gas Corp, at the time it lodged its application to this Court and indeed at all relevant times after 2.30 pm Australian Eastern Time on 6 December 1995 was to be treated as not having been registered.

At the request of the parties, I ordered that there be tried, as a separate issue, separate and distinct from other issues between Gas Corp and the respondents (or for that matter the other applicants in the proceedings and the respondents), the following question:

> *"Whether the Second Applicant's registration under Section 39J, as communicated by letter dated 25 November 1996, is vitiated by the* Industry Research and Development Amendment Act *1996."*

The word *"vitiated"* in the question so stated is to be taken as raising the question whether, as a result of the 1996 IRD Act, Gas Corp is to be treated in respect of the 1992-93 year of income as not being registered, for the purposes of s 73B(10) of the *Income Tax Assessment Act* 1936:

> *" ... under s 39J of the* Industry Research and Development Act *1986 ..."*

The Legislative Scheme

To understand both how the issue arises between the parties and the proper construction of the relevant legislation, it is necessary to look to the statutory scheme applicable in respect of the relevant year of income which provided a deduction to taxpayers qualifying under that legislative scheme of 150 per cent of certain expenditure on research and development incurred during the relevant year of income.

The starting point of the legislative scheme is to found in s 73B of the *Income Tax Assessment Act* 1936. Subject to the provisions of that section, deductions are available to eligible companies incurring either contracted expenditure on research and development or expenditure not being contracted expenditure in an amount equal to the expenditure multiplied by 1.5 in the year of income. A company is an eligible company if, being a body corporate, it is incorporated under the law of the Commonwealth or of a State or Territory. Gas Corp is an eligible company.

Among the prerequisites to the deduction which an eligible company must satisfy is the requirement of s 73B(10) which relevantly provided:

> *"A deduction is not allowable under this section to an eligible company for a year of income in respect of expenditure in relation to research and development activities unless:*
>
> *(a)* *the company is registered, in relation to the year of income and in relation to those activities, under section 39J of the* Industry Research and Development Act *1986 ..."*

It is then necessary to turn to the 1986 IRD Act. As the long title to that Act claims, it is:

> *"An Act to encourage certain research and development."*

Its object is to be found in s 3 of the 1986 IRD Act and is:

> *" ... to promote the development, and improve the efficiency and international competitiveness, of Australian industry by encouraging research and development activities."*

Part II of the 1986 IRD Act establishes a board by the name of the Industry Research and

Development Board. That Board is the First Respondent in these proceedings. It has, inter alia, the functions conferred upon it by the 1986 IRD Act. One of those functions appears in Part III of the same Act, namely the registration of eligible companies. Prior to the passing of the 1996 IRD Act, s 39J of the 1986 IRD Act provided as follows:

> *"39J(1) Where:*
>
> *(a) an eligible company applies to the Board for registration in respect of a year of income;*
> *(b) the company provides to the Board such information in relation to its research and development activities, or proposed research and development activities, as the Board reasonably requires; and*
> *(c) there are no grounds under section 39K on which the Board is entitled to refuse to register the company in respect of that year of income;*
>
> *the Board shall register the company in relation to that year of income."*

The provisions of s 39K are not presently relevant. Suffice it to say that the Board can refuse registration of an eligible company if its activities are not or do not include research and development activities.

On 25 November 1996 the Board wrote to Gas Corp advising it that Gas Corp had been registered under s 39J of the 1986 IRD Act for the financial year 1992-93. By the date of that letter there was pending in the Senate the *Industry Research and Development Amendment Bill* 1996 which subsequently became the 1996 IRD Act. The letter from the Board drew attention to this pending legislation, noting that the registration of Gas Corp for the 1992-93 year of income might be rendered nugatory should the legislation pass.

It seems that the Treasury and the Government had become concerned at the revenue cost of claims for research and development deductions. Among these concerns, as appears from the report of the Senate Economics Legislation Committee of 28 October 1996, was the fact that an eligible company could claim deductions at any time back to the commencement date of the research and development concession provided it became registered in respect of a relevant year of income, there being no deadline for applications for registration. The Government's concern (it was originally the Labor Government, although the concern continued with the Liberal/National Party Coalition) found its way into a press release issued

jointly by the then Minister for Industry Science and Technology, Senator Peter Cook and the Treasurer, The Hon. Mr Ralph Willis. The press release announced the Government's intention to limit the ability of companies to register for concessions in respect of past expenditure. It noted that, as and from 6 December 1995, companies would be permitted to register no longer than six months after the end of the financial year in which the research and development expenditure was incurred. Consistent with the policy expressed in that statement was no doubt the view, although it is certainly not expressed in the statement, that in respect of the 1992-93 year of income as six months had already expired, companies would no longer be permitted to be registered.

