

Submission to the Ministerial Council on Energy Standing Committee of Officials

Re Review of Decision-Making in the Gas and Electricity Regulatory Frameworks



Submitted by:

Alinta Gas Networks

Multinet Gas

United Energy Distribution

Alinta Infrastructure Holdings

321 Ferntree Gully Road

Mount Waverley Vic 3149

Phone: 03 8544 9434

Fax: 03 8544 9927

Contact: Geoff Towns

Date: November 2005

TABLE OF CONTENTS

1	INTRODUCTION.....	1
2	SUMMARY	1
3	COMMENTS ON THE OPTIONS IN THE DISCUSSION PAPER.....	4
3.1	The Issue of Model A or B	4
	<i>The Costs and Benefits of Merit Appeals</i>	<i>4</i>
	<i>Background to Merit Review in Australia</i>	<i>4</i>
	<i>Wide Support for Merit Review</i>	<i>5</i>
	<i>The Dangers of Delaying on Judicial Review</i>	<i>6</i>
	<i>The Issue of Electricity and Merit Review.....</i>	<i>7</i>
3.2	The Scope for Merit Review Under Model A	8
3.3	Who Should be Able to Commence Appeals Under Model A	9
	<i>Coverage Decisions.....</i>	<i>9</i>
3.4	Who Should Join Merits Review and What Issues Should be Raised.....	11
3.5	The Grounds of Review	12
3.6	Restrictions on Evidence	13
3.7	Awarding of Costs.....	14

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

1 Introduction

This submission is from United Energy Distribution Pty Ltd, Multinet Gas Pty Ltd, AlintaGas Networks Pty Ltd (WA) and Alinta Infrastructure Holdings Pty Ltd (‘the companies’ hereafter). United Energy Distribution (UED) is one of five electricity distribution businesses operating under licence within the State of Victoria. UED’s network provides services to some 600,000 end-use customers in Melbourne’s southern and eastern suburbs. Multinet Gas Distribution (Multinet) is one of three gas distribution businesses in Victoria and is the only urban distributor servicing some 626,000 gas connections in Melbourne’s eastern suburbs. AlintaGas Networks (AGN) is an energy distributor, which serves more than 440,000 gas customers in Western Australia. Alinta Infrastructure Holdings (AIH) is a major new asset investor with the initial AIH assets consisting of the gas pipeline and electricity generation assets acquired by Alinta from the Duke Energy Group in 2004 and the further sale of the assets to AIH.

2 Summary

The companies strongly support the merit appeal rights of both gas and electricity distributors and transmission companies in the new national regulatory model due to the fact that:

- decisions by regulators in both gas and electricity are characterised by a very wide discretion and their decisions affect the private property rights of regulated businesses;
- this type of regulatory decision making meets the requirements of the Administrative Review Council (ARC) on what decisions should be subject to merit review;
- merit review provides a sufficient accountability of decision making as a matter of effective public policy;
- the use of merit appeals has been supported by a range of expert commentators including the Australian Competition and Consumer Commission (ACCC) in public comments;
- electricity distribution businesses in Victoria already have access to merit appeals under the 2001 Victorian Essential Services Commission Act (ESC); and
- gas distribution and transmission companies across Australia have access to merit appeals under the National Gas Code (NGC).

Support for Model A

The companies strongly support Model A as providing an effective and efficient appeal process for electricity and gas transmission and distribution businesses. The companies do not support reliance on Model B as it fails to deliver the range of appeal matters that can be appealed under Model A. The companies consider that Models A and B are complemented not alternatives.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

Need to Expand Scope of Review

The companies are concerned that the proposed scope of the Australian Competition Tribunal (ACT) purview will not fully protect the private property rights of regulated businesses, as there are other regulatory instruments currently at the State level (and potentially at the national level) that can also have financial implications if varied during the access or regulatory period. These can include changes to licences, industry codes, monitoring arrangements, information gathering and operational guidelines.

Support for Coverage Criteria

The companies' support the ground for merit appeals on coverage being limited to the revised coverage criteria proposed for the NGC and for the Trade Practices Act (TPA). The companies' also support that the grounds for appeal on AER decisions are limited to errors of fact and errors in the exercise of discretion as proposed in the Discussion Paper.

