

REVIEW OF DECISION-MAKING IN THE GAS AND ELECTRICITY REGULATORY FRAMEWORKS

COMMENTS ON REGULATORY IMPACT STATEMENT

Executive summary

1. Merits review is essential for good governance and greater accountability, efficiency and consistency in the gas industry.
2. Review of administrative discretion should comply with the relevant terms of reference of the Senate Scrutiny of Bills Committee, which requires consideration of, amongst other matters, whether legislation makes rights, liberties or obligations unduly dependent on non-reviewable decisions.
3. Consideration of the review of administrative discretion in the gas industry should involve consideration of review rights available in related contexts. Industries regulated under Part IIIA of the Trade Practices Act have full merits review (Option 4), as does the telecommunications industry under Part XIC in some cases. Decisions by the ACCC on matters such as authorisations are also subject to full merits review. Changes to the current review right in the gas regime under Options 2 and 3 may further distort the pattern of investment between infrastructure based industries.
4. The optimal review model, which achieves the correct balance between the policy objectives of accountability, transparency and timeliness, is a model with the following features:
 - (a) two tiers of review rights, being a review limited to process issues (judicial review), and a review allowing parties to canvas the merits of a decision;
 - (b) a merits review right which offers the ability to fully explore the correctness of the decision, unlimited by uncertain or artificial grounds of review, and which is in that sense clearly a superior review right to a process-oriented review right;
 - (c) a restriction on merits review to issues that are likely to have significant impacts, that is, decisions which determine what assets will be subject to an access regime (including greenfield exemptions), and the terms and conditions of that regime including the revenue to be allowed to the owner.;
 - (d) a merits review process which equates to an appeal right, in that there are limits on the introduction of new evidence ;
 - (e) a merits review procedure in the Australian Competition Tribunal which captures the benefits of court processes and avoids many of the disadvantages;

- (f) a merits review model that has (where appropriate) elements in common with other merits review rights in regulated industries (such as standing and costs issues). This will foster the development of a body of jurisprudence which will create certainty for those involved in regulation of the gas industry.
5. A removal or restriction on merits review will erode current rights and accountability available to investors and other participants in the gas industry and will have a negative impact on future investment. It will also alter the balance of the regulatory risk posed by the Gas Access Regime without any countervailing effort to achieve a rebalance.
6. We support maintaining the existing review rights in the gas access regime (Option 1 of the Regulatory Impact Statement), although there may be procedural improvements to Tribunal processes to expedite hearings. While Option 4 is the best option, and is consistent with the Productivity Commission's findings, we understand that a decision has been made not to proceed with this option, and consequently do not address it further.
7. Options 2 and 3 are not acceptable.

1. Background and scope

- 1.1 Australian Pipeline Trust (*APA*) is a major owner of gas transmission infrastructure in Australia. It holds interests in over 7,500km of pipelines, and transports approximately 25% of Australia's natural gas consumption.
- 1.2 The MCE has also recently issued a Regulatory Impact Statement (*RIS*) on the *Review of Decision-Making in the Gas and Electricity Regulatory Frameworks*. The RIS is designed to encourage consultation on certain options for regulation of the gas and electricity industries. Minter Ellison Lawyers has been retained by APT to comment from a legal perspective on aspects of the RIS insofar as it relates to the gas regulatory framework.

2. The decision to regulate

- 2.1 The risks of regulation are asymmetric, that is, the costs of regulation when it is not justified are acknowledged to be higher than the cost of not regulating when it is justified. The imposition of regulation increases compliance costs and, more importantly, leads to the risk of regulatory error creating unforeseen and large social costs. Regulation also creates rule making and enforcement costs for the state. For this reason, governments typically decide to regulate only where the benefits of regulation clearly - not marginally - outweigh the costs.
- 2.2 In considering whether or not to regulate, government focuses on the benefits and detriments regulation would bring to the acquirers (both direct and indirect) of the regulated service. This analysis also requires an evaluation of the counterfactual, that is, the benefits and detriments that would result if regulation was not imposed.

- 2.3 One of the potential detriments of regulation are the social and economic costs of error in the exercise of regulatory discretion. For example, errors can send incorrect price signals to the market, leading to failure to invest and wider social cost. Equally, an erroneous decision to not regulate an asset can result in excessive monopoly rents being charged by the asset owner, leading to inefficient outcomes. The presence of a meaningful merits review right is an important mechanism for identifying and reducing regulatory risk. A regulatory regime without a merits review right is a fundamentally different regime (from a risk perspective) to a regime with appropriate review rights.
- 2.4 Removing merits review rights from an existing regulatory regime also involves a rebalancing of the benefit / detriment equation that was originally answered when making the decision to regulate. For this reason, removing a merits review right without also removing risk in some other aspect of the regulatory regime is a startling and ill advised step.

