



Response to Discussion Paper *Review of Decision-making in the Gas and Electricity Regulatory Frameworks*

November 2005

1. Overview

The ENA welcomes the opportunity to comment on the Standing Committee of Officials (SCO) Discussion Paper *Review of Decision-Making in the Gas and Electricity Regulatory Frameworks (Discussion Paper)*.

Ensuring appropriate review arrangements are available for decisions related to regulatory pricing and the scope of regulation is a critical component of building an accountable and sustainable regulatory framework for electricity and gas distribution networks.

Provision of merit review mechanisms provides a range of substantial benefits to regulatory frameworks. The identified benefits of providing for accessible and low cost merit review mechanisms has meant that a wide range of parties has publicly supported the principle of ensuring merits review is available on key third party access decisions. These parties include regulatory and competition authorities, independent review bodies, and a wide range of energy industry participants.

Energy network businesses support Model A outlined in the *Discussion Paper* applying to both gas and electricity frameworks. Model A provides for a limited form of merits review similar to that which has applied under the National Gas Code for the past eight years. This model contains a number of procedural restrictions which ensures that the review process is low cost, targeted to the issues in contention, does not delay the entry into effect of the decision, and is not subject to any opportunities for potential gaming by any party. The ENA supports the introduction of further procedural safeguards (such as time limits on review decisions) if governments have any remaining concerns in this regard.

The current operation of the limited merits review arrangements in gas illustrates that this mechanism has not impeded efficient regulatory decision-making. A small proportion of pricing decisions - approximately 1 in 6 - have been subject to review applications. Reviews to date (including in the limited number of cases where review is available in electricity) have identified significant regulatory errors in findings of fact, and unreasonable exercises of discretion, which would have had adverse consequences for service providers and the community if left uncorrected. Review arrangements to date have identified errors of more than \$300 million in regulatory decisions which featured lengthy and transparent consultation processes, and varying levels of regulatory prescription.

Over the next two years the Australian Energy Regulator (the AER - a constituent part of the ACCC) is scheduled to assume responsibility for the economic regulation of energy distribution networks. This means the AER will in future be responsible for the regulation of approximately \$8-9 billion per annum of gas and electricity network revenues. This

concentration of decision-making could significantly magnify the scope and impact of any future regulatory errors of the kind which have been found in decisions of the ACCC and jurisdictional regulatory bodies to date. Availability of merits review is an appropriate protection against this risk.

Energy network businesses do not consider Model B as an appropriate or workable alternative to limited merits review. Model B fails to recognise that judicial review and merits review are different forms of review processes which seek to achieve different objectives. As the Administrative Review Council has noted, they are not substitutes. Contrary to the contention that Model B might provide for an 'augmented' form of review which approaches merits review, there are strict constitutional limitations which prevent the Federal Court from undertaking effective merits review.

Energy network businesses do not consider the arguments presented in the *Discussion Paper* against the provision for merits review for regulatory decisions are compelling or consistent with the empirical evidence available. As an example, merits review decisions have taken on average of 6.4 months, compared to an average of over 13 months for judicial decisions. This illustrates that the objective of minimising appeal times and cost would be served by adoption of Model A rather than Model B, which would be likely to result in increased numbers of appeals of regulatory decisions being sought through costly, potentially inexpert, and less timely judicial proceedings.

Substantial doubt also exists over the judicial interpretation which could be made of the regulatory principles included in legislation, such as contained in Section 16, 35 & 36 of the *National Electricity Law*. Energy network businesses consider these broad principles are a manifestly inadequate basis for 'augmented' judicial review. The principles are high level, fail to provide any meaningful limitations to wide regulatory discretion, and their interpretation by judicial authorities is likely to be uncertain and varied.

Energy network businesses do not consider that any feasible increase in prescriptiveness of the provisions of the legislative or regulatory framework can replicate the specific benefits that merits review alone provides, or allow for judicial review to serve as a substitute.

A key stated objective of Model B is to prevent multiple actions in respect of a single decision. This concern appears to be based largely on a single instance which arose in Victoria in 2000 (and which was linked to ambiguities in Victorian electricity tariff pricing orders). As such, this exception case is not a sound empirical basis for national policy making with respect to merits review. In a number of other areas Model B appears deficient when compared to Model A. In several places this deficiency appears to be so marked that arguments for Model B are developed against a hypothetical alternative of full merits review with no procedural constraints. This is despite the fact that this hypothetical alternative is not supported by regulated businesses and SCO has already explicitly ruled out such an option.¹

¹ SCO Discussion Paper *Review of Decision-Making in the Gas and Electricity Regulatory Frameworks*, October 2005 [2.1]

2. Background

This submission responds to the Ministerial Council on Energy Standing Committee of Officials Discussion Paper *Review of Decision-Making in the Gas and Electricity Regulatory Frameworks*.

The Energy Networks Association is the national representative body for gas and electricity distribution network businesses. Energy network businesses deliver electricity and gas to over 12 million customer connections across Australia through approximately 800 000 kilometres of electricity lines and 75 000 kilometres of gas distribution pipelines. These distribution networks are valued at more than \$35 billion, and each year energy network businesses undertake capital investment of more than \$5 billion in network reinforcement, expansions and greenfield extensions.

3. Benefits of merits review

Access to merits review provides a wide range of benefits to the sustainability, credibility, operation and application of regulatory frameworks.

The *Discussion Paper* refers to a range of benefits provided by the availability of merits or administrative review. It lists three main benefits relating to increased awareness by decision-makers of the need to exercise powers within the terms of legislation, promoting consistency, and improving the quality of primary decision making. While these benefits are present, they represent an incomplete assessment of the benefits of merits review.

The ENA considers it important that, in assessing review mechanisms, governments are cognisant of the full range of benefits provided by access to merits review. These benefits include that merits review:

- improves the quality, transparency and consistency of regulatory decision-making²
- encourages decisions that are supported by robust evidence
- encourages regulatory discretion to be exercised on a sound basis
- reduces the risks to the community and service providers of regulatory error and failure
- clarifies and informs the operation of legal frameworks through the development of precedents which provide greater predictability in future decision-making
- underpins private sector decisions to invest in new and existing long-lived capital assets
- improves accountability in regulatory decision-making and frameworks
- ensures regulatory decisions remain consistent with the intended policy framework.

The ENA considers that these benefits are significant, and present a compelling justification for the provisions of merits review for key regulatory determinations. All of these benefits would also apply equally across electricity and gas industries.

² Australian Law Reform Commission *Managing Justice: A review of the federal civil justice system* Report No. 89, 2000

3.1 Broad consensus on the benefits of merits review

Consideration of the benefits of the operation of merits review under gas and a number of electricity frameworks has led to strong and broadly based support for the provision of merits review on key regulatory determinations.