Service Provider and Access Seekers Can Initiate Coverage Appeals

In terms of who can appeal coverage decisions the companies consider that the current ability for "any person" to review coverage decisions has led to gaming with competitors using the appeal arrangements for their own purposes. Given the proper interested parties in these matters are service providers and access seekers then the ability to institute review should be limited to such groups. In terms of appeals to uncover a pipeline only service providers should have rights to initiate appeals.

Service Providers and Significantly Affected Users Can Appeal AER Decision

For who can initiate appeals on other AER decisions the companies consider that only service providers and major affected users should have rights to initiate merit reviews of the AER's decisions. This is because the companies agree with the central proposition of the Discussion Paper that only entities that were substantially impacted by the decision should have rights to initiate appeals. The companies also consider that the ACT should determine the status of which entities are "substantially" affected by the AER decision. In addition, the companies consider that AER decisions should be backdated to the start of the access or pricing period where relevant.

Need to Clarify the Role of the Regulator

The companies are concerned with the reference to "the regulator" as able to seek merit review. The companies cannot see why this option has been included, as the regulator has no reason to appeal their own decision.

Consumers and Lobby Groups Can Join Appeals

In terms of those who can join appeals the companies consider that the principles of the impact of the decision support the following arrangements:

- that consumers or industry lobby groups can join a merit review only on the issue that has been raised by the initiator of the review; and
- they cannot introduce any new grounds in the appeal.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

Support for AER Decision Groups

For the review of coverage decisions the companies support the use of the coverage criteria in the NGL and the Trade Practices Act. The Discussion Paper proposes that the grounds for review of AER decisions will be limited to:

- error of the fact-finding by the decision-maker; and
- that the exercise of the decision-maker's discretion was incorrect or was unreasonable having regard to all the circumstances.

The companies support these grounds as they are consistent with the grounds for appeal in the NGC and are similar for electricity distribution businesses in Victoria under the ESC Act appeal arrangements.

Use of New Material

The companies consider that new material should be able to be introduced that is pertinent to the appeal and was not available at the time of the decision or could not have reasonably been known at the time of the decision. The companies do not support the formalisation of AER policy document in ACT appeals but rather favour a model where the ACT can take account of all relevant material used by the AER to make decisions. Such terms are already a part of National Gas Law.

Awarding of Costs

In terms of the awarding of costs the companies support the principle that costs should follow the legal traditions such that the party (parties) that loses the action should pay the costs of the party (parties) that win the action, except in exceptional circumstances as determined by the ACT.

3 Comments on the Options in the Discussion Paper

3.1 The Issue of Model A or B

The Costs and Benefits of Merit Appeals

The companies strongly support the use of Model A as the model for gas and electricity regulation under the new national regulatory model. The use of and support for merit review is widespread in both Australia and overseas.

Effective merits appeal mechanisms are critical components of regulated industries as they:

- improve accountability in regulatory decision-making;
- assist in the transparency of regulatory decisions and decision-making processes;
- use consistent interpretations on the regulatory framework to provide more certainty about its application over time;
- reduce the risks to the community and service providers of regulatory error and failure;
- recognise the continuing property rights of owners of sunk capital investment especially when regulatory periods are shorter than the technical and economic life of the assets;
- better support private sector investment in new and existing long-lived capital assets; and
- the benefits of appropriate appeal processes outweigh their cost to society.

This latter point is best demonstrated by the Productivity Commission who have outlined their support on cost-benefit grounds for an effective and efficient appeal system:

“While a number of other participants also acknowledged that provisions for merit review of undertakings would involve some additional costs and delays, they contend that these costs would be more than outweighed by the benefits of promoting thorough analysis of the issues at hand. Moreover, some went on to suggest that other mechanisms could and should be used to limit these additional costs. Thus the Australian Gas Association commented that:

Any concerns regarding the timeliness of decision making which arise from the proposal to allow reviews of undertaking decisions should be addressed through tighter rules on decision making not through retaining restrictions on access to merit reviews (sub DR84, p.11)

The Commission agrees with this argument.”¹

Background to Merit Review in Australia

The background to administrative review and to one of its key elements - merit review - in Australia has been recently discussed by Justice Deirdre O’Connor who argued that:

¹ Productivity Commission, (September 2001), p. 390-391

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

“The desire to provide individuals with an opportunity to challenge government decisions affecting their interests in a country without a Bill of Rights was the primary motivation for establishing an administrative review tribunal with broad jurisdiction. The subsequent development of the administrative review system in Australia would appear to represent the realisation of this objective. The administrative review system currently provides for the review of decisions made under more than 350 legislative enactments and in 1998-99 administrative review tribunals received more than 35000 applications for review.”²

Justice O’Connor concluded that:

“This country does not have a Bill of Rights. However, for the last 25 years it has had an administrative review system which gives individuals “rights” to have reviewed adverse decisions of government in a wide variety of circumstances. There is no decline in the demand for such review, if fact it is increasing, and the current system built around the AAT has been regarded for that 25 years as world best practice.”