3. Background to merits review

- 3.1 Administrative decision makers, including economic regulators, are given discretion by Parliament to make decisions which give effect to government policy (within the parameters of the relevant legislation). Legislation enacted by the Commonwealth Parliament which grants administrative discretion is subject to scrutiny to determine how that discretion impacts the public (see below). While the Gas Pipelines Access Law (*Gas Law*) and National Electricity Law (*NEL*) are State enactments, it would be an odd result if the scrutiny of changes to those pieces of legislation was less rigorous than that applied to Commonwealth laws. We note that the NCC's recent submission to the taskforce on reducing the regulatory burden on business stressed the importance of a legislative review process which identifies the risks, costs and benefits of regulation, and considers regulatory and non-regulatory alternatives.
- 3.2 Taking the Commonwealth Parliament's approach to scrutiny of bills which grant administrative discretions, the terms of reference of the Senate Scrutiny of Bills Committee (*Senate Bills Committee*) require it to report to the Senate whether bills coming before the Senate, and Acts of the Parliament:
- (a) trespass unduly on personal rights and liberties;
 - (b) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- 3.3 The approach of the Senate Bills Committee calls for a focus on whether rights - including property rights - or obligations are unduly dependent on:
- uncontrolled or insufficiently defined discretion; or
 - non-reviewable decisions or decisions reviewable on a limited basis.

In our view, those are the two key questions for consideration in relation to decisions under the gas regulatory regime.

- 3.4 In terms of approach, it is important to consider both of those questions and to understand the inter-relationship between their answers. For example, the RIS suggests that the scope for judicial review can be significantly increased if the legislation governing a decision-maker makes "express and detailed provision for how the decision-maker must carry out its functions" (page 8). This implies that the more controlled the discretion, the less merits review is deemed necessary because any errors can be assumed to arise from a failure of process. It is a mistake to reason back too readily from a desire to curtail merits review to a conclusion that greater prescription of an administrative discretion is therefore appropriate.
- 3.5 It is also undesirable (and certainly very difficult) to specify in detail the grounds on which a regulator must exercise its discretion; for example, due to the need to specify the relevant economic principles, models and so on. In addition, prescribing in detail the basis for decision-making risks enshrining principles that are conflicting (or 'incommensurable'¹) or which may become outdated²; '*...greater prescription brings with it a greater risk of ambiguity, inconsistency and inflexibility*'.
- 3.6 The better approach is to give regulators discretion and endeavour to ensure:

*'that they use this discretion in the manner that best contributes to the welfare of society, without making errors of fact or using illogical reasoning. Such an optimal outcome can be guaranteed only through the presence of a merits appeal mechanism...Legislation that creates the power for a statutory agency to make decisions must also provide for the right to appeal those decisions on the merits, in the interests of good governance, regulatory accountability and natural justice'*³.

4. Options 1 and 4 are optimal for the gas industry

Summary

- 4.1 While APT has instructed us that it also supports introducing a de novo/ full merits review for the gas access regime, they consider this is unlikely and have therefore instructed us to not discuss Option 4. We have focussed our comments on Option 1, that is, maintaining the status quo.
- 4.2 The RIS states that the current system of review is understood by all stakeholders in the energy market but fails to articulate the other benefits of Option 1.
- 4.3 There are significant benefits arising from existing merits review rights in the Gas Law. To this end the benefits arising from Option 1 in the RIS are at least those articulated for Option 2 in the RIS.

¹ **Justin Gleeson SC** *Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?* Paper for Administrative Law Conference, November 2004.

² **John Tamblyn**, "Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?", paper presented to the 2004 Public Law Weekend Administrative Law Conference (Tamblyn paper), p13

³ **Professor David K Round** *Merits Review of Regulatory Decisions: A necessary check on discretionary power* paper prepared for the Australian Merchants Payment Forum [2004]

- 4.4 In particular, outcome predictability (a crucial ingredient of infrastructure investor trust) is enhanced by a merits regime and is essential for continued investment in the energy industry, which has high capital costs. Continued investment in the energy sector will be driven by investors' views of the regulatory environment and the balance of risks in that environment, including whether or not meaningful rights of review are available to parties adversely affected by regulatory decisions.
- 4.5 There is a real economic cost that arises from not implementing a review option that will increase opportunities for investment in both the electricity and gas markets, and for this reason Options 2 and 3 should not be implemented.
- 4.6 If there is a concern that the current system of review does not provide a consistent framework to support the efficient investment in and use of energy infrastructure, the solution is not to implement the 'lowest common denominator' (being judicial review).