The provision for merits review on key regulatory decisions is supported by all significant participants in the energy sector, and a range of independent parties, including:

- major energy users and representatives of small energy consumers³
- energy retailing firms⁴
- energy network service providers
- energy transmission service providers⁵
- major gas production and electricity generation firms⁶
- the Productivity Commission which undertook independent reviews into the operation of the gas and national access regimes and the Prime Minister's Infrastructure Taskforce⁷
- the overwhelming majority of regulatory bodies operating under such review provisions⁸

Given this broad consensus the ENA considers that there is a clear case for ensuring the accessibility of merits review on key electricity and gas regulatory determinations (such as pricing determinations). So far there has been no compelling policy case presented by any party for a reduction in existing appeal avenues, and ENA considers that there is a significant onus on any party supporting such an approach to demonstrate why the consensus view of actual market participants and regulatory bodies should not be followed.

4. Network industry support for Discussion Paper 'Model A'

Energy network businesses support Model A as providing a clear merit review mechanism for the energy industry. The ENA considers that key regulatory decisions, including revenue or tariff decisions for the electricity and gas sectors, gas sector coverage, and ring fencing decisions should be subject to Model A-type merit review.

The ENA supports key aspects of Model A that ensure that merit review decisions are considered by a specialist and expert tribunal, and that procedural limitations lead to timely and efficient decision making.

³ EUAA and Energy Action Group Presentation, National Electricity Law Pre-finalisation Hearing, 7 January 2005 and also EUAA Supplementary Submission National Electricity Law, January 2005, p.1

⁴ ERAA Presentation National Electricity Law Pre-finalisation Hearing, 7 January 2005

⁵ Electricity Transmission Service Providers *Initial Response to Draft National Electricity Law*, December 2004

⁶ BHP Billiton *Submission to the Productivity Commission Review of the Gas Access Regime*, submission no.26, p 114-5 and also electricity generation company presentations to National Electricity Law Pre-finalisation Hearing, 7 January 2005.

⁷ Productivity Commission *Review of the Gas Access Regime*, June 2004, p.498 and Productivity Commission *Review of the National Access Regime*, September 2001, p.387-397

⁸ Tamblin, J. 'Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?' Draft Paper - Public Law Weekend Administrative Law Conference, December 2004, p.129

4.1 Model A represents a balanced and workable model

Network distribution businesses consider that the form of limited review offered by Model A represents a model appropriately balanced between the positions of judicial review (Model B) and full merits review, which was originally recommended by the Productivity Commission in its June 2004 final report on the *Review of the Gas Access Regime*.

The appropriate and balanced nature of limited merits review was commented on by the National Competition Council (NCC) in its assessment of the effectiveness of the gas access regime. In supporting limited merit review avenues under the *Gas Pipelines Access Law* the NCC stated:

The Council's view is that a merits-based appeals mechanism on a regulator's decision to impose an access arrangement would be in accord with principles of natural justice, due process and accountability, given the potential for the regulator's powers in this matter to influence a service provider's property rights and financial position.⁹

The NCC recommendation also outlines the case for various features shared by the *Gas Pipelines Access Law* and Model A as appropriate safeguards to avoid concerns regarding delays or providing incentives for gaming by any parties. Other expert commentators, such as former ESC Chair John Tamblyn, have noted that the limited appeal arrangements under the gas access regime provide a workable model for future appeal provisions applying to utility infrastructure generally.¹⁰

Operation of appeal arrangements to date

The broad form of limited merits review described in Model A has been tested over the eight years of operation of the National Gas Code. An assessment of the operation of merit review arrangements to date shows that recourse to merits review has been relatively rare since the commencement of current regulatory frameworks in electricity and gas. Further, reviews to date have demonstrated that significant regulatory errors continue to be made under a variety of energy access frameworks.

Use of appeal arrangements

There is no evidence of a pattern either of indiscriminate use of appeal mechanisms or 'gaming' which would justify not providing adequate merits-based review avenues in the future.

Figure 1 below, drawn from information in *Annexure D* of the *Discussion Paper*, illustrates the number of merits reviews applied for by regulated businesses since the commencement of the National Electricity and Gas Codes. During this period there have been six merits-based reviews on decisions relating to price or revenue caps, compared to a total of 36 regulatory decisions made over the period which were eligible for review through either the *Gas Pipelines Access Law* or State-based merits review avenues in relation to electricity distribution decisions.¹¹

⁹ NCC *Recommendation to Gas Reform Implementation Group on National Gas Access Regime*, September 1997, p.5

¹⁰ Tamblyn (December 2004), p.141

¹¹ The six reviews have been: GasNet (2003), Moomba-Adelaide Pipeline System (2003), EAPL/MSP (2004), Duke Queensland Gas Pipeline decision (2001), Victorian Electricity Distribution Pricing Review (2000) and ESCOSA electricity distribution price determination (2005).

Figure 1 – Merits reviews on revenue cap and pricing decisions in energy 1998-2005

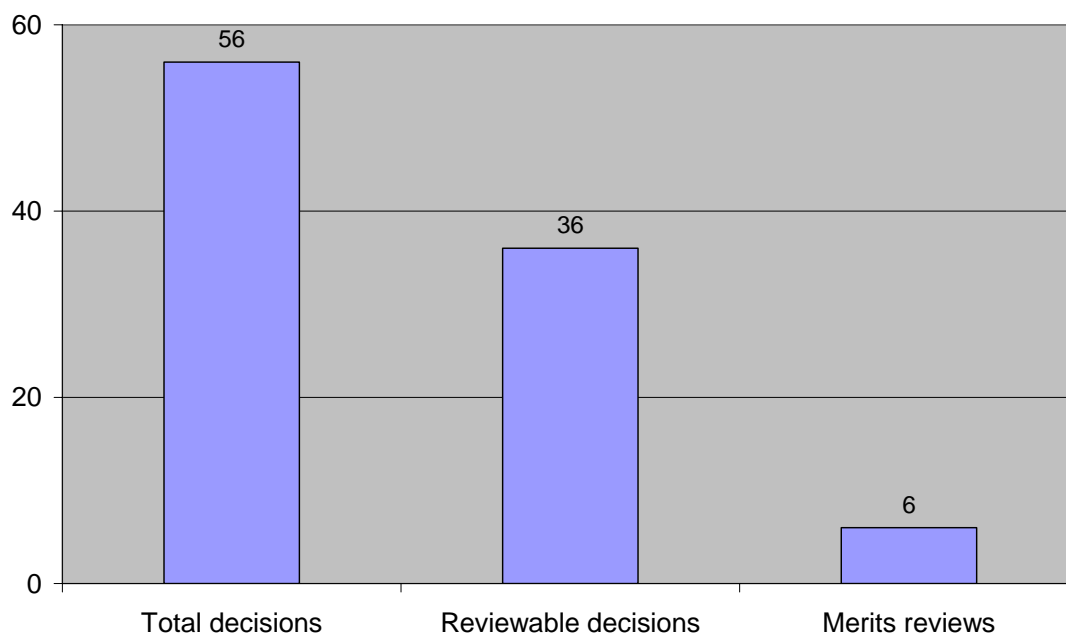


Figure 1 demonstrates that approximately one in six regulatory revenue or pricing decisions eligible for appeal have been the subject of merits-based review.