Wide Support for Merit Review

In the final report of the Productivity Commission in the National Gas Access regime the role of merit appeals was widely analysed with the Productivity Commission viewing the issue as extremely important for regulated utilities:

“There is a need for a merits review under the Gas Access Regime. In the Commission’s view, appropriate protection for property rights and natural justice are key considerations. While the appeal process might take considerable time and expend considerable resources, the regulatory bodies and Ministers have powers to make decisions that have an impact on fundamental rights of service providers. The prospect of exposure to imperfect regulatory instruments means there is a strong case for a merits review.”³

The Hilmer Committee also noted that property rights are fundamental rights in our legal system and are not to be disturbed lightly by access arrangements:

“The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to owners of such facilities has the potential to undermine incentives for investment.”⁴

The issue of merit review has also been discussed by the ACCC. For example, in a presentation to the Productivity Commission in the Review of the Gas Access Regime where the ACCC Commissioner for Energy and Mergers supported the Commission’s proposed extension of full merit appeal provisions into the NGC in a discussion with the Chairman of the Inquiry:

² Administrative Appeals Tribunal, *Lessons for the Past/Challenges for the Future: Merits Review in the New Millennium*, Justice Deirdre O’Connor, Paper Presented at the 2000 National Administrative Law Forum – Sunrise or Sunset? Administrative Law in the New Millennium, June 2000, p. 1.

³ Productivity Commission, *Review of the National Access Regime*, Inquiry Report No. 31 (September 2001), Canberra, p.

⁴ Hilmer Committee (Independent Committee of Inquiry into Competition Policy in Australia, chaired by Professor F. Hilmer 1993, *National Competition Policy: Report of the Independent Committee of Inquiry into Competition Policy in Australia*, AGPS, Canberra, p. 248.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

Mr. Willet:...I must say that since I started with the NCC some eight years ago, one of the things that has really struck me is the discipline that is created on large parts of your work by the fact that you know that work is reviewable by the judicial or quasi-judicial body and you know that when you make findings and you make recommendations that you really need to be in a position to prove those, if a review is called for. In both my life at the NCC and my current life I can tell you that everyone involved in these sorts of matters is very cognisant of the fact that we are likely to have to be able to establish what we're saying to the satisfaction of the Australian Competition Tribunal. ...

Mr. Hinton: A bit like public hearings.

Mr. Willet: Indeed they are a bit like public hearings.....We would suggest some changes to the review of access arrangements. There are arguments for a full merits review, rather the partial constrained process that there is at the moment. I am relaxed about that, I must say.”⁵

Two recent papers by Justin Gleeson SC and John Tamblyn, the ex Chair of the ESC also support the use of merit review in regulated energy industries.⁶

The National Economic Research Associates (NERA) in their review of regulatory systems in Australia, the UK and the US for the New Zealand Treasury concluded that in the US:

“The transparency of the process opens up opportunities for appeal when the regulator does not meet the required standards. The desire to avoid appeal means that individual decision-makers take more care to ensure their decisions are transparent and justified by the most reliable evidence.”⁷

In a submission to the Productivity Commissions review of Third Party Access the National Competition Council supported a strong merit appeal system for regulated businesses:

“Another important dimension of effective access regulation is the availability of effective review mechanisms to test the efficacy of decisions by regulatory institutions. Effective review mechanisms help to ensure that access regulation meets its identified objectives, through, in particular, enforcing process requirements and ensuring appropriate use of regulator discretion.”

The Dangers of Delaying on Judicial Review

Legal commentators have also warned about the return to judicial review without the use of merit (or administrative appeal) as not being best practice regulation. Whilst the case deals with the private contracting of government services the points remain valid for regulated assets more generally:

“The effect of removing or shrinking access to merits review and the other administrative law remedies could result in a partial return to the situation that existed prior to the introduction of the administrative reforms. Individuals adversely affected by

⁵ Transcript of Proceedings, Productivity Commission, Draft Report into Gas Access Regime, Comments by Ed Willet, ACCC Commissioner, At Sydney, 25 March 2004pp.707-708.