Merits review in the gas industry

- 4.7 There is a great deal of commentary on the benefits of merits review in an administrative review system⁴ and the benefits of transparency in regulatory decision making is well recognised in OECD countries, where appeal rights are regarded as essential safeguards in the compliance and implementation stages of the regulatory process⁵.
- 4.8 Merits review clarifies the meaning and principles of the relevant law. In this way not only industry, but also regulators are given guidance as to how decisions may best be made:
- '...since the introduction of the [Australian regulatory] reforms we have seen the development of a substantial body of regulatory thinking and practice that has substantially improved the predictability and replicability of regulatory decisions and processes. The threat - and occurrence - of appeals has been an important part of the development of this regulatory precedent, and will continue to provide a positive pressure for improved regulatory decision-making into the future'*⁶.
- 4.9 In its review of the Gas Access Regime, the Productivity Commission (*PC*) strongly supported merits review. The PC was critical of some regulatory interpretations of the Gas Law, noting a high potential for regulatory error due to the fact that the Gas Access Regime requires regulators to make decisions about future market circumstances that are uncertain, leading to an adoption of controversial assumptions⁷. It argued that merits review was needed in the Gas Access Regime to protect property rights and provide natural justice. It added:

⁴ See for example: Administrative Review Council *What decisions should be subject to merit review?* Canberra 1999; *Lessons from 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;

⁵ *Regulatory transparency in OECD countries: Overview, trends and challenges*, Deighton-Smith, Australian Journal of Public Administration Vol 63, March 2004

⁶ **John Tamblin**, "Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?", paper presented to the 2004 Public Law Weekend Administrative Law Conference

⁷ *ibid*, page 329

'... the regulatory bodies and Ministers have power 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'⁸.

- 4.10 Review rights were originally included in the Gas Access Regime to place appropriate limits on the potential for regulatory decisions to impact on property rights. (we refer to the NCC's assessment at the time of the effectiveness of the national gas access regime). We are not aware of any changes since 1997 which remove these fundamental reasons for review rights.

The cost/benefit analysis of Option 1

- 4.11 The RIS does not outline the costs and benefits of Option 1 in any detail⁹.
- 4.12 However, there are significant and specific benefits arising from maintaining the status quo and continuing the availability of merits review. These benefits can be loosely grouped as 'public policy benefits', ie:

- greater accountability of the regulator¹⁰;
- better decision making by the regulator¹¹;
- enforcement of process requirements;
- fairness, that is, ensuring that fundamental tenets of justice and justiciability are observed;
- transparency in the regulatory decision making process; and
- helping to ensure the political independence of the process,

and also as a subcategory of public policy benefits, being 'public economic benefits' (in a regulatory context), ie:

- merits review creates precedent, leading to greater efficiency, consistency and predictability in regulation because the regulator is thereby legitimised and guided. This ensures greater stability in regulatory decisions;
- merits review creates precedent, enhancing the confidence of regulated companies in the regulatory process;
- as a variety of outcomes are possible (the review can affirm, reverse, remit or substitute a decision of the regulator) there is an increased chance that an economically correct decision will be made;
- merits review before the Australian Competition Tribunal is often faster than other review alternatives.

- 4.13 The benefits arising from maintaining the existing merit review rights for the gas industry under Option 1 are at least those stated as being available for Option 2, being:

⁸ *ibid*, page 498

⁹ RIS page 10

¹⁰ Accountability benefits are acknowledged by many regulators, including recently by **Graeme Samuel** Chairman of the ACCC in a speech called "The balance between competition & cooperation - regulating infrastructure development", 19 October 2004, Australian Davos Convention

¹¹ See a submission by **Ed Willet**, a Commissioner of the ACCC, to the Productivity Commissions enquiry into the Gas Access Regime, in which he emphasised the discipline a review process imposes on the decision making process of a regulator.

- (a) the ability to correct a greater range of regulatory errors than judicial review;
- (b) higher accountability for decision-makers;
- (c) greater ability to balance competing interests; and
- (d) the advantages of review by a specialist tribunal,

as well as those referred to in paragraph 4.12 above.

- 4.14 The current benefits of judicial review would also be available under Option 1 or Option 4, namely legislative accountability for the AER, given that judicial review would continue to be available as well as merits review.
- 4.15 The RIS states¹² that a potential cost of Option 1 is the difference in the gas and electricity review schemes that may have the potential to distort investment between gas and electricity. However, if there is a concern that the current system of review does not provide a consistent framework to support the efficient investment in and use of energy infrastructure, the solution is not to implement the 'lowest common denominator' (being judicial review). Further, a 'lowest common denominator' solution ignores the reality that merits review remains available in other regulated industries - shifting the investment distortion to other areas, rather than removing it.
- 4.16 In terms of other costs of Option 1, we note the assumption expressed in the RIS in relation to Options 2 and 3 that:
- (a) merits review is likely to result in delays, gaming and forum shopping;
 - (b) merits review can result in a 'free rider' problem;
 - (c) there is no particular advantage in having review by a specialist tribunal and it may only impose additional costs;
 - (d) service providers have the resources to be heard again and push their interests; and
 - (e) there are large costs to the regulator of running an electricity or gas merits review.