Annexure D and *Figure 1*, however, *exclude* two other substantive classes of regulatory decisions which are eligible for merits review. Since 1998-1999 regulatory bodies have made 43 ring-fencing decisions under the National Gas Code. In addition, around 23 Ministerial decisions on applications for coverage or revocation matters under the Gas Code have been made. To date, there have been no applications for merits review of ring-fencing decisions and only two merits-based reviews sought in respect of revocation/coverage matters.¹² This means that of approximately 100 reviewable decisions taken since 1998, only 8 have been subject to merits-based review.

Identified regulatory errors to date

The ENA considers that a decision on future appeal arrangements should take into account the findings of appeal bodies to date regarding regulatory decisions made under gas and electricity frameworks.

These appeals have demonstrated that even well-resourced regulatory bodies undertaking transparent public consultation processes have been found to have made serious regulatory errors which have significant investment consequences for the community at large. A summary of the outcomes of recent merit appeals is set out in Information Box 1 (overleaf).

¹² One of these coverage review applications, brought by an access seeker, was subsequently dropped before the review proper commenced.

Information Box 1 - Outcomes of merit reviews

Review findings to date include that in various regulatory decisions:

- the ACCC applied a mathematically flawed approach to determining the risk-free rate which was '*neither true to the formula nor a conventional use*' of the Capital Asset Pricing Model¹³
- the Essential Services Commission of South Australia failed to give sufficient weight to National Electricity Code requirements to provide reasonable certainty and consistency over time in the outcomes of regulatory processes¹⁴
- the ACCC fundamentally misconceived the nature of its task in relation to approving a rate of return consistent with the provisions of the National Gas Code¹⁵
- the former Victorian Office of the Regulator-General's 2000 electricity distribution pricing review erroneously penalised distribution businesses in relation to the recognition of achieved efficiency gains
- the ACCC's reasoning in relation to asset valuation had been so '*arbitrary*' that it supported the view that there was an element of '*pre-determination*' in its decision-making process¹⁶
- the Essential Services Commission of South Australia failed to adequately consider the impacts of gearing assumptions on equity beta estimates when making assumptions about the risk-characteristics of energy network businesses¹⁷
- the ACCC adopted choices regarding cost estimates without there being evidence that the choice resulted from any systematic evaluation process¹⁸
- The Victorian Essential Services Commission issued a request for information (with a 14 day deadline) which was so broad as to potentially require a single full time employee of the relevant business to have worked between four (low case) and 49 years to meet the request¹⁹
- the ACCC used a process which was '*flawed and unreasonable*' in estimating pipeline costs²⁰

Regulatory errors and the misapplication of regulatory frameworks have significant potential economic consequences for service providers and the community. Errors of fact, or the unreasonable exercise of discretion, have the capacity to lead to significant under-compensation of service providers, leading to distorted prices and under-investment consequences for the community at large. Table 1 below sets out the direct under-recovery of allowable regulated revenues which would have resulted if merit review arrangements had not been in place in for gas and a limited number of electricity pricing decisions since 1998.

¹³ *Application of GasNet Australia (Operations) Pty Ltd* [46-47]

¹⁴ ESCOSA *Application by ETSA Utilities for Review Pursuant to Section 31 of ESC (SA) Act*, 31 May 2005, Para 4.4.7.12

¹⁵ *Application of GasNet Australia (Operations) Pty Ltd* [42]

¹⁶ *Application by East Australian Pipeline Ltd* [2004] [para 32]

¹⁷ ESCOSA (May 2005) [para 4.4.6.7]

¹⁸ *Application of Epic Energy South Australia Pty Ltd* [2003] [para 84]

¹⁹ VESC Appeal Panel Reference E2/2005, 12 September 2005

²⁰ *Application of Epic Energy South Australia Pty Ltd* [2003] [para 92]

Table 1 – Magnitude of established regulatory errors corrected by merits review

Review decision	Area of established regulatory error	Approximate value of revenue under-recovery corrected (5 years)
Victorian Electricity Distribution Pricing Review (Oct 2000)	Interaction of efficiency mechanism and demand growth expenditure	\$180 m
Moomba Adelaide Pipeline System (Dec 2003)	Correct estimation of line pipe costs	\$4 m
GasNet (Dec 2003)	Appropriate insurance costs and measuring risk-free rates	\$2 m
Moomba-Sydney Pipeline Access Arrangement (Jul 2004)	Correct establishment of asset base	\$101 m
ETSA Electricity Distribution Pricing Review (May 2005)	Risk characteristics of distribution business	\$38 m
Total		\$325 million

The value of established regulatory errors is at least \$325 million to date. This is a conservative estimate owing to the lack of access to merits review avenues in electricity in a number of jurisdictions. Additionally, it could be expected that if the established regulatory errors had been left uncorrected the total economic loss to the community through distorted pricing and investment outcomes would have generously exceeded the total revenue under-recoveries corrected by merit reviews to date.

Australian governments are currently in negotiation over the timetable for the transfer of distribution regulation functions to the AER, a constituent part of the Australian Competition and Consumer Commission. This transfer will make that AER directly responsible for the regulation of gas and electricity distribution network revenues of between \$8-9 billion per annum, magnifying the potential scope and impact of poor regulatory decisions.²¹ Significant regulatory errors of the types specified in the [Information Box](#) and [Table 1](#) above could be expected to have wider national consequences compared to a situation in which local jurisdictional regulators make decisions which only impact on a limited number of distribution networks. This point reinforces the strong need for adequate ongoing merit review mechanisms in the move toward national network regulation.

4.2 Support for the Australian Competition Tribunal as review body

The Australian Competition Tribunal has considerable expertise in competition law matters, including particular experience in the energy sector. The composition of the Competition Tribunal, which includes a Federal Court judge and two other members that must have expertise in industry, commerce, economics, law or public administration, ensure that decisions are considered by a panel that can consider legal, policy and economic aspects of any decision. As the Competition Tribunal considers trade practices issues for a diverse range of sectors, it can also bring an economy wide perspective to its decisions.

In contrast, the Federal Court, while clearly being capable of hearing complex and difficult cases, does not have as many opportunities to build specialist knowledge in this

²¹ This estimate is based on currently approved capital and operating costs and a cost of capital of 7.0 per cent. Note the estimate excludes depreciation.

area, due to the diverse range of issues on which it conducts hearings. Cases are also only heard by a single judge, without the benefit of three members that provide legal, economic and other expertise relevant to the case at hand.

The Competition Tribunal has greater expertise and experience in the consideration of trade practices issues than the Federal Court, and is able to more readily consider complex economic and market issues, by virtue of the composition of members hearing Tribunal cases.

4.3 Support for limited merit review with procedural safeguards

The ENA also broadly supports the limitations suggested for merit review under Model A as providing a balanced, low cost and procedurally efficient model.

Limitation of standing

The ENA considers it appropriate that standing be limited to parties that satisfy some type of materiality test, as is suggested under Model A. This limitation ensures that the costs associated with merit review are only encountered by the parties to a decision and the community where material issues are at stake.