⁶ John Tamblyn, Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatibles? Draft Paper, Public Law Weekend, Administrative Law Conference, December 2004, p.129. Justin Gleeson SC, Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatibles? Draft Paper, Public Law Weekend, Administrative Law Conference, December 2004, p.158.

⁷ NZ Treasury Working Paper 00/5, Economic Regulation of Network Businesses, NERA, p.36

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

decisions relating to government services must in such situations seek remedies from the courts which are by no means straightforward to establish nor inexpensive to assert. This is not to deny that there are other avenues for redress that can provide service recipients with a means of challenging the decisions of contractors.....

The difficulties that individuals face in seeking to challenge decisions of contractors is only one of the negative consequences that flow from not maintaining the universality of a right to merits review. A further negative consequence of general significance for the community is the absence of one of the established mechanisms for the systemic review of the decision making system. As the ARC has noted, private law remedies do not provide the same type of feedback and enhancement of decision making and accountability that is provided by the administrative law remedies.”⁸

This quote suggests there are major differences between judicial and administrative review. The reason for the preference for merit appeals for regulatory pricing and access decisions is that they are generally not a matter of law or the interpretation of law but are about economic pricing issues and financial and accounting matters. In other words the issues are about the correctness of the decision rather than its legality.

The Issue of Electricity and Merit Review

Whilst the Discussion paper includes electricity distribution and transmission in statements of the coverage of Model A it also states that:

“Under the old NEL, judicial review alone has been available for economic regulatory decisions. It is considered that this does not appear to have lessened the quality of the decisions made by economic regulators, although some may disagree. In any event, the AER has now been established as an expert decision-maker and, under Model B, will review the AER’s compliance with the specific requirements of ss.16, 35 and 36 of the NEL. Therefore, introduction of merits review need to be justified on substantial grounds and would not be warranted, for example, simply to achieve consistency between gas and electricity.”⁹

This quote indicates a fundamental misunderstanding of the role of judicial and merits review in Australia. The companies wish to make four points in this regard:

- It is only serious regulatory errors like the Epic case before the Western Australia Supreme Court where the company in question was forecast to be bankrupt that are likely to be available under an enhanced judicial review Model B;
- The same issue are dealt with in all regulated energy businesses – what should be the rate of return earned in delivering the energy service – therefore appeals should be the same for all energy businesses;
- The Victorian Government has determined that merit review should be available to electricity distributors; and,
- In Victoria there have been merits reviews of regulatory decisions which has indicated that regulatory errors are relatively common;

⁸ O’Connor, D (Justice) 2000, Lessons from Past/ Challenges for the Future: Merit Review in the New Millennium, Presented at the 2000 National Administrative Law Review – Sunrise or Sunset? Administrative Law in the New Millennium www.aat.gov.au/speeches. p.4

⁹ Ministerial Council on Energy, Standing Committee of Officials, Discussion Paper on the Review of Decision-Making in the Gas and Electricity Regulatory Framework, 10 October 2005, p.14.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

In establishing the regulatory regime in Victoria the government in the Second reading speech:

“Clause 40 of the bill provides that proceedings cannot be brought in respect of a determination, provisional order or final order except on the ground that there was no power to make the determination or order or that the procedural requirements in relation to the making of the determination or order have not been complied with. The bill provides for an appeals panel and process associated with the office, and the commercial nature of the industries to be regulated requires that appeals be heard and decided as quickly as possible. It is considered that the appeals mechanism would satisfy the requirements for appellants to be given a fair hearing and for a considered decision on any appeals to be made.”¹⁰

Given that Victorian electricity distributors currently have merit appeal rights the MCE process should not disadvantage the Victorian industry in the new national regulatory framework by limiting the coverage of merit review.

The above discussion has shown the strong support for merit review from regulators, key governmental advisory bodies, legal advisers and consultants and it would be a major detrimental step to implement Model B over Model A in terms of best practice public policy.

Recommendation 1

That Model A is the preferred model for appeals in the new national regulatory framework for appeals in electricity and gas transmission and distribution.