We do not agree that assumptions (a) – (c) are correct. In particular, the ability of industry to game or delay the Gas Access Regime is limited by provisions in the Gas Law which provide that regulatory decisions are *not* stayed in the event of an appeal from that decision.

- 4.17 In our view, assumption (d) is not a 'cost' in the sense that term is used elsewhere in the RIS. We note in any event that pipeline transmission owners are usually smaller, in an operational sense, than their customers.
- 4.18 Assumption (e) is a 'cost'. However it is not significant when weighed against the benefits of Option 1. We also note that the ACT has power to dismiss applications which it believes are mischievous. In other words, only genuine applications will be heard and the regulator should bear the cost of involvement in these cases.

¹² RIS page 11

- 4.19 These costs or risks are no doubt also applicable to Option 1. We deal with the 'timeliness vs accuracy' equation in our discussion of Option 3. The suggestion to curtail review rights in the Discussion Paper and the RIS seems to be at least partly attributable to a perceived need to re-balance this equation. We also argue in paragraphs 4.30 to 4.35 that merits review has worked well to date without the 'floodgates' opening or the ACT embarking on completely *de novo* hearings.
- 4.20 Concerns about gaming in terms of delay, forum shopping and holding back relevant evidence can be addressed by specific measures such as limiting the evidence to be considered on a merits review and imposing strict time limits.¹³ We outline some suggestions for possible improvements to the merits review process in paragraph 4.41.
- 4.21 Finally, we agree with the statement in the RIS that there is a real economic cost with any option that does not increase opportunities for investment in both the electricity and gas markets, including reducing investor security and confidence. However for this reason we support Option 1.

Merits review is key for continued investment in the gas industry

- 4.22 Investment is critical for the gas industry and Australia is becoming increasingly dependant on natural gas as a primary energy source¹⁴.
- 4.23 The Federal Government's 2004 White Paper '*Securing Australia's Energy Future*' states that '*competitively priced stationary energy supplies (essentially provided by electricity and gas) have been an important factor in Australia's national prosperity, underpinning the Australian economy and industrial growth, and providing cheap reliable energy to 400 businesses and households*' and that '*Most projections point to growth of at least 50 per cent over the period to 2020, necessitating ongoing large-scale investments in new and replacement energy supplies, infrastructure and improved energy management strategies*'¹⁵.
- 4.24 The NSW Government's 2004 '*Energy Directions*' Green Paper also notes that '*gas is a likely future source of fuel for significant levels of electricity generation in this State*' but that accessing vast gas reserves in the North-West of Australia to NSW is likely to require a transcontinental pipeline costing several billion dollars, and a '*major constraint on gas pipeline development is the nature of investment in the industry*'¹⁶.
- 4.25 A removal or restriction on merits review will erode current rights and accountability available to investors and other participants in the gas industry and will have a negative impact on future investment in the industry in Australia.
- 4.26 For example, the Gas Access Regime includes a number of key decision making powers, which are subject to some type of merits review:
- (a) Ring-fencing decisions and approval of associate contracts; and

¹³ As suggested in the Law Council of Australia's submission to the MCE, 11 November 2005, page 3

¹⁴ According to recent energy forecasts by the Australian Bureau of Agricultural and Resource Economics (ABARE) (Australian Energy: Projections to 2019-20), natural gas will be the fastest growing primary energy source in Australia for the next 20 years. Annual domestic gas consumption is projected to increase from 534 PJ to 858 PJ over the period 2001-02 to 2019-20, growing at 3.7 per cent per year, with growth expected in all states and territories. In comparison, the average annual growth rates of oil and black coal over the same period are projected to be 2.2 per cent and 1.4 per cent respectively

¹⁵ Federal Government's 2004 White Paper '*Securing Australia's Energy Future*' page 66

¹⁶ NSW Energy Directions Green Paper, December 2004, page 37.

- (b) Decisions of Ministers in relation to coverage of pipelines (ie, whether a pipeline will be subject to a regulatory regime rather than operating in a normal market environment).
- (c) decision of regulator on revenue recoverable by the asset owner, including value of assets and allowable return.

- 4.27 It goes almost without saying that these types of decisions are fundamental to the business of pipeline operators such as APT. Investment in transmission pipelines is indivisible and sunk costs are very large.
- 4.28 In the most basic sense, these types of decisions intrude on the fundamental property rights of pipeline owners and their freedom to contract. Put into the simple language of the terms of reference of the Senate Bills Committee: a failure to provide for the best possible decisions about whether one business is required by law to make its facilities available to another, or the price at which those facilities must be made available, would be an undue impost on its fundamental property rights.
- 4.29 Further, outcome predictability (a crucial ingredient of infrastructure investor trust) is enhanced by a merits regime that has features in common with other regimes because it is then able to receive the benefit of jurisprudence arising out of a greater number of cases than might occur in one industry. Many issues can overlap in review regimes - for example, standing tests, procedure, treatment of evidence and costs. Principles, such as the appropriate WACC, are more rigorously tested and develop faster if a wide base of jurisprudence develops.