The 1996 IRD Act passed through Parliament and was assented to on 19 December 1996. Section 2(3) provided, inter alia, that Item 13 of Schedule 1 to that Act was to be taken to have commenced at 2.30 pm Australian Eastern Standard time on 6 December 1995. Subject to the exceptions claimed in s 2(2), the 1996 IRD Act commenced on the day it received Royal Assent. Section 3 then provided, but subject to s 2, for amendments to the 1986 IRD Act as set out in the relevant item in Schedule 1. Item 13 provided for the insertion after s 39J(1) of the 1986 IRD Act the following new subsection:

> *"(1A) Subject to sections 39JA, 39JB, 39JC and 39JE, the Board cannot register a company under this section, in relation to the company's research and development activities, in respect of a year of income:*
>
> *(a) if the year is the 1992-93 year of income or an earlier year of income - after 2.30 pm Australian Eastern Standard Time on 6 December 1995; or*
>
> *(b) if the year is the 1993-94 or 1994-95 year of income - unless the application for registration is made before 7 June 1996; or*
>
> *(c) if the year is the 1995-96 year of income or a later year of income - unless the application for registration is made after the year of income but within 6 months after the end of that year."*

Submissions on behalf of Gas Corp

Counsel for Gas Corp relied both on the Common Law and on s 8 of the *Acts Interpretation Act* 1901 in support of a submission that the 1996 IRD Act should not be construed as having

the effect retrospectively of vitiating the Board's act of registration on 25 November 1996.

It was submitted that the entitlement to the research and development deduction depended upon the fact of registration and that the 1996 IRD Act did not expressly deal with the case where registration in fact took place between 6 December 1995 and the time of assent of the 1996 IRD Act.

The Applicable Principles of Interpretation

Senior Counsel for Gas Corp commenced his submissions with reference to the principles of statutory construction enunciated by Lindley LJ in *Lauri v Renad* [1892] 3 Ch 402 at 421 where his Lordship said:

> *"It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."*

A similar formulation of this principle is likewise to be found in a judgment of Bowen LJ in *Reid v Reid* (1886) 31 Ch D 402 at 408-9 where his Lordship said:

> *"We are dealing, it is true, with an Act which is in some sense and to some extent retrospective, and with a section that is to some degree retrospective. ... Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is ... that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant."*

It may be conceded that there is an element of ambiguity in labelling a statute retrospective. The extent of that ambiguity is pointed up by Jordan CJ in *Coleman v The Shell Company of Australia Limited* (1943) 45 SR (NSW) 27 at 30 and in the cases referred to in the joint

judgment of McHugh and Gummow JJ in *Commonwealth of Australia v ACI Operations Pty Limited* [1998] HCA 20 at 21. A distinction can be drawn between a statute which provided that as at a past date the law shall have been taken to be that which it was not and the creation by statute of further particular rights or liabilities with respect to past matters or transactions. Both are labelled retrospective in operation.

That the 1996 IRD Act is to some extent retrospective in the first of the senses explored above is not a matter of dispute between the parties. The real dispute is as to the ambit of retrospectivity. That is to say it is the operation of the subordinate rule to which reference was made by Lindley LJ in *Lauri v Renad,* supra, which divides the parties.

Reliance upon s 8 of the *Acts Interpretation Act* 1901 raises, albeit by reference to a statutory rule of interpretation rather than a common law rule, no different issue. Section 8 relevantly provides:

> *"Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:*
>
> *...*
> *(a) affect the previous operation of an Act so repealed , or anything duly done or suffered under any Act so repealed; or*
> *(b) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or ..."*

It is not in dispute between the parties that the construction contended for by the respondents of the 1996 IRD Act and its effect on the 1986 IRD Act operates to affect an accrued right of Gas Corp. The statutory issue that is thrown up by s 8 in the present case is whether the 1996 IRD Act reveals a contrary intention so as to exclude the operation of s 8 of the *Acts Interpretation Act* 1901.

As I have already indicated it is not suggested by Gas Corp that the 1996 IRD Act had no retrospective operation. Nor could it be. Both s 2 of the 1996 IRD Act and Item 13 to the First Schedule to that Act emphasise in the clearest terms that Parliament intended the provisions of s 39J(1A) to operate as and from 2.30 pm Australian Eastern Standard Time on 6 December 1995. As and from that time, the law was to be read as if the power to register a company under s 39J did not exist notwithstanding that but for the 1996 amending legislation

the power had been in force under the 1986 IRD Act.

