



## ADMINISTRATIVE REVIEW COUNCIL

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Dear Sir/Madam

The Administrative Review Council welcomes the opportunity to provide the Ministerial Council on Energy's Standing Committee of Officials with comments on its Discussion Paper 'Review of Decision-Making in the Gas and Electricity Regulatory Frameworks'.

The Council is a statutory body, established under Part V of the *Administrative Appeals Tribunal Act 1975* to advise the Commonwealth Attorney-General on a broad range of matters relating to the Commonwealth system of administrative law. In view of its statutory function, the proposals in relation to merits review and judicial review outlined in the discussion paper are of considerable interest to the Council.

### Summary of comments

The Council's comments on the discussion paper may be summarised as follows:

- The Council considers that Model A and Model B are not alternatives and that both merits review and judicial review should be available for the decisions under consideration.

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Jillian Segal AM  
Professor John McMillan  
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Robert Cornall  
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- The Council's preference is for full merits review for the economic regulatory decisions of the AER in relation to gas and electricity, the ring-fencing decisions of the AER in relation to gas, and the gas pipeline coverage decisions of the relevant Ministers.
- The Council accepts that there are arguments against adopting full merits review, such as the risk of gaming, the likely time and cost of conducting such a merits review and the complexity of the decision-making. However, the Council considers that these arguments are not sufficient to justify exclusion of full merits review and can be overcome through other mechanisms, such as giving the Australian Competition Tribunal (the ACT) the discretion to dismiss vexatious applications and award costs, and by limiting the material able to be taken into account by the ACT to the material presented to the original decision maker.
- Such merits review should be available to all parties who meet a simple standing threshold, such as the party having a 'sufficient interest' in the outcome of the decision.
- The grounds of review should not be limited in the manner proposed in the discussion paper.
- The Council suggests that the ACT should be granted a general discretion to make an award as to costs as it thinks fit in order to dissuade frivolous applications. The ACT should also have the discretion to dismiss an application for review if the Tribunal is satisfied that the application is frivolous or vexatious.

## **Introduction**

### *Model A and Model B*

The Discussion Paper sets out two proposed models for review of certain regulatory decisions. Our understanding of each of the models is summarised below:

#### 1. Model A

This model proposes a form of limited merits review of the economic regulatory decisions of the Australian Energy Regulator (the AER) in relation to electricity and gas regulation, and the decisions by the relevant Ministers in relation to the coverage of gas pipelines.

Under the model the Australian Competition Tribunal (the ACT) would be the appropriate review body. The ACT would be able to affirm the original decision, vary the decision, set aside the decision and substitute its own decision, or set aside the decision and remit the decision to the original decision maker to be made in accordance with its directions or recommendations.

Standing to commence proceedings under this model would be limited to service and network providers, the regulator (the AER) and users who meet some type of materiality test. Persons who might be 'adversely affected' or 'aggrieved' by the decision, or who have a 'sufficient interest', would be given standing to intervene in the proceedings once they have commenced. It is also proposed that there could be specific provision to allow for consumer advocacy groups, or a particular group or groups, to be able to intervene in the matter.

While the discussion paper proposes that a wider standing test may be appropriate in respect of merits review of gas pipeline coverage decisions by the relevant Ministers, it does not detail what this test should be.

The grounds of review available under this model would be limited to: (i) error in the fact finding of the decision-maker; and (ii) incorrect or unreasonable exercise of discretion by the decision maker.

The applicant would not be able to introduce any new information to establish a ground of review. However, once a ground of review has been made out on the existing material before the ACT, the ACT may then be able to take into account new material in reaching its decision. The discussion paper suggests that there may need to be legislative criteria setting out the circumstances in which new evidence can be admitted to the ACT and proposes that the ACT be under an obligation to have regard to the relevant AER policy documentation in its decision making process.

This discussion paper proposes that the ACT should have the discretion to award costs against an applicant who has not succeeded in making out any grounds of review.

## 2. Model B

Model B proposes judicial review by the Federal Court of economic regulatory decisions made by the AER and the decisions by the relevant Ministers in relation to coverage of gas pipelines. Merits review would not be available under this model.

As judicial review is already available for these decisions, the proposal does not relate in a strict sense to a new review mechanism.

It is suggested under this model that the National Electricity Law (NEL) and the proposed National Gas Law (NGL) would set out specific requirements in relation to the basis and process for decision-making by the AER so that it would be easier to seek effective judicial review.