Merits review has worked effectively to date in the gas regulatory context

- 4.30 The current gas regulatory regime recognises that a regulatory or economic decision made by an administrative body is different to a typical administrative decision. The regulatory decision is more complex, involves consideration of national policy issues and potentially affects a large number of Australians, in terms of the price paid for essential services and investment in future nationally significant infrastructure. Many administrative decisions have a lesser significance financially and politically and do not occur in the highly specialised context of a regulated industry.
- 4.31 In the gas regulatory context, in relation to decisions about pipeline coverage and ring-fencing reviewable under s38, and access arrangement decisions under section 39, there is a limited merits review right.
- 4.32 The current review regime has worked very effectively in the context of the GAS LAW. There has been no opening of floodgates to review. Only a small number of merits reviews have occurred, notwithstanding the significant number of regulatory decisions which have been made. Out of numerous decisions concerning pipelines and networks by regulators under the Code since 1997, there have been five applications for review under the Code. Notwithstanding that limited opportunity, the Australian Competition Tribunal (*ACT*) has performed an important role in reviewing the ACCC's decisions under section 38 and 39 of the Gas Law. The ACT has clarified the nature of the ACCC's discretion and the nature and weight of objectives set out in the Gas Law.
- 4.33 On four out of the five occasions upon which there has been merits review of decisions under the Gas Law, the result has been to set aside or vary those decisions in a manner

favourable to the pipeline owner or operator¹⁷. In the fifth (Duke Queensland Gas Pipeline 2001), the decision of the regulator was upheld.

- 4.34 A partial explanation for the divergence of views between the original decision-maker and the merits reviewer in cases concerning the Gas Law may be found in the nature of stakeholders interested in the outcome of administrative decisions in the gas regulatory context. Put simply, the owner has a clear objective and position. In contrast, the interests of other stakeholders, such as gas producers, potential access seekers, or ultimate consumers are less focussed and more disparate. As a result, there can be a tendency in a first level decision maker to take on more of a 'contradictor' role when considering material put before it by a pipeline operator:

*'It is inevitable, therefore that while regulated entities can be relied upon to advocate their position professionally, it will often fall upon the regulator to identify and evaluate what may be the counter case, and to take it into account'*¹⁸.

In those circumstances it is difficult for the decision-maker to keep clearly separate the functions of investigator and decision maker; its role as one may be hard to leave behind when performing its role as the other.

- 4.35 The nature of decisions under the gas regulatory regime and the relative concentration of stakeholder interests itself places a first level decision-maker in a position which is difficult to manage; a requirement for merits review is strongly suggested by that circumstance.

Merits review is available for analogous decisions in other regulatory contexts

- 4.36 Decisions to declare a service or to give access to a service provided by means of facilities under Part IIIA of the TPA are also subject to full merits review¹⁹. Similarly, the ACT sits as a merits reviewer in relation to access determinations by the ACCC²⁰. An administrative decision-maker under Pt IIIA of the TPA does not have the ability to 'declare' a service without there being an ability to review that decision on its merits, and it is unclear why a decision that a pipeline should be covered under the Gas Law should not be subject to a similar review (as it currently is under section 38 of the Gas Law). Indeed, restricting or removing the merits review option currently available to the gas industry would be contrary to the current move to widen review rights under the general access provisions in Part IIIA of the TPA²¹. Such a move may also have the potential to distort the pattern of investment between infrastructure based industries.
- 4.37 In the context of discussions on regulatory review rights, it must not be overlooked that authorisation decisions by the ACCC under the *Trade Practices Act (TPA)* are subject a

¹⁷ In *Re Duke Eastern Gas Pipeline* [2001] A Comp T 2, the ACT set aside a decision by the Minister that the EGP between Bass Strait and Sydney should be covered. In *GasNet Australia (Operations) Pty Limited* [2003] A Comp T 6 a decision of the ACCC to approve an access arrangement was largely overturned by the ACT. In *Epic Energy South Australia* [2003] ACompT 5, the ACT varied the ACCC's approval of an arrangement in some key respects. In *Application by East Australian Pipeline Limited* [2004] ACompT 8, the ACT again set aside key aspects of the ACCC's access arrangement in respect of the Moomba to Sydney Pipeline (see also [2005] ACompT 1).

¹⁸ Tamblyn paper p7

¹⁹ s44K TPA. An example is *Re Sydney International Airport* [2000] A Comp T 1.