The *Discussion Paper* includes regulatory bodies in the possible list of parties that may seek a review of economic regulatory decisions (excluding coverage decisions).²² This reference is inappropriate, as in these cases, the regulator is the decision-maker, and would have no logical reason to appeal its own decision. As the paper sets out, the proposal is to have the decision-maker automatically included as party to the hearing, and therefore the regulator does not need to be included in the list of parties able to seek review of economic regulatory decisions.

Specification of limited grounds of review

The ENA also supports the limitation of possible avenues of review to specific grounds.

The introduction of clear grounds for review of electricity and gas revenue and coverage decisions constrains the review body from undertaking a full review of aspects of a decision that may not be under dispute between the parties. This limits the review body to issues under dispute, and prevents unnecessary time delays that would arise were the review body required to remake an entire decision.

The ENA rejects the possible limitation of the second ground of review to the exercise of discretion that was “manifestly unreasonable”, rather than “merely” incorrect.²³ A requirement for ‘manifest’ unreasonableness being required to be demonstrated would effectively result in Model A being indistinct from a common law judicial review avenue. The introduction of this limitation would be inconsistent with common administrative review practice, and might create the perverse outcome of a *higher* level of unreasonableness being required to be demonstrated to obtain a remedy through administrative review than that required for narrow judicial review actions under avenues such as the *Administrative Decisions (Judicial Review) Act*.

Limitation of evidence admissible by the review body

The ENA supports the limitation of admissible evidence to that which was before the original decision-maker, except where, as suggested in the *Discussion Paper*, it would be

²² SCO *Discussion Paper*, paragraph 2.4.

²³ SCO *Discussion Paper*, paragraph 6.29.

unreasonable for the review body not to admit the evidence taking into account all the circumstances.

4.4 Possible additional procedural safeguards for merit review

The ENA considers that there are further procedural safeguards that could be included in Model A that would further enhance the efficiency and timelines of merits review processes.

Some of these limitations are currently in place under the *Gas Pipelines Access Law*, and some are new limitations.

Introduction of time limits in the review process

Lengthy or delayed appeals processes can increase costs for all parties to an appeal and costs the community directly through court or tribunal costs, and also through uncertainty over future regulatory arrangements. The ENA considers that time limits on how long a party has to launch a review, as well as how long the Australian Competition Tribunal has to consider a review, provide benefits to all parties to a review as well as the community.

The *Gas Pipelines Access Law* currently includes time limits on the amount of time a party has to launch an appeal following a regulatory or coverage decision, as well as limitations on the time available to the Tribunal in considering a review case. Placing time limits on the Tribunal in considering a decision is an appropriate procedural safeguard to introduce to ensure that merit review under Model A is cost effective and timely.

Discretion over whether a review process has the effect of “staying” a decision

A key argument raised in the *Discussion Paper* against review processes is the potential for parties to a dispute, in particular service providers, to use review processes to delay the effect or implementation of a decision, thereby gaining advantage from the delaying application of an adverse decision. The ENA considers that procedural safeguards currently in place in the gas access regime that ensure that this outcome does not eventuate are appropriate for inclusion in Model A.

Under the current *Gas Pipelines Access Law*, an appeal under Section 39 relating to an access arrangement does not operate to stay the decision of the regulator, which will continue to apply unless that decision is remade by the Competition Tribunal or returned to the relevant regulator for remaking. A decision reviewed under Section 38 of the *Gas Pipelines Access Law* relating to coverage decisions does have the effect of staying the decision, however the Tribunal has the discretion to determine otherwise.

These currently available procedural safeguards mean that the service provider has no incentive to seek review of an access arrangement decision simply to delay its effect, and also means that for coverage decisions, the Australian Competition Tribunal has the discretion to determine whether staying a decision is in the best interests of all the parties.²⁴ Important in these approaches is that merit review is only available once there is a decision in place that can apply while the review is undertaken. Merit review, available only after a final decision is in place, coupled with appropriate rules over whether review has the effect of staying a decision, does not provide incentives to delay decision making through appeals processes.

²⁴ For coverage decisions, incentives to delay a decision may change depending on whether the decision is to cover or to revoke coverage of a pipeline, and whether the appellant is the service provider or an access seeker.

5. Assessment of Discussion Paper ‘Model B’

A key contention of the *Discussion Paper* is that the provision of prescriptive rules governing how the decision maker must carry out its functions can significantly increase the scope of judicial review.

This is the basis of Model B, where, because of the inclusion of specific requirements in the energy legislation, it is claimed that “regulatory errors that have adverse economic effects will be more readily corrected than would be the case if the Court were able to consider only issues of procedural fairness or jurisdiction”.²⁵

5.1 Different roles for administrative and judicial reviews

Judicial and merit review are different review mechanisms directed at addressing different aspects of the decision and process taken in making the decision. In this respect, judicial and merit review are not substitutes, but can and do operate complementarily in the review of decisions.²⁶ The ENA considers that the *Discussion Paper*, particularly in its consideration of Model B, does not adequately take into account the complementary nature of judicial and administrative review.

The distinctive role of administrative tribunals as opposed to the courts was pointed out by The Hon. Justice Garry Downes AM:

Merits review in an administrative appeals tribunal is to be contrasted with judicial review in a court. Courts reviewing administrative decisions are concerned with the lawfulness of the decision rather than its correctness... Modern administrative tribunals fulfil an important role in Australia.²⁷

M L Barker and R L Simmonds have also considered this difference:

The court system was not the place for administrative decision-making to be reviewed on its merits. Courts were best equipped to deal with the declaration and enforcement of existing legal rights, not with the formulation or application of government policy or the review of administrative decision-making on its merits.²⁸

The then Attorney-General, Hon. Daryl Williams AM QC MP, in introducing the commencement of the Council of Australasian Tribunals, summarised the essential importance of tribunals and the growing role of tribunals in Australia and abroad:

Courts play an important role in holding governments to account for the lawfulness of their actions. However, as you would be aware, courts have a limited capacity to rectify administrative injustice. They are restricted to declaring and enforcing the law. To remedy administrative injustice, people most often look to tribunals. Tribunals are often better able to deal with the real issues of concern to applicants – and indeed primary decision-makers. Because of this, tribunals offer a more immediate tool for ‘normative’ improvements in administrative decision-making compared to the occasional and costly appeals to superior courts.²⁹

An example of this is the current approach to a decision that the Tribunal has power to consider in deciding matters under Section 39 of the *Gas Pipelines Access Law*

²⁵ SCO *Discussion Paper*, paragraph 2.35.

²⁶ Administrative Review Council, *What decisions should be subject to merit review?* 1999, paragraph 5.31.

²⁷ Hon. Justice Downes, Garry AM, *Tribunals in Australia: their roles and responsibilities*, at: www.aat.gov.au/corporatepublications/speeches/downes/pdf/tribunals.pdf

²⁸ M L Barker and R L Simmonds *Delivering Administrative Justice: Role of Tribunals*, ALRC Conference, 13-16 April 2004, at p.28-29.