The *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (ADJR Act) sets out the position that would apply under this model in relation to standing, grounds of review, admissible material, powers and remedies and costs.

The discussion paper notes that a *de novo* review is not proposed under either model.<sup>1</sup>

#### *Existing review mechanisms*

The decisions suggested in the discussion paper for review are:

- the economic regulatory decisions of the AER in relation to electricity;
- the economic regulatory decisions of the AER in relation to the drafting and approving of access arrangements in gas;
- the decisions by the relevant Ministers in relation to the coverage of gas pipelines; and
- the ring fencing decisions by the AER in relation to gas.

Decisions by the AER in relation to electricity are currently subject to judicial review under the ADJR Act, and also under s.75(v) of the *Australian Constitution* and s.39B of the *Judiciary Act 1903 (Cth)*. The electricity decisions of the AER are not presently subject to any merits review mechanism.

Decisions by the AER in relation to gas are also subject to judicial review under the ADJR Act, s.75(v) of the *Australian Constitution* and s.39B of the *Judiciary Act*. The current Gas Pipelines Access Law also provides for merits review of the decisions by the regulator (the AER) to draft and approve access arrangements, ring-fencing decisions by the AER, and decisions by the Minister in relation to the coverage of gas pipelines.

#### **Detailed Comments**

The Council does not propose to address each of the specific questions asked on pages 14 to 16 of the discussion paper. Instead, the Council's comments will be

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<sup>1</sup> At paragraph 2.1 discussion paper.

directed towards identifying the decisions that are suitable for merits review, and discussion of the appropriate form for such merits review.

#### *Preference for Model A or Model B*

The first question asked on page 14 of the discussion paper assumes that the two models are alternatives and that either/or model is appropriate. It is the Council's view that judicial review is complementary to, but distinct from, merits review.<sup>2</sup> Therefore the Council does not view Model B as an adequate alternative for merits review.

The Council's position, as expressed in its *What Decisions Should be Subject to Merits Review* booklet, is that as a matter of principle, where an administrative decision will or is likely to affect the interests of a person, it should be subject to merits review unless the decision falls within a small category of decisions which are, by their nature, unsuitable for merits review, or where factors justify excluding merits review.

#### *Decisions suitable for merits review*

The Council considers that the following decisions should be subject to merits review:

- AER decisions to draft and approve access arrangements in relation to gas;
- Ring fencing decisions by the AER in relation to gas;
- The relevant Ministers' decisions in relation to coverage of gas pipelines; and
- The economic regulatory decisions of the AER in relation to the setting of revenue caps for transmission network service providers, and ultimately distribution network service providers, in the electricity industry.

The Council suggests that these decisions should be subject to merits review for the following reasons:

- The decisions impact significantly on the property rights and financial interests of many affected parties;

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<sup>2</sup> Administrative Review Council, *What Decisions Should be Subject to Merit Review?* 1999, 5.31.

- The regulators exercise a high level of discretion in the decision-making process;
- There is high risk of regulatory error occurring in the decision-making process;
- If regulatory error occurs there is the potential for this to result in considerable financial losses or under-investment or inefficient use of infrastructure. It may be difficult for network and service providers and/or consumers to recoup any losses incurred if merits review is not available;
- Merits review is likely to ensure that regulators pay very close attention to the detail of the decision making and hence may help ensure that the most correct or preferable decision is made; and
- The introduction of new national regulatory body, the AER, centralises regulatory power in the energy industry in one body. In order for the participants and users in the energy industry to have confidence in the AER's decisions the AER needs to be transparent in, and accountable for, its decision-making.

The nature of the economic regulatory decisions requires a decision maker to assess conflicting objectives, balance varying interests, take into account differing views on the correct economic formula and principles to apply, perform complex calculations and exercise broad discretion and judgement. The possibility of regulatory error occurring is accordingly high. Any regulatory error has the potential to result in considerable economic loss for the network and service providers and also for consumers.

The discussion paper<sup>3</sup> also indicates that the decisions of the AER and the relevant Ministers discussed above involve high levels of discretion, complex economic concepts and many layers of small, inter-related judgements. As a result if regulatory error occurs the error is unlikely to be one that allows for successful judicial review.

Judicial review is concerned with the legality of a decision. Provided that an exercise of discretion by an energy regulator was within the broad parameters set by the law, any error of fact, or applying an inappropriate economic formula in the circumstances, would not be corrected by judicial review.