²⁰ s44ZP TPA.

²¹ See the *Trade Practices Amendment (National Access Regime) Bill 2005* which, if passed, will allow full merits review for certain new classes of decision.

full merits review by the ACT, which will be conducted as a rehearing of the matter²². Many of the decisions thus reviewed, while undeniably important, may perhaps have less financial or consumer welfare significance than decisions on the coverage of gas pipelines or on the price of access to gas pipelines²³. It is anomalous that the industry specific regulatory regime for gas provides for more limited rights of review of regulatory decisions than are available in the administration of generic competition laws.

- 4.38 Similarly, under Part IIIA, decisions of the arbitrator are subject to full merits review. The Gas Law arose as a particular implementation of policy behind Part IIIA. It is anomalous and inconsistent with that policy that participants in the gas industry have more limited appeal rights than other infrastructure owners. That anomaly would become even more significant were those appeal rights further reduced.

Some possible improvements

- 4.39 The PC made a finding that *'there are valid concerns about the inadequate timeliness of regulatory decisions in some cases under the Gas Access Regime'*²⁴. It considered various possible reasons for delay, including:

- lack of binding time limits in the Gas Code;
- the processes for access arrangement approval;
- transitional and pipeline specific circumstances; and
- lack of incentive for service providers to expedite the process.

Under that last category, the PC noted that some of the ways in which an interested party might seek to delay the process included seeking merits (where available) or judicial review²⁵. Note that there seems to be no evidence of this occurring – out of numerous regulatory decisions/processes, only five appeals under Code.

- 4.40 In considering timeliness of regulatory decisions, the PC made a number of recommendations to improve timeliness: the regulator should be restricted from extending the period for approval of an access arrangement more than two months²⁶; a step of the regulator's decision-making process be removed²⁷; service providers should be restricted from proposing amendments to an access arrangement at certain times²⁸. That is, timeliness is more of an issue when the regulator makes a decision, rather than a review body. The PC also looked at implications for timeliness in allowing merits review of decisions and not only concluded that *'there is a need for merits review'*²⁹ but also that the scope of merits review should be extended notwithstanding the timeliness and cost implications

²² s101 TPA. An example of the approach and we would say the benefits of the approach is *Re EFTPOS Interchange Fees Agreement* [2004] A Comp T 7 where the ACT overturned a decision by the ACCC to authorise a price fixing arrangement between various banks.

²³ For example, the ACT has recently considered whether to authorise exclusive dealing arrangements whereby private in-patients in NSW public hospitals were restricted to receiving pathology services from public pathology providers in *Re Australian Association of Pathology Practices Incorporated* [2004] A Comp T 4 (8 April 2004)

²⁴ PC Report, Finding 11.1, p473

²⁵ PC Report, p472

²⁶ PC Report, Recommendation 11.1, p479

²⁷ PC Report, Recommendation 11.2, p483

²⁸ PC Report, Recommendation 11.3, p484

²⁹ PC Report, p498

- 4.41 The procedure of the merits reviewer is also crucial. The Discussion Paper notes that while the ACT has considerable flexibility in its procedure, in practice proceedings resemble those before the Courts. Encouraging the ACT to streamline its processes may result in matters proceeding to hearing at a faster pace. For example:
- (a) parties often experience delays in obtaining court dates due to the need to involve all three tribunal members. It should be possible for a judge sitting alone to decide non-substantive issues;
 - (b) proceedings before the ACT often involve predictable steps, such as obtaining documents relating to the decision from the regulator, and from other parties. The ACT could consider imposing enforceable timeframes for the completion of these steps, much in the manner that commercial courts manage their lists. If these timeframes (and procedures) were documented, the risk of matters taking some time to proceed to hearing would be minimised, and
 - (c) the ACT could consider promulgating a 'standard' approach to issues that normally arise (such as confidentiality), with the onus on the parties to establish why the ACT should depart from that approach (instead of allowing the parties to go through the lengthy process of agreeing on procedural issues).

A review of the ACT's procedures may assist in removing some of the frequently cited disadvantages of reviews (cost and delay), while retaining the benefits. Retaining the ACT (rather than the Federal Court) is consistent with the PC's recommendation.

- 4.42 By adopting the suggestions outlined above, it is possible to decrease the costs and risks associated with option 1, while retaining the benefits. Implementing procedural improvements is a low-impact 'non-regulatory' alternative, and is the kind of alternative the NCC recommends be explored prior to regulatory change³⁰.

5. Option 2 – limited merits review

- 5.1 The Option 2 type of review outlined in the RIS is a narrower variant of the existing regulatory review model for the gas industry under which the ACT would undertake a more limited form of merits review.
- 5.2 Under Option 2 the proposed grounds of review would be limited to:
- (a) error of fact finding by the decision maker; and
 - (b) that the exercise of the decision maker's discretion was incorrect or was unreasonable having regard to all the circumstances.