If there was some explanation for retrospectively backdating the amendment to 6 December 1995 apart from vitiating an act of registration that had occurred prior to the assent to the 1996 IRD Act, then it may be that there would be considerable substance to Gas Corp's submissions. But no credible explanation can be found. Yet it cannot be assumed that Parliament intended the specific retrospectivity legislated for to have no application.

If all the legislator had intended to do was to prohibit registration occurring of companies not registered as at the date of the giving of the Royal Assent there would be no need to provide for the dating back of the amendment to s 39J earlier than the time of Royal Assent. The legislation would act prospectively in the ordinary way.

In the present context and in the period between 6 December 1995 and 19 December 1996 only two possibilities existed for eligible companies: either a company was in fact registered in that period or not. As indicated above, if an eligible company was not registered a prospective operation of the law sufficed to prevent registration in the future. It is not in dispute that if, in respect of the 1992-93 year of income, an eligible company not in fact registered as at 19 December 1996 was thereafter registered, that registration would be a nullity. An eligible company that was in fact registered would, however, on the submissions of Gas Corp be unaffected by the amendments to s 39J. If that is so then the backdating of the amendment to s 39J would have been a pointless exercise.

Faced with this conundrum, senior counsel for Gas Corp suggested that the backdating to the date of the initial governmental statement might perhaps have been included to ensure that no complaint could be made as to the failure of the Board to act in time or, put another way, where negligence on the part of the Board for failing to act promptly was alleged. There is no suggestion in any extrinsic material that this was the purpose. Indeed it strains credulity to suggest that retrospective legislation of the kind here in question might have been introduced for this purpose. The legislature is entitled to presume that a statutory body will act properly and not negligently.

In approaching a question of construction such as the present it is the duty of the Court to ascertain and give effect to the legislative purpose. In accordance with s 15AA of the *Acts*

Interpretation Act 1901 this Court is required to prefer a construction that would promote the purpose or object underlying the 1996 legislation to a construction that would not promote that purpose. The adoption of a construction of the 1996 IRD Act which would give no role to play to Parliament's intention that the amendment to s 39J operated as and from 6 December 1995 would be to ignore altogether the retrospective consequence for which Parliament has legislated. To adopt the construction contended for by senior counsel for Gas Corp would be to give no effect at all to Parliament's direction that the 1996 amendment was to operate as from 2.30 pm Australian Eastern Standard Time on 6 December 1995.

In this respect the present case is analogous to *Zainal bin Hashim v Government of Malaysia* [1980] AC 734 where Viscount Dilhorne delivering the judgment of the Board pointed out that the reference in the legislation there under consideration to Merdeka Day being 1 August 1957 would have had no effect at all if the submissions put on behalf of the Appellant had been correct. His Lordship referred to comments of Lord Wilberforce in *Wijesuriya v Amit* [1966] AC 372 at 378 where his Lordship had said in the context of construing a retrospective ordinance:

> *"It must be shown that the enacting words clearly cover the case to which it is sought to apply them. The court will no doubt prefer an interpretation which gives effect to the amending ordinance, rather than one which denies it any efficacy, but it will not strain the language used, nor will it rewrite or adapt it to cover cases other than those to which it clearly applies."*

The construction contended for in *Hashim* was only able to be avoided if violence was done to the language of the amending legislation. The present is in the same position.

Retrospective legislation is somewhat distasteful. Retrospective legislation which takes away accrued rights is even more so. A construction not retrospective and a construction that does not operate in respect to vested rights will always be preferred if open. But ultimately this Court must give effect to the language which Parliament has used and the legislative purpose to which that language points. Not only does s 8 of the *Acts Interpretation Act* 1901 allow the possibility of a contrary intention but it also must be read subject to s 15AA of the same Act which directs the Court, looking at the question of construction as a whole, to adopt that construction which will further the parliamentary purpose.

It follows in my view that, while Gas Corp factually was registered on 25 November 1996, as and from the 1996 IRD Act being given the Royal Assent on 19 December 1996 but operating retrospectively from 6 December 1995, that act of registration was beyond power and in breach of s 39J(1)(a) with the consequence that, at the time of commencing the present application, Gas Corp was not and, for legal purposes, never had been registered by the Board. I would accordingly answer the question reserved for decision in the affirmative. Gas Corp should pay the respondents' costs of the separate issue reserved by the Court.

I certify that this and the preceding eight (8) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill

Associate:

Dated: 6 May 1998

Counsel for the Applicant: Mr J Spigelman QC and Mr N Williams

Solicitor for the Applicant: Murphy and Moloney

Counsel for the Respondent: Mr A Robertson SC and G Johnson

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 27 April 1998

Date of Judgment: 6 May 1998