While the recent amendments to the NEL, and those proposed to be introduced to the new NGL, discussed as part of Model B, do to some extent clarify and

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<sup>3</sup> At paragraph 2.24 discussion paper.

structure the manner in which the regulators must exercise their decision-making power, the decision maker must still exercise substantially unstructured discretion. For example, while s.16 of the NEL sets out that the AER must:

- perform or exercise its function or powers in a manner likely to contribute to the achievement of the NEM objectives;
- inform the network service providers of all material issues and provide a reasonable opportunity for the network service providers to make submissions in respect of the determination; and
- provide a reasonable opportunity for the network service provider to recover the efficient costs of complying with regulatory obligations, provide incentives for economic efficiency and have regard to the value of assets forming part of the transmission system,

the AER still has a very broad discretion when deciding on the method of asset valuation to be applied, the appropriate parameters to adopt to calculate return on investment, and the incentive mechanisms to be applied. Any errors in these processes are not likely to be corrected by judicial review alone. If there is no review mechanism through which such regulatory errors can be corrected both participants and users may lose confidence in the regulatory decisions.

It is particularly important that the new national energy regulator, the AER, be seen to be transparent in its decision making and that it be accountable for its decisions. With the creation of the AER, it is proposed that the regulatory power previously exercised by various state regulators in relation to gas and electricity distribution pricing, be centralised in one body. It is therefore important that the AER be accountable for how it exercises this significant regulatory power in order to ensure that the participants and users in the energy industry have confidence in the AER's decisions. Therefore it is important that a review mechanism be in place so that decisions resulting from poor judgements or the use of incorrect facts can be corrected.

The Council's preference is therefore that the decisions identified above be subject to merits review and judicial review. The Council supports the specification of the processes and basis for decision making proposed as part of Model B, in order to improve the effectiveness of judicial review for such decisions.<sup>4</sup> However the Council sees this as a necessary complement to, rather than substitute for, an effective merits review system.

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<sup>4</sup> The Council notes, however, that in its view such specific legislative requirements should not seek to exhaustively specify the procedural obligations imposed on administrative decision makers as this may have the effect of reducing or eliminating the capacity of courts to identify procedural obligations through the principles of procedural fairness. The specific legislative

### *The appropriate form of merits review*

The Council is of the view that the limited version of merits review proposed in Model A is unlikely to adequately meet the needs of the participants and users in the energy market, nor to adequately ensure that the administrative decisions made are correct or preferable.

The Council's preference is for full merits review for the decisions under consideration, to be available to all parties who meet a simple standing threshold, such as the party having a 'sufficient interest' in the outcome of the decision. The Council is also of the view that the grounds of review available should not be limited in the manner proposed.

The Council's responses to the main arguments put forward by SCO in the discussion paper against full merits review are as follows:

- The discussion paper notes that the nature and complexity of the regulatory decisions may increase the risk of regulatory error occurring if the merits review body is not at least equally resourced with expertise. The Council has not accepted as a general rule that the nature and complexity of a decision is a factor that can justify the exclusion of merits review.<sup>5</sup> The ACT has considerable expertise and would be able to take into account all the material before the regulator, including submissions from interested parties and expert reports, and can draw on the regulators expertise. It would also be possible to appoint specialist members to the ACT to assist with the review.
- It should be noted that while the Council has accepted that in some cases where there has been extensive public consultation by the primary decision maker it may be appropriate to exclude merits review<sup>6</sup> as it would be difficult for the review body to go through the same process of public consultation. However, the Council is of the view that as the ACT would have access to all the material before the regulator, including all submissions and discussions between the regulator and the regulated entity, it would not be necessary for the ACT to engage in a fresh round of public consultation. Therefore this argument would not justify the exclusion of merits review.
- The discussion paper notes that full merits review may be costly and time consuming. The Council considers that given the importance of the

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requirements should be drafted in such a way as to give guidance to the decision maker on what procedures they should follow, but should not be exhaustive.

<sup>5</sup> As above, n 2, 5.17.

<sup>6</sup> As above, n 2, 4.54.

decisions being made and the consequences of the decisions to the operation of the energy market and its participants such cost and time is justified to ensure that preferable decisions are made. The Council also notes that judicial review can be a costly and time consuming exercise.