The cost/benefit analysis of Option 2

- 5.3 The benefits available under Option 2 are greater than the benefits available under Option 3. However, the benefits are less than those available under Options 1 and 4, and the costs appear to be very similar, while the risks are greater.
- (a) Further, we have outlined in paragraphs 4.30 to 4.35 how merits review has worked well to date. As noted above, we do not agree with many of the 'costs' identified for Option 2.

³⁰ See the NCC's "Submission to the taskforce on reducing the regulatory burden on business", November 2005

- 5.4 In any event, many of these concerns can be addressed by specific measures such as limiting the evidence to be considered on a merits review and imposing strict time limits, as outlined in paragraph 4.41.

Narrowing the grounds of merits review is dangerous

- 5.5 We disagree with the RIS regarding the impact of Option 2 on stakeholders.
- 5.6 As the Discussion Paper records, the grounds of review are '*probably the key design feature of a review regime that will most influence the 'reach' of a review body*'³¹. Model A in the Discussion Paper and Option 2 would limit the grounds of review for all classes of decision.
- 5.7 The Discussion Paper records that Model A is similar (but not identical) to the existing grounds of review in s39 of the Gas Law. Unlike review under s38, the ACT has found that review on the grounds in s39 '*ought to be construed as one to be exercised for the correction of error*' and '*there being no relevant difference in this respect between an appeal to an administrative tribunal or a Court*'³². That being the case, bringing the decisions currently subject to s38 review - including pipeline coverage - into a regime with prescribed grounds of review will create significant uncertainty for pipeline owners, developers and investors.
- 5.8 In addition, the proposed grounds are not identical (and will not be in an identical context) from those currently in place; thereby potentially unsettling the jurisprudence in this area and creating uncertainty³³. Novelty in these infrequently tested areas means that outcomes are unpredictable.

Curtailing merits review - the 'timeliness trade-off' fallacy

- 5.9 The RIS states that '*The introduction of a merits review system will encourage regulators to take a lot more time and consideration into the decision making process in order to deter future appeal, again increasing the cost to the regulator. The limited merits review option proposed attempts to limit time and costs of the review process*'³⁴.
- 5.10 The suggestion to curtail review rights in the RIS, whether under Option 2 or Option 3, seems therefore to be at least partly attributable to a perceived need to re-balance the equation between speed of decisions on one hand and correctness of decisions on the other.
- 5.11 That equation is at the heart of ongoing debate around the role and activities of regulators in the various regulated industries. An example is a recent comment by the Chairman of the ACCC that '*achieving a regulatory decision is ... less about achieving the holy grail of the right answer and more about getting practical timely decisions*'³⁵.

³¹ Discussion Paper, para 6.27

³² *Application by Epic Energy South Australia* [2002] ACompT 4 at para 20.

³³ *GasNet Australia (Operations) Pty Limited* [2003] A Comp T 6 (23 December 2003) and *Re Epic Energy (South Australia) Pty Limited* [2003] A Comp T 5

³⁴ RIS page 14

³⁵ See a paper by the Chairman of the ACCC **Graeme Samuel**, "The balance between competition & cooperation - regulating infrastructure development", 19 October 2004, Australian Davos Convention

Such a statement offers little comfort for a pipeline operator the '*economic viability*'³⁶ of which, as the RIS notes, may depend on such a decision (page 4).

- 5.12 In our view, the approach described in the RIS (and perhaps by the Chairman of the ACCC), is based on a fallacious, or at least incomplete, identification and analysis of the trade-off. Two aspects of the equation between speed and correctness must be clearly articulated and understood:
- (a) The timing consequences of merits review are only a part of the real issue for stakeholders which is the timeliness of regulatory decision-making as a whole, accountability of the decision-maker, and transparency of decisions;
 - (b) To the extent that merits review or appeal might increase the time and cost of regulatory decision-making, there are levers which may be more appropriate to adjust to improve the timeliness of merits review than a significant reduction in the substantive grounds of review (Option 2) or removal of merits review entirely (Option 3) given that decisions under review affect fundamental property rights.
- 5.13 Instead of curtailing the review rights in the gas industry, suggestions for improving the timeliness of the merits review process are discussed in paragraph 4.41 above.
- 6. Option 3 – judicial review**
- 6.1 Judicial review is not substitutable for merits review. Judicial review is limited to review of questions (or errors) of law, and does not extend to review of the merits of the administrative action or, usually, correcting errors of fact. It was established in a judgement by Mason CJ in 1990 that an applicant for judicial review cannot challenge the decision for an error of fact or want or logic as follows:
- '... want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.'*³⁷
- 6.2 The Hon J.J. Spigelman, Chief Justice of New South Wales has recently stated:
- 'Judicial review ... seeks to protect a social process, rather than to ensure that justice narrowly defined is achieved for a party. In contrast, merits review seeks to ensure that the "correct and preferable" decision is made ... [and that] fairness, consistency and quality of decision-making are maintained'*³⁸.
- 6.3 Option 3 privileges procedural certainty over substantive certainty (ie, certainty that the decision will be correctly made rather than the decision being correct).
- 6.4 Decisions under the gas regulatory regime involve both procedural and substantive elements so that even if a decision is 'correctly made' under the statute it may still be substantively in error. On that basis there is a risk of uncorrectable error.