3.2 The Scope for Merit Review Under Model A

The Discussion paper outlines four areas for appeal including:

1. Australian Energy Regulator (AER) decisions to draft and approve access arrangements or revisions to access arrangements in gas;
2. Ring fencing decision by the AER, including decisions not to approve associate contracts;
3. Ministerial decisions in relation to coverage of gas pipelines; and
4. For electricity, the AER’s determinations for revenue caps for transmission network services, and ultimately electricity distribution network services.¹¹

The companies are concerned that these broad areas above will not fully protect the private property rights of regulated businesses, as there are other regulatory instruments currently at the State level (that may be transferred to the National Level) that can also have financial implications if varied during the access or regulatory period. These can include changes to licences, codes, information gathering and operational guidelines.

¹⁰ from website

<http://tex.parliament.vic.gov.au/bin/texhtmlt?form=VicHansard.dumpall&db=hansard91&dodraft=0&ho use=ASSEMBLY&speech=17784&activity=Second+Reading&title=OFFICE+OF+THE+REGULATOR-RENERAL+BILL&date1=5&date2=May&date3=1994&query=true%0a%09and+%28+data+contains+r egulator-general'+%29%0a>>

¹¹ ibid p.15.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

In addition, the need for wider coverage is clearly demonstrated by the recent appeal in Victoria on the information gathering powers of the regulator, which was successful on the basis that the requirement was unfair and could have resulted in substantial costs to the company.

Given that there are many regulatory instruments that may change over the regulated access or pricing period the new appeal area should be generalised to an output related measure.

In addition, the fourth term in the list above refers to electricity “revenue caps”. Not all regulated electricity businesses operate with revenue caps. For example, Victorian electricity distributors operate with price caps. This presumably unintentional reference to “revenue caps” needs to be enlarged to cover “price caps”.

Recommendation 2

- (i) **That a new area 5 is added to the list of appeal areas above that states:**
“A capacity to appeal against any regulatory decision made during the access or pricing period that has a financial cost for the regulated energy business.”
- (ii) **That the fourth term should read “the AER’s determinations on revenue or price caps for transmission network services, and ultimately distribution network services”.**

3.3 Who Should be Able to Commence Appeals Under Model A

Coverage Decisions

The Discussion paper notes that:

“However, under Model A, it may be that a different standing test is appropriate in respect of coverage decisions. We note that the Productivity Commission considered that, for coverage decisions, it is appropriate any person can seek review (as is presently the case under s. 38 of the GPAL). Coverage of gas pipelines affects persons and entities other than the network providers such as retailers seeking access. If a decision is made that a pipeline is not covered (or coverage is revoked), then the result may be that retailers are unable to gain access to that pipeline. There is clearly potential for decision in relation to coverage, including revocation of coverage, to affect access seekers in a significant sense.”¹²

The companies consider that the ability for “any person” to review coverage decisions has led to gaming opportunities. Given the proper interested parties in these matters are service providers and access seekers then the ability to institute review should be limited to such groups.

Recommendation 3

That only service providers and legitimate access seekers should have a right of review to seek coverage and only service providers should be able to apply for uncovered status.

¹² *ibid*, pp. 36-37.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

The Specified AER Economic Regulatory Decisions.

The Discussion Paper points out that:

“For the AER’s economic regulatory decision in gas and electricity (excluding coverage decisions by relevant Ministers in the case of gas pipelines), the proposal is that standing to commence proceedings be restricted to service and network providers, the regulator, and affected users who meet some type of high threshold or “materiality” test.¹³

The companies are concerned with the reference to “the regulator” as able to seek merit review. The companies cannot see why this option has been included, as the regulator has no reason to appeal their own decision. The regulator can also be effectively represented in appeals by the ACT requiring the provision of all relevant information as described below.

The Discussion paper also refers to the issue of the role of consumers being able to initiate merits review. The Discussion paper argues that:

“Our understanding is that industry participants do not support an open standing for any person to seek merit review (so called third party appeal rights), because of the cost involved. They would support a more onerous test for standing to seek review. The policy decision to be made is how “high” to set the threshold to allow third parties with more indirect interests or interests represented adequately in earlier participatory procedures, to seek merit review.”¹⁴

The companies consider that there should be no open standing for any groups given the likely cost and gaming opportunities that such an option would entail. The companies agree with the Discussion Paper that some “high threshold” to ensure that only parties substantially affected by the decision should have rights to initiate appeals. This would certainly include the affected regulated network businesses and any energy user where energy costs were a substantial part of their business operations. This group may include high energy using businesses or domestic consumers.