²⁹ Hon. Williams, Daryl, AM QC MP, *Australian Institute of Judicial Administrative Tribunals Conference Dinner*, at: www.ag.gov.au

compared to the approach the Federal Court is limited to. The grounds for review under Section 39 are whether:

- an error in the relevant regulator’s findings of fact has occurred;
- the exercise of the relevant regulator’s discretion was incorrect or was unreasonable having regard to all the circumstances; or
- the occasion for exercising the discretion did not arise.

The above grounds that the Australian Competition Tribunal is empowered to consider demonstrates the difference between merits and judicial review.

Regardless of how prescriptive the legislation is the Federal Court cannot determine whether a regulator was in error when it made findings of fact, or whether the regulator’s exercise of discretion was unreasonable or incorrect. The Federal Court can only consider the legality of the decision. To the extent that Model B is claimed to provide scope for some examination of the merits of a decision or its factual basis, it may be constitutionally vulnerable to challenge on the basis of the doctrine of separation of powers. The basis for this vulnerability would be that the legislation sought to assign an executive (administrative review) functions on a Federal judicial body. The ENA considers the uncertainty and risk this entails provides a further strong justification for preferring Model A.

5.2 Response to arguments made against Model A merit review

The *Discussion Paper* raises three main considerations claimed to factor against the provision of merits review of economic regulatory decisions. These are:

- a) the nature and complexity of certain regulatory decisions will increase the risk of regulatory error if the merits review body is not at least equally resourced with expertise;
- b) the interests of the range of stakeholders may be less likely to be factored into the final outcome as the merits review body does not provide a comparable investigative and consultative process to that which is used by the regulator; and
- c) the time and cost of conducting such merits review are very substantial and can add significant delays to the decision-making process.³⁰

Each of these statements is considered below, including an assessment of whether limited merit review as provided under Model A, or judicial review ‘augmented’ with prescriptive rules governing how the decision maker must carry out its functions as provided under Model B offers the most appropriate and effective remedy to the problems raised.

a) Does a review body require the same resources as a primary decision-maker?

Access to merits review is available under a wide range of legal and regulatory frameworks. In many circumstances, merit review processes exist despite the complex and detailed nature of the decision being assessed. Economic regulatory bodies are not unique in being asked to balance a range of complex factors and factual circumstances in a way which is robust and which produces a sound decision.

³⁰ SCO *Discussion Paper*, paragraph 2.50.

The ENA is not aware of the argument being raised in respect of any other type of regulatory or administrative decision that review ought not be available unless the review body is 'equally resourced' with expertise as the primary decision-maker. Indeed, few if any legal and administrative review arrangements across the Australian legal framework would satisfy this unusual criterion. In practice, the hierarchy of both legal and administrative review frameworks rely on the more efficient principle of providing for review based on the facts before prior decision-makers, supplemented by access to expert evidence when and if required. These standard types of efficient procedural restrictions on review bodies making a *de novo* decision are precisely those already included in Model A.³¹

The proposition that review bodies are not valuable unless provided with the full expertise of the primary decision-maker is flawed, and would be duplicative in scope and costly in practice. It is not an option contemplated either by industry or under Model A in the *Discussion Paper*, or an approach adopted in relation to administrative or judicial review mechanisms generally. It is difficult therefore to understand how it can be used as an argument for the alternative Model B.

Further, the proposition is not supported by experience with merit review arrangements under the gas access regime. Reviews under this regime have demonstrated that despite the substantial resources provided to economic regulatory bodies such as the ACCC, basic errors such as the misapprehension of the regulator's role under the Gas Code, and the failure to correctly apply a standard financing model - the well-accepted Capital Asset Pricing Model - have continued to be made.³² These basic errors could not have been corrected in the absence of access to merits review by the Australian Competition Tribunal.

Finally, a review panel such as the Australian Competition Tribunal has available to it all of the reasoning and expert assessment of the primary decision maker. It may rely upon this reasoning and analysis to inform its assessment of the factual issues at hand. If for any reason the review body considers it does not have the technical or analytical resources to resolve the issue (thus far, this has not arisen in practice) review bodies are sometimes given the option (but not the obligation) of remitting the detailed resolution of the review outcome to the original decision-maker.

b) Would the interests of a diverse range of stakeholders be less likely to be factored in under merits review?

The *Discussion Paper* raises the argument that due to a merit review process not duplicating the consultation processes entered into by regulatory bodies prior to regulatory decisions, there may be a risk that a diverse range of stakeholders may find their interests excluded from the final outcome of the merit review body.

This argument is unrealistic for two reasons.

Model A in the *Discussion Paper* specifically provides that the review body has access to all of the information before the original decision-maker. This feature brings all of the information provided by all stakeholders in public consultations into the scope of consideration of the review body. Additionally, as provided for under Model A, parties with significant interests in the review outcome would be able to apply for and receive standing.

Secondly, it is not necessary or desirable for a review body to duplicate the process undertaken by the original decision-maker. The evidence before the original decision-maker is sufficient to determine the outcomes of review. Even under Model B, the

³¹ SCO *Discussion Paper*, paragraph 6.1-6.4

³² *Application by GasNet Australia (Operations) Pty Ltd* [2003] [para 42]

Federal Court also will be unable to provide a comparative investigative and consultative process to the extent that the primary decision-maker will. That is, neither the Competition Tribunal nor the Federal Court will be re-opening the case for consultation by all interested stakeholders, making this an unsound argument against merits-based review under Model A.

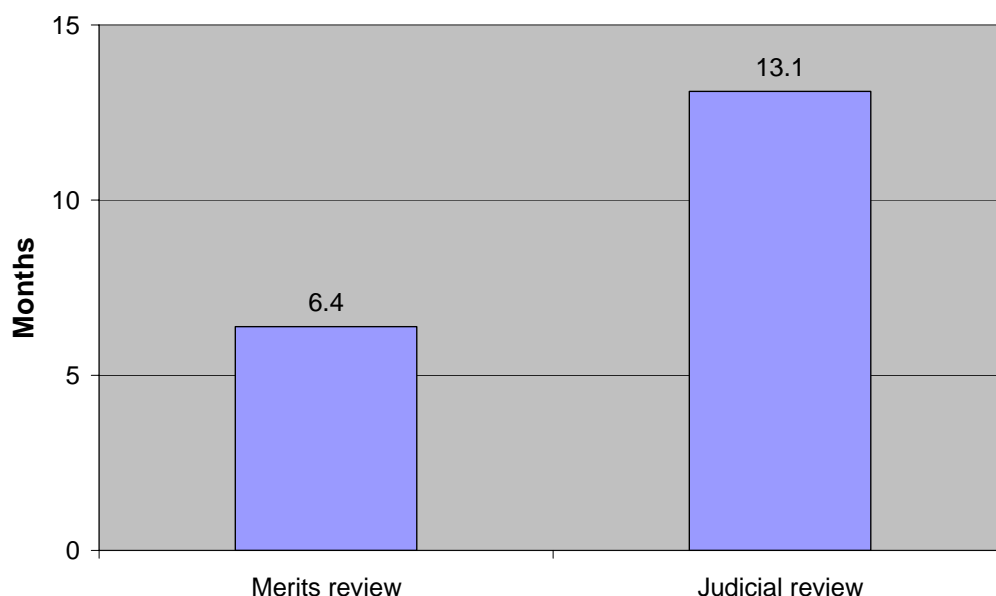
c) Does merits review lead to undue time delays and costs?