³⁶ Discussion Paper para 5.5

³⁷ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356. The decision has been challenged, but remains authority on this point.

³⁸ **JJ Spigelman**, "The Integrity **Branch of Government**", *Quadrant*, Vol. XLVIII, July - August 2004

The cost/benefit analysis of Option 3

- 6.5 Option 3 has none of the benefits of merits review, but does have a number of the costs associated with a review mechanism.
- 6.6 Narrowing review options to judicial review is likely to result in an unstable review method given the recent trend in administrative law cases for parties to push the boundaries of what administrative review means, leading to unpredictable outcomes. It is not appropriate for pipeline industry participants to be reliant on a review method that is largely articulated and expanded in the context of vastly different issues (for example the numerous applications for review of decisions by the Refugee Tribunal).
- 6.7 We note and agree with the views of Stephen Gageler SC and Margaret Allars in their Joint Opinion of 10 October 2005 that '*Errors of technical and economic reasoning rarely lend themselves to redress by way of judicial review*'³⁹ and that there are a number of problems associated with judicial review including:
- (a) technical and economic errors are generally errors of fact or discretion which are part of the merits;
 - (b) judicial review has proved expensive and cumbersome where the error of law is alleged to have occurred in a technical or economic context;
 - (c) the lack of any guarantee that the judges will have any relevant technical or economic background;
 - (d) delays in the allocation of a hearing date and the giving of a judgment;
 - (e) the necessity for the parties to lead expert evidence in admissible form;
 - (f) uncertainty as to what evidence will be admitted by the court; and
 - (g) uncertainty as to what is or isn't an error of law.
- 6.8 Errors in the exercise of regulatory discretion also impose direct 'costs' on industry participants who are thereby prevented from recovering their investment. We note the views of the Energy Networks Association that recent review decisions have indicated errors totalling over \$430million over a five year regulatory period⁴⁰. The RIS acknowledges that the lack of merits review increases the riskiness of investment, and that a possible consequence is that investors will reduce investment in industries where there is no merits review mechanism to protect their interests (page 11).
- 6.9 The proposal that the Minister's decisions on coverage be subject to judicial review only significantly increases the risks associated with Option 3. The Minister's decision is not a policy decision in the usual sense, as it is reached after receipt of an NCC recommendation that addresses specific legislative criteria and contains a review of the NCC's consultation with industry. A coverage decision has a major impact on the timing and rate of return of sunk assets and for that reason is a property right that would

³⁹ **Stephen Gageler and Margaret Allars** *Joint Opinion on the Review of Decision-making in the Gas and Electricity Regulatory Frameworks Discussion Paper*, 10 October 2005, page 11

⁴⁰ Speech delivered by Garth Crawford of the Energy Networks Association "*Creating Best practice national network regulation – practical steps*" Melbourne 20 September 2005

be unduly dependent on decision reviewable on a too limited basis (to use the terminology of the Senate Bills Committee).

- 6.10 As discussed above, errors can also impose costs, by, for example, sending incorrect price signals to consumers and the industry, leading to wider social costs. In many cases, errors may deliver short term gains to consumers, but work against the long term interests of consumers by, for example, reducing the dynamic efficiency of the relevant market.
- 6.11 The risk associated with Option 3 is that it provides no countervailing measure for the problem identified at the start of this paper – that is, that the costs associated with regulation may outweigh the social benefits of regulation. The costs of regulation might include the cost of new investment being deterred, perhaps resulting in reduced service quality for existing customers, or a delay in supplying new customers⁴¹. The provision of a genuine merits review is a method of alleviating regulatory risk.
- 6.12 In short, we are strongly of the view that Option 3 imposes higher regulatory costs (and risk) without a corresponding increase in benefits. In contrast, under Option 1, risks are minimised and the costs significantly outweighed by the benefits to the major stakeholders identified by the RIS.

Minter Ellison

19 December 2005

⁴¹ See the discussion about the costs of regulation and control by the NZ Commerce Commission in the Gas Control Inquiry Report (November 2004) which recommended control (that is, the applicability of sections of the NZ equivalent of the Trade Practices Act) of large portions of the gas industry in New Zealand.