- The Council considers that limiting the grounds of review to an error in fact or an unreasonable exercise of discretion would result in a full merits review process being applied in practice. The test for establishing that there has been an unreasonable exercise of discretion, taking into account the circumstances, is indeterminate and would result in a full merits review process being applied.
- The discussion paper raises the issue of 'gaming' by regulated entities, and suggests that the limited form of merits review suggested, or judicial review alone, would minimise the risk of a regulated entity withholding information from the regulator and then attempting to get a more favourable decision from the ACT on review.<sup>7</sup> However, the Council is of the view that the proposed restrictions on the admission of new material before the ACT would limit the 'gaming' incentive. Allowing the ACT the discretion to dismiss applications where the ACT was of the view that the regulated entity did not act in good faith in its participation in the decision-making process of the regulator may also reduce the risk of gaming.
- The Council supports the suggestion that the ACT be granted the discretion to award costs against applicants. Such discretion would help to discourage frivolous applications for review and potential gaming and would reduce the cost concerns associated with full merits review.
- The Council notes concerns that any merits review may cause delay in the application of a new transmission or distribution pricing determination. However, the Council believes that this issue could be addressed through a legislative provision providing that the current determination continue to apply until such time as a new determination is finalised. If, as may be the case in gas, there is no current access arrangement in place for a particular pipeline, the determination the subject to review should continue in force during the review process in order to reduce the incentive of the provider to 'game' the system and delay the finalisation of the review.<sup>8</sup>
- The discussion paper suggests that the decisions by the relevant Ministers in relation to coverage of gas pipelines are essentially policy decisions

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<sup>7</sup> Paragraphs 2.31, 2.54, 5.24 and 6.60 of the discussion paper.

<sup>8</sup> Productivity Commission *Report on the Gas Access Regime* 2004 at p.492-493.

which may not be suitable for judicial review.<sup>9</sup> The Council does not agree with this argument and notes that while some policy decisions of a highly political content may not be suitable for merits review, it is rare that decisions fall within this exception.<sup>10</sup> The gas coverage decisions are unlikely to fall within this exception as the decisions are based primarily on economic reasoning presented to the Minister by the National Competition Council. While there is a policy element to the Minister's decision, the decision is part of a broader regulatory framework designed to ensure access to essential facilities, and therefore the exercise of the Minister's discretion must be made within some defined parameters.

### *Standing*

The Council considers that there is no justification for limiting the persons who may bring merits review specifically to the network service providers, regulators and energy users with sufficient material interests. In the Council's view all persons who might be 'adversely affected' or 'aggrieved' or who have a 'sufficient interest' in an economic regulatory decision should have standing to commence review. Such an approach is unlikely to open the flood gates as the costs of bringing a merits review action is likely to dissuade all but those whose interests are significantly affected by such decisions. As noted below, the Council also supports the ACT having the discretion to award costs against an applicant where no grounds of review are made out, or to dissuade frivolous or vexatious applications.

In the Council's view, the test for standing should be based on a simple threshold test, similar to that set out in s.27(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), i.e. 'a person whose interests are affected', or who has 'sufficient interest' in the outcome of the decision' as set out in s.101(1AA) of the *Trade Practices Act 1974* (TPA). A person whose interests are affected refers to an interest which a person has other than as a member of the general public and other than as a person merely holding a belief that a particular type of conduct should be prevented or a particular law observed.<sup>11</sup>

Similarly in the case of s.101(1AA) it has been said that a person with sufficient interest would include persons who establish that their business interests or prospects could be adversely affected by the decision<sup>12</sup>. While the test is not an unduly high one, the interest should be:

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<sup>9</sup> See paragraph 2.37 discussion paper.

<sup>10</sup> As above, n 2, 4.22 – 4.30.

<sup>11</sup> *Control Investments Pty Ltd v Australian Broadcasting Tribunal* (1980) 50 FLR 1 at 8-9.

<sup>12</sup> *Re Wylie Steele Pty Ltd* (1980) ATPR 40-170.

‘sufficient to warrant putting those who will be involved in the review to the very considerable time, effort and expense that review involves.’<sup>13</sup>

The Council notes that such a threshold test is unlikely to extend standing to consumer advocacy groups, as in the context of the gas access regime, both large and small consumer advocacy groups have failed to establish that they are ‘adversely affected’ by a decision even where the decision relates to the groups’ objectives and purposes.<sup>14</sup> The Council would support specific legislative provisions that allow for such consumer advocacy groups, or a particular group or groups, to have standing to bring an application.