However, to set any “threshold” level in terms of percentages in legislation would be difficult given that variations in the business cycle may mean that the issue of those businesses significantly affected by a decision may vary over time. Given these circumstances it should be open to the ACT to determine the standing of companies and consumers that claim to be significantly affected by the AER’s decision.

The companies consider that while this proposal would introduce some asymmetry in terms of who can seek a merit review this is justified in terms of sound economic principles. For example the Productivity Commission argued that:

“Regarding the symmetry of appeal rights, there is an asymmetry in the rights to appeal. However, the Commission considers this asymmetry is appropriate given the pre-eminent reason for a right to merit review is the protection of the service providers’

¹³ *ibid*, pp. 3-4.

¹⁴ Ministerial Council on Energy, Standing Committee of Officials, *op cit* p. 32.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

property rights and that the intervention is on behalf of the wider economy, including users”.¹⁵

In addition the companies consider the decisions of the ACT should be backdated to the start of the access arrangement given this is consistent with protecting the private property rights of regulated businesses. This will also reduce any gaming opportunities associated with time wasting.

Recommendation 4

That only service providers and major affected users should have rights to initiate merit reviews of the AER’s decisions.

That the regulator should not have rights to initiate review as this would unnecessarily complicate the appeal process;

That affected users should only be able to exercise such rights when the operation of their business or domestic premises was substantially affected by the AER’s decision and this position should be assessed by the ACT.

That where relevant ACT decisions are backdated to the start of the access or pricing period.

3.4 Who Should Join Merits Review and What Issues Should be Raised

The Discussion Paper refers to the operation of the appeal process under Model A as:

“However, once proceedings have been commenced in relation to a particular regulatory decision, then a wider range of persons will be permitted to put their views, such as persons “adversely affected” and/or those with a “sufficient interest” in the matter. There could be specific provisions to allow for consumer advocacy groups to intervene in a matter. The role these parties may have in alleging that the original decision was in error on ground other than those raised, would need to be determined” (p.4)

The problem with a role for consumer representatives in joining an appeal is that as the Discussion paper indicates they have an “indirect interest” and under these circumstances they should not have rights to initiate appeal processes.

Under these circumstances the companies consider the role for indirectly interested parties including consumer groups should be:

- that they can join a merit review only on the issue that has been raised by the initiator of the review; and
- they cannot introduce any new grounds in the appeal.

¹⁵ Productivity Commission, Review of the National Access Regime, Inquiry Report No. 31 (September 2001), Canberra, p. 360.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

Recommendation 5

That consumer representatives can have limited standing in merit appeals:

- **that they can join a merit review only on the issue that has been raised by the initiator of the review; and**
- **they cannot introduce any new grounds in the appeal.**

3.5 The Grounds of Review

Coverage

The companies consider that the ground for review in the case of coverage should be the coverage criteria as set out in the new National Gas Law (NGL) that:

- access (or increased access) to Services provided by means of the Pipeline would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the Services provided by means of the Pipeline.
- it would be uneconomic for anyone to develop another Pipeline to provide the Services provided by means of the Pipeline
- access (or increased access) to the Services provided by means of the Pipeline can be provided without undue risk to human health or safety
- access (or increased access) to the Services provided by means of the Pipeline would not be contrary to the public interest.

These grounds have been agreed by the MCE to make the criteria for coverage in the NGL the same as that in the Trade Practices Act. The companies support such a change to the coverage criteria.

AER Appeal Grounds

The Discussion Paper proposes that the grounds for review will be limited to:

- error of the fact-finding by the decision-maker; and
- that the exercise of the decision-maker's discretion was incorrect or was unreasonable having regard to all the circumstances.

Such terms are consistent with the grounds for appeal in the NGC and is similar for electricity distribution businesses in Victoria under the Victorian Essential Services Commission (ESC) Act appeal arrangements.

The Productivity Commission however has consistently supported wider ground for review on the basis of protecting the property rights of investors in the energy industry in all of its reviews of access regimes.

However, the companies support the proposal in the Discussion Paper to limit the ground for appeal as set out above on the basis that they do not seem to have adversely affected to appeals undertaken under such criteria before the ACT or under the Victorian ESC Act.

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

Recommendation 6

That the ground for merit appeals on coverage are limited to the coverage criteria in the NGC and the Trade Practices Act.

That the grounds for appeal on AER decisions are limited to errors of fact and errors in the exercise of discretion.