Experience to date relating to electricity and gas access decisions where merits review is present demonstrates that merits review can be an efficient low cost alternative to reliance on Court-based review processes.

Delays due to merits based review have not arisen in the significant majority of reviews to date due to the provision under the *Gas Pipeline Access Law* which provides that the regulator’s decision continues to enter into effect even if review is sought on the merits. The addition of this feature to the current Model A would be supported by energy network businesses. Similarly, industry supports a proposal to have a 90 day limitation on the conduct of a merits review, as is currently in place under *Gas Pipeline Access Law*. Time delays are a significant potential issue in respect of judicial reviews. For example, the *Epic Energy* Supreme Court decision was related to a draft decision and effectively served to ‘stay’ the regulatory decision process.

Analysis of merit and judicial review decisions relating to pricing and coverage issues undertaken to date illustrates that merits review typically takes around half the time taken for resolution of judicial reviews (See [Figure 2](#)).³³

Figure 2 – Average length of merit and judicial reviews – pricing and coverage



This data demonstrates that failing to provide for merits-based review on the grounds of unwarranted time delays can not be sustained with reference to empirical evidence. In fact, the analysis appears to indicate that time and costs would be likely to be substantially higher under Model B compared to Model A, taking into account the length of proceedings and the formal Court environment.³⁴ Since the majority of costs related to

³³ See also [Attachment 2](#) for further information

³⁴ In addition, judicial review necessarily entails a delay resulting from the requirement for the decision being required to be remitted to the original decision-maker. This makes judicial review a cumbersome ‘two-step’ process of

review relate to the costs of retaining legal counsel, it is clear that merit review, with quicker decision making processes, is the less costly review option for service providers, users and the community as a whole.

5.3 Assessment of arguments supporting Model B judicial review

The *Discussion Paper* presents six main arguments supporting judicial review as provided under Model B. These are outlined and considered below.

Higher accountability for the AER

The *Discussion Paper* raises the prospect that judicial review, augmented by the specific insertion of clauses such as Section 16, 35 and 36 of the *National Electricity Law* would provide high levels of accountability for AER decisions.

This proposition rests on the scope for judicial bodies to interpret the specific legislative requirements as set out in the *National Electricity Law* in a way which in fact does limit regulatory discretion and increase regulatory accountability.

Examination of Sections 16, 35 and 36 provides little confidence that these provisions do create materially higher level of accountability for the AER. Sections 35 and 36 set out a range of mandatory procedural steps for economic regulatory decision-making, including obligations to inform regulated businesses of material issues under consideration, and provide an opportunity to make submissions to the AER. These may be regarded as basic requirements of any effective regulatory regime, and these provisions represent merely a formalisation of universal regulatory practice, not an enhancement of accountability. Section 16 provides that the AER must provide a 'reasonable opportunity' for recovery of efficient costs, and incentives for efficiency. These obligations represent quite broad and high level principles. A broad range of outcomes, including outcomes which are unreasonable or based on substantial errors of fact, or which result from an inappropriate exercise of discretion, might still be considered by a Court to conform to these requirements.

Judicial review has only a very constrained power to consider errors of fact or discretion. Merits review powers are broader, and will result in a higher level of accountability than if only judicial review was available. This fact remains regardless of how prescriptively the rules are formulated, as long as the regulator is still charged with substantive decision making powers.

The *Discussion Paper* also argues in this section that as the Federal Court does not have the power to substitute its decision for that of the decision-maker, the decision-maker has a better incentive to make a correct initial decision as "any inclination on the part of the decision-maker to act in the expectation of having its decisions substituted by a review body will be avoided."

The ENA is not aware of any evidence to support the highly contestable proposal that regulators in the past have reneged on their obligations to make difficult decisions in the expectation that the decision would be reviewed by a review tribunal. In any case, as is stated in the *Discussion Paper*, one of the options available to the Competition Tribunal in making a decision is to remit the decision back to the decision-maker if it considers this to be appropriate.

In most cases, the Tribunal has been able to substitute its own decision for that of the regulator and resolve the issue at the time of handing down its decision. The scope for

correcting a regulatory error. This 'second step' also carries with it a risk of further error making on the part of the original decision-maker.

the Tribunal to replace its decision for that of the regulator is likely to mean that most reviews would be completed faster than if they were remitted to the regulator for implementation (as is required under judicial review/Model B).

Model B offers little incentive for ‘gaming’ by regulated entities

The *Discussion Paper* states that Model B may reduce ‘gaming’ compared to a merit review process which does not feature limitations on admissible evidence.

This does not appear to be a substantial argument for Model B, as the merits review Model A *does* contain restrictions on admissible evidence. Industry considers that arguments for Model B should be assessed with reference to the alternative proposed – Model A – not a hypothetical form of merits review which neither industry nor SCO have proposed.

The merits review option outlined in Model A includes a range of procedural safeguards against “gaming” by regulated entities and users, and industry has suggested further additional procedural restrictions. A central procedural safeguard under Model A is the limitation of review processes to the papers and evidence before the original decision-maker. In contrast, it is not proposed to place a similar limitation on the Federal Court (Model B), which is free to consider evidence as it sees fits. This would imply that Model A has lower potential ‘gaming’ opportunities than Model B.

There is no advantage in review by a specialist tribunal

The *Discussion Paper* makes the argument that there may be no advantage in review by a specialist tribunal compared to a Court. The paper argues that Courts may be as able as specialist tribunals to assess economically complex decisions.

The only evidence cited for this proposition appears to be the recent Federal Court judgement in the *Loy Yang* matter. This judgement represents one Court’s treatment of the complex economic issues involved in mergers provisions. Abstraction from this single instance of a Federal Court judges’ treatment of the application of general merger provisions to the energy sector to a proposition that Courts will always have the capability and willingness to deal with detailed and complex economic matters is not justified.

In the *Loy Yang* matter the Federal Court was required through the application of the party to effectively assume the role of primary decision-maker (in relation to a mergers provision of the *Trade Practices Act*). This meant that the Federal Court was particularly willing (and required) to examine and resolve the complex economic questions at issue, as it was not in the position of displacing an original economic assessment. This set of circumstances would not be applicable if Model B was implemented, and it is likely that Courts would not demonstrate a consistent willingness to interpret the meaning of economic regulatory provisions such as those contained in some elements of Section 16, 35 and 36. In this sense, Model B would not actually be ‘augmented’ by these provisions as the *Discussion Paper* claims would be the case.

In contrast, the Australian Competition Tribunal is specifically constituted to deal with competition and access matters. The Tribunal’s wide role in broader non-energy related access and competition matters also provides for the development of a consistent economy-wide body of decisions taken by an expert review body on third party access issues.