The Council notes the proposition in the discussion paper that the regulator represents the interests of consumers and the public at large, and that these interests can be adequately taken into account in the consultation processes. However, the Council considers that this is not an adequate arrangement, especially when coupled with the fact that such consumer groups may not have standing under the ADJR Act to bring an application for judicial review.

#### *Grounds of review and admissible material*

The Council’s preference is that the grounds of merit review be unrestricted to allow the review body to focus on whether the decision is in fact correct or preferable. The Council notes that in practice the test of establishing an unreasonable exercise of discretion is likely to be indeterminate and difficult to administer at any rate without in effect undertaking a full merits review, so that in practice the model proposed by SCO would result in full merits review being applied.

The Council supports the proposal that the applicant for review may not raise any matter that was not raised in the submissions to the regulator before the original decision was made in order to establish a ground of review. Once a regulatory error has been found then new material can be submitted and taken into account by the ACT.

The Council is of the view that such an approach will reduce the risk of gaming. However, it may be appropriate for the ACT to have the discretion to admit new material where the matter was not known at the time of the initial decision and is critical to the decision. However the ACT must be satisfied that the information was not deliberately withheld from the initial decision maker.

#### *Costs*

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<sup>13</sup> *Re Wakeman* (1999) ATPR 41-675.

<sup>14</sup> See *Orica Assets Ltd: Re Moomba to Sydney Gas Pipeline (No 2)* [2004] ACompT.

The discussion paper suggests that it should be possible for the ACT to have discretion to award costs against an applicant who has not succeeded in making out any grounds of review. The Council considers that such an approach will help to dissuade frivolous applications. The Council suggests that the ACT should in fact be granted a general discretion to make an award as to costs, similar to the current approach under section 38(10) of the GPAL, where the relevant appeals body may make such orders (if any) as to costs of the proceedings as it thinks fit.

The Council also suggests that the ACT be allowed the discretion to refuse standing to a vexatious or trivial application and this may also help to act as a filter to unwarranted review applications. The ACT currently has this discretion in relation to the gas merits review mechanisms under s.38(11) of the GPAL. A similar discretion could be included to enable the ACT to dismiss an application if it were of the view that applicant did not engage in the review process in good faith, for example where it appears that the applicant has withheld information from the original decision maker.

### **Other comments**

The Council agrees that the ACT is the most appropriate review body to undertake merits review within the energy industry. The ACT would be the appropriate review body whether to undertake either Model A merits review as suggested by the discussion paper, or full merits review as suggested by the Council.

The Council supports the proposition<sup>15</sup> that the rule-making decisions of the AEMC are not suitable for merits review. Such decisions are legislative like decisions affecting the interests of the public at large. However, the Council notes that if the AEMC has the power to make rules that are directed to individual participants in the NEM or to only a few participants in the NEM then the decisions to impose such rules may be suitable for merits review. The Council is not aware if the AEMC has any such rule making powers.

The Council also supports the proposition that the enforcement decisions of the AER are not appropriate for merits review and that the preliminary or procedural decisions, such as recommendations by the NCC to the relevant Ministers, or the AER's draft determinations, are also not suitable for merits review.

The Council notes that it appears from the discussion paper that some of the decisions by NEMMCO and the AER to determine who may participate in the NEM via the registration process set out under part 2 of the NEL were

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<sup>15</sup> At paragraph 5.4 discussion paper.

previously subject to merits review under the National Electricity Code (the decisions were then made by NEMMCO and NECA)<sup>16</sup>. It is not proposed that such decisions be subject to merits review under the new regime. It is suggested in the discussion paper that such decisions are almost automatic or mandatory in character as the criteria that must be followed in each case is quite straightforward.<sup>17</sup>

If these decisions are indeed highly structured so that they are automatic or mandatory then the Council would accept that they are likely to be inappropriate for merits review.<sup>18</sup> However, the Council would need more information about the nature of these decision-making powers in order to draw any conclusive view.

I trust that our comments are of assistance to the Standing Committee of Officials.

Should you wish to discuss further any of the issues raised in the course of this letter, please do not hesitate to contact the Council's Executive Director, Margaret Harrison-Smith on telephone (02) 6250 5801 or by email at <[margaret.harrison-smith@ag.gov.au](mailto:margaret.harrison-smith@ag.gov.au)>.

Yours sincerely

Jillian Segal AM  
President

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<sup>16</sup> See paragraph 4.4 and 4.5 discussion paper.

<sup>17</sup> Paragraph 5.37 discussion paper.

<sup>18</sup> As above, n 2, 3.8 to 3.12.