3.6 Restrictions on Evidence

The Discussion Paper argues that:

“There could be legislative criteria setting out the circumstances in which new evidence may be admitted by the ACT. For example, new evidence could be admitted where, in the opinion of the ACT, it would be unreasonable not to admit the evidence taking into account all the circumstances, including where the evidence was not available or not known at the time of the original decision and could not reasonably have been made available or known. The ACT will also have supporting powers to make directions to exclude irrelevant material generally and these powers would similarly apply to any new evidence proposed to be submitted.”¹⁶

In addition, the Discussion Paper refers to the issues of the standing of AER policy documents in appeal arrangements:

“A separate issue relating to material before the review body involves policy documentation developed, or used, by the AER. It is expected that the AER will develop extensive policy guidance on how to exercise its discretion in making the economic regulatory decisions specified in this paper, and it is likely that the AER will generally follow that policy guidance unless there are important reasons for the AER not to do so. However, in relation to Model A, the wider discretionary role for the review body raises the question of what status the AER’s policy documentation should be given. It would seem sensible for an administrative review body, to have regard to or take into account the AER’s policy documents to assist that body in undertaking a review. The review body could depart from the AER’s policy documents in appropriate cases. This suggestion would help to prevent the review body making widely divergent decisions to the regulator (thus making gaming less attractive).”¹⁷

The companies agree with the proposal to allow new material to be introduced that is pertinent to the appeal and was not available at the time of the decision or could not have reasonably been known at the time of the decision.

The companies do not agree with the proposal for the ACT to “have regard” to AER policy documents. The companies consider this proposal to be unnecessary as it would elevate “policy” documents above other matters of law and there is no reason to constrain the ACT in its review of the AER’s exercise of discretion. The current Gas Access law allows that the ACT must consider:

“Any reports relied on by the relevant regulator before the decision was made”¹⁸

¹⁶ *ibid*, p.45

¹⁷ *ibid*, p. 48.

¹⁸ National Gas Law, Clause 39 (5) (c)

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

In addition the ability of the ACT to undertake a comprehensive evaluation of the appeal can be assisted by the use of the clause that is already in the Gas Access Law:

“The relevant appeals body may require the relevant regulator to give information and other assistance, and to make reports, as specified by the appeals body”¹⁹

The ACT should also have the ability to manage the relevant appeal such that it is both effective and efficient:

“In a review under this section, the relevant appeals body may give directions to the parties excluding from the review specified facts, findings, matters or actions that the relevant appeals body considers should be excluded...” (Section 39 (4))

Recommendation 7

That new material can be introduced that is pertinent to the appeal and was not available at the time of the decision or could not have reasonably been known at the time of the decision.

That the MCE should use the terms from the current National Gas Law to ensure the ACT can take account of all relevant material used by the AER to make decisions and to ensure that the ACT can operate in an efficient and effective manner.

3.7 Awarding of Costs

The Discussion Paper argues that:

“In any merits regime scheme such as suggested in Model A, consideration would be given to an appropriate way to determine whether costs can be recovered from parties to a dispute. As an applicant may force a considerable number of parties (including the decision-maker) to great expense over a decision it may be possible for there to be discretion for the review body to make an award as to costs against an applicant who has not succeeded in making out any ground of review. Indeed, where an industry participant brings proceedings and fails to make out any ground of review, it may be appropriate that, as a general rule, that participant meet the costs of the other parties save in exceptional circumstances. However, where a ground of review has been made out, all parties would bear their own costs.”²⁰

The companies note that the normal rule in judicial proceedings is that the “costs follow the event” or that the party losing the appeal usually pays the cost of the other party involved. The companies can find no empirical or other support in the Discussion Paper to justify moving from the traditional judicial method of allocating costs.

The companies consider that the awarding of costs should follow the legal traditions such that the party (parties) that loses the action should pay the costs of the party (parties) that win the action, except in exceptional circumstances as determined by the ACT. This also implies that the successful party should pay the costs of any unsuccessful part of their overall action to the other “winning” parties.

¹⁹ *ibid*, Clause 38 (8).

²⁰ *ibid*, p. 47.



Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

The companies consider that such a requirement will mean that frivolous or poor quality appeals will be discouraged and serve to make the appeal structure both efficient and effective. These two requirements are the key requirements for best practice regulation.

Recommendation 8

That the awarding of costs should follow the legal traditions such that the party (parties) that loses the action should pay the costs of the party (parties) that win the action, except in exceptional circumstances as determined by the ACT.