The Tribunal has extensive expertise, experience and resources to consider and review regulatory decisions, by virtue of the fact that it was created and resourced specifically to consider these issues as they arise under the *Trade Practices Act 1974*. This contrasts with only legal expertise being available to the Court in its decision making.

The Tribunal also has extensive experience in the energy sector including hearing applications for review of determinations of the ACCC and certain decisions of the Minister or the Commission in electricity grids and gas pipeline access matters. The Tribunal has been performing this role since 6 November 1995, and prior to that as the Trades Practices Tribunal.

Avoiding multiple actions in respect of the same matter

The *Discussion Paper* lists as one possible argument for Model B that this option would avoid multiple actions in respect of the same matter. This argument is not supported by strong empirical evidence from appeal and review actions to date.

In relation to the potential for Tribunal decisions to be appealed on legal grounds, there appears to be little evidence that this represents a substantive concern. Only one appeal has been made to the Federal Court in respect of a gas decision made by the Tribunal, and this was made by the ACCC. As of October 2005, the Federal Court has taken over 14 months to prepare its judgement in this matter (over double the length of time taken by the Tribunal to reach the original decision).

In the electricity sector where merits review is generally not available, only one decision was referred to the judicial review (to the Victorian Supreme Court). A core focus of this later judicial review was whether the regulator's decision was consistent with the highly uncertain meaning and intent of key provisions of the *Electricity Industry Tariff Order* drafted by the Victorian Government relating to form of pricing regulation which was intended to apply to electricity distribution networks. This matter reinforces the need to avoid vague and poorly drafted regulatory provisions, rather than providing an argument in favour of encouraging Courts-based review of economic regulatory provisions.

Minimising costs and time delays – maximising regulatory certainty

The *Discussion Paper* argues that reducing scope for multiple actions in respect of the same decisions will assist in minimising costs and time delays and maximising regulatory certainty.

The issues of time delays and costs are addressed above, with the finding that experience with merit review has yielded faster and less costly decision making than Federal or State-based Courts. Experience has also shown that only in exceptional cases have parties utilised multiple actions where these multiple actions are available. There are significant financial and non-financial costs involved in review processes and evidence to date suggests they are not entered into lightly by any parties.

In respect of achieving greater certainty in decision making, the ENA notes that certain, but incorrect decisions, are not preferable to correct decisions reached after a short period of uncertainty. By promoting sustainable high-quality regulatory decision-making, the accountability mechanism of the availability of merits review *increases* certainty. Regulatory certainty is not provided solely by quick decisions, but by robust, well reasoned, high quality decisions, made against the background of the genuine accountability mechanism of access to review on the merits.

The *Discussion Paper* cites the Administrative Review Council Guideline “*What decisions should be subject to merit review?*” to support the contention that where a decision involves an extensive inquiry process, merits review may not be justified. The Guideline is referring to decisions where “decisions are the product of processes that would be time-consuming and costly to repeat on review”³⁵. The ENA notes that the *Discussion Paper* explicitly states that *de novo* review is not being proposed.³⁶ Instead, review is

³⁵ Administrative Review Council, *What decisions should be subject to merit review?* 1999, paragraph 4.53.

³⁶ SCO *Discussion Paper* paragraph 2.1

proposed to be “on the papers”. Experience has shown that these review processes have been timely and cost effective, particularly compared to judicial review processes.

5.4 Is Model B capable of providing for ‘augmented’ judicial review?

Model B is based on the example of Sections 16, 35 and 36 of the new *National Electricity Law* in relation to transmission determinations.

These provisions are claimed to have the possible effect of significantly increasing the scope of traditional judicial review as they provide some minimum benchmarks for how the decision-maker must carry out its functions. The *Discussion Paper* argues that this may allow the Court to review compliance with those legislative requirements in relation to both the process followed by the decision-maker and the decision made, and that, therefore, merits appeal would not be needed.

An analysis of the contents of Sections 16, 35 and 36 of the *National Electricity Law* demonstrates that the sections cannot replace merits review and cannot provide the benefits of merits review. The grounds under which merits review can be triggered under Model A are not replaced within Sections 16, 35 and 36 of the *National Electricity Law*. For example, an applicant could not under Model B claim an error in the regulator’s findings of fact as they could under Model A.

Further, it is highly uncertain how Courts which do not typically deal in complex economic matters relating to access pricing would interpret core provisions which are claimed would ‘augment’ the scope of judicial review.

For example, there is no certainty regarding how widely or narrowly a future Federal Court judge would interpret the obligation under Section 16 (2) of the *National Electricity Law* to provide a ‘reasonable opportunity’ to recover the ‘efficient costs of regulatory obligations’. The ENA notes in this regard that many energy user groups, governments and other commentators expressed the view that they regarded the WA Supreme Court’s assessment in the *Epic Energy* case of the meaning of efficient costs and the nature of competition which access pricing decisions should seek to replicate (‘workable competition’) as lengthy, unclear and an impractical source of guidance for future regulatory decisions.

In summary there are three significant uncertainties under Model B. First, uncertainty over the interpretative role the Federal Court would be willing to play in relation to what are extremely high-level revenue principles. Second, there is uncertainty over the meaning of the principles themselves (which are untested and were not the subject of any public analytical or consultative processes). Thirdly, and most seriously, there is uncertainty over whether the Federal Court could be judged under Model B to be exercising executive powers if its assessment *did* examine merits issues. This would render Model B vulnerable to potentially successful constitutional challenge.

6. Consistent review arrangements - electricity and gas

The *Discussion Paper* suggests at several points that due to differences in the regulatory framework Ministerial Council on Energy could recommend the continuance of inconsistent appeal and review arrangements in electricity and gas.

There does not appear to be a clear rationale for proceeding to retain merits review under the gas access regime, whilst failing to allow access to merits review in respect of key determinations under the National Electricity Rules. This approach would also be inconsistent with SCO’s previous policy decision to move consideration of appeals and

review mechanisms from the work program relating to the gas access to the broader generic process now in place. This previous decision was justified by a need to look holistically at appeal and review arrangements across the regulated energy sector.

Existing gas and electricity regulatory frameworks have in common the requirement for regulatory bodies to undertake regular reviews of access terms and conditions to electricity and gas distribution and transmission assets. While being undertaken under different frameworks, these decisions are made by the same regulatory bodies, following similar processes and have many core common elements. There is no justification for price review processes under electricity frameworks to have lower levels of accountability than those under the national gas regime. The ENA considers that there is a strong case for merits review of the type outlined in Model A, and that this model should be consistently applied across electricity and gas.

Recent regulatory policy development by a number of States and Territories support the availability of merits review for both electricity and gas frameworks. Many recently established jurisdictional regulatory bodies have appeal arrangements that apply by virtue of the body having made a binding final decision on third party access, without differentiation between whether the decision was made in respect of gas, electricity, ports, or water infrastructure. This approach recognises the common features and investment impacts of regulatory pricing decisions across a range of infrastructure classes.

The *Discussion Paper* provides two possible justifications for an option of not extending merits review in the form of Option A to electricity. First, it is asserted that a lack of merits review does not appear to have lessened the quality of regulatory decisions. Secondly, it suggests that the specific requirements of Sections 16, 35 and 36 of the *National Electricity Law* might render merits review redundant.³⁷ A significant question raised by the first point is whether it is possible to assess or be adequately satisfied with the quality of a set of decisions in the absence of any opportunity for administrative review. In this sense, it is the very absence of merits review which makes unverifiable the suggestion that poor or erroneous regulatory decisions have been avoided. As outlined previously, the high-level provisions contained in the *National Electricity Law* are unlikely to provide a meaningful basis for effective judicial review.

The only relevant evidence available (in gas and in the limited number of jurisdictions where merits review is available in electricity decisions) suggests that errors are likely to have been made, and have likely imposed significant costs on the community. The proposition that potentially costly regulatory errors have to date, fortuitously, only occurred in circumstances where presently there exist merit review arrangements is implausible and not a sound basis for policy making in this area.

³⁷ SCO *Discussion Paper* paragraph 5.2

RESPONSE TO SPECIFIC CONSULTATION QUESTIONS

Question 1: Do you prefer Model A or Model B?

The ENA supports Model A. Model B is an entirely inadequate substitute for merits appeal.

As to Model A

Question 2(a): Do you agree with subjecting the following decisions to Model A merits review:

- ***AER decisions to draft and approve access arrangements or revisions to access arrangements in gas;***
- ***Ring fencing decisions by the AER, including decisions not to approve associate contracts, in gas;***
- ***Ministerial decisions in relation to coverage of gas pipelines; and***
- ***For electricity, the AER's determinations on revenue caps for transmission network services, and ultimately distribution network services?***

The ENA supports all of the above decisions being subject to Model A merits review.

Question 2(b): Who do you consider should be able to commence Model A merits review in respect of:

- ***Ministerial decisions on coverage in gas, and***
- ***the specified AER economic regulatory decisions?***

The ENA supports the suggestion within Model A that standing to commence proceedings should be restricted to service providers and affected users who meet some type of threshold or 'materiality' test.

Question 2(c): Who should be able to join Model A merits review proceedings once they have been commenced and what issues should intervenors be able to raise with a decision?

The threshold for joining proceedings also requires a 'materiality' test, the ENA agrees that persons who are 'adversely affected' and/or those with a 'sufficient interest' in the matter should have the opportunity to join. In addition, it is important that the original matter put forth by the party who initially commenced the appeal is the matter that the joining party will be contributing to, not a separate matter.

The joining party should only be able to join if they have something sufficiently additional to contribute with regards to the particular matter. This can be either by providing further reasoning under the original ground/s of review or by arguing the matter in light of a different ground of review.

Question 2(d): SCO seeks comments from stakeholders as to the suggested grounds of review set out in Model A, in respect of both:

- ***Ministerial decisions on coverage in gas, and***
- ***the specified AER economic regulatory decisions.***

The ENA agrees with the grounds of review set out within Model A to apply to both coverage in gas and AER economic regulatory decisions.

Question 2(e): Do you agree with the restriction on evidence proposed for Model A, merits review in paragraph 6.60? Do you agree with the suggestion set out at paragraph 6.64?

The ENA agrees that only information available before the AER at the time of making the decision should be available to the ACT in considering the matter before it. The only exception should be limited to cases where the ACT considers it unreasonable to not admit new evidence which was not available or known at the time of the original decision.

The ENA considers that the Australian Competition Tribunal should only be required to have regard to the AER policy guidelines, but should not be bound by those guidelines. However, the AER policy guidelines will form part of the material that was before the AER at the time of making its decision, therefore specifically pointing out that the ACT should have regard to the AER policy guidelines is a redundant statement.

Question 2(f): Do you agree with the proposal for awarding costs for Model A merits review in paragraph 6.67 or have any other views as to the costs of the review process?

The ENA agrees with costs allocations described in paragraph 6.67.

As to Model B

Question 3(a): Comment is sought on the central proposition of Model B: namely, that the usual basis for judicial review should be augmented by specific legislative requirements to define the decision-making process and make explicit the basis for decision-making.

Comment on this proposition could be directed to the requirements now set out in ss.16, 35 and 36 of the NEL (in relation to transmission determinations) – eg are those requirements appropriate to form the basis for judicial review of the kind proposed in Model B? Comments might also be made on what requirements would be appropriate for that purpose in the case of distribution determinations under the NEL and economic regulatory decisions under the NGL.

As previously discussed within this submission, Sections 16, 35 and 36 do not substantially increase the level of accountability for the AER. Sections 35 and 36 do little more than formalise universal regulatory practice, they do not enhance regulatory accountability. Section 16 provides broad and high level obligations, for example, that the AER must provide a 'reasonable opportunity' for recovery of efficient costs, and incentives for efficiency. These sections do not substitute or even partially cover the functions of merits review, which includes uncovering errors of fact and the incorrect use of discretion.

Question 3(b): Do you agree with the approach proposed in respect of Ministerial decisions on coverage in gas?

No. As already discussed within the submission, judicial review cannot substitute merits review. Errors of fact, use of discretion when it is not available, and incorrect application of discretion are all vital grounds for review which judicial review does not have jurisdiction to cover.

It is also important for consistency with the national access regime to be maintained, where decisions as to declarations are subject to merits review.

Question 3(c): Comments are invited on other aspects of Model B.

The availability of only judicial review will result in appeals that are significantly more costly, result in time delays, and restricted to points of law. Model B will result in lower accountability and certainty of the AER's decision-making process. In addition, allowing only judicial review to be the available appeals mechanism for relevant AER decisions will encourage lower quality regulatory decision

ENERGY ACCESS PRICING AND COVERAGE APPEAL TIMELINES

Merits review proceedings

Review	Type of decision reviewed	Time taken (months)
Duke Eastern Gas Pipeline (2001)	Coverage	6.6
Victorian EDPR Appeal Panel (2000)	Pricing	2.3
Duke Queensland Gas Pipeline (2001)	Pricing/derogation	5.3
Moomba-Adelaide Pipeline System (2003)	Pricing	16.3
GasNet (2003)	Pricing	11.2
Moomba-Sydney Pipeline System (2004)	Pricing	7.0
South Australian ETSA - ESCOSA Appeal Panel (2005)	Pricing	1.3
Victorian ESC Appeal Panel (2005)	Information Provision	1.1

Judicial review proceedings

Review	Type of decision reviewed	Time taken (months)
Victorian EDPR	Pricing	5.5
Goldfields Gas Pipeline	Pricing	5.8
Dampier-Bunbury Gas Pipeline	Pricing	28.1
Moomba-Sydney Pipeline System – ACCC Action	Pricing	14.8 (to date)

Note: Dates used for calculations of time taken were typically the dates of leave to appeal being granted to final ruling in respect of judicial reviews, and dates of final regulatory decision to date of review judgement in the case of merits reviews.