

7 November 2005



Merits Review
C/- MCE Market Reform
Department of Industry, Tourism and Resources
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CANBERRA ACT 2601
Email: MCEMarketReform@industry.gov.au

Dear Sir or Madam

Re: Review of decision-making in the gas and electricity regulatory frameworks

The ERAA welcomes the opportunity to comment on the Standing Committee of Officials (SCO) discussion paper titled "Review of decision-making in the gas and electricity regulatory frameworks. The ERAA is an independent association representing retailers of electricity and gas throughout the National Electricity Market (NEM) and the National Gas Markets. ERAA members collectively provide electricity to over 98% of customers in the NEM and are the first point of contact for end use customers for both Gas and Electricity.

As a general rule the ERAA considers that all decisions of regulators and administrative bodies should be subject to merits based review. This is certainly the case for decisions that impact the participation of parties in the NEM. We will, however, let network owners comment on the appropriate approach for economic regulation of their businesses and limit our comments to the recent changes to the electricity governance regime.

The ERAA is concerned that this paper does not adequately cover decisions that were previously subject to full merits review in the NEM. These decisions are listed in Annexure B of the paper but the paper does not address reinstatement of merits review for these decisions. This is contrary to the response by the SCO to the concerns of participants expressed in submissions to version 1 of the draft Rules earlier this year:

"... merits review [for decisions previously reviewable] is a matter that is to be considered in the future in the context of the broader consideration of merits review."¹

The reviewable decisions previously in the National Electricity Code but omitted from the National Electricity Rules were subject to a full merits review by the then existing National Electricity Tribunal, which had broad powers when conducting a review. This potential for review constrained the actions of the decision-makers and protected existing and potential participants.

¹ Extract from the Response to Key Issues Raised by Stakeholders on the Exposure Draft of the National Electricity Rules, Released on 10 December 2004 published by the MCE on 4 April 2005

The discussion paper, in the body and Annexure C, indicates when merits review should apply. In summary, these conditions are when the decision-maker has discretion and the decision has a significant impact on the parties subject to the decision. The ERAA asserts that the previously reviewable decisions, with a few exceptions, meet these criteria.

The ERAA therefore considers that the Standing Committee of Officials must broaden its examination of merits review to include these matters.

On the specific questions asked in the paper, the ERAA:

- prefers model A. The reviewing body must have all of the powers of the original decision-maker. The ERAA accepts, however, that the reviewing body must have discretion on how much of the original process it repeats;
- considers that all decisions by the AEMC, AER and NEMMCO should be subject to review except where specifically excluded (using the criteria of Annexure C) because of their policy or legislative nature. Judicial review should apply in all cases;
- supports the reviewing body having discretion on whom it accepts as a party to the review;
- believes that, in general, the reviewing body should examine the original material that was used by the decision-maker but the ERAA considers that the proposal to admit new material in specific cases and at the discretion of the reviewing body (para 6.61) should be adopted;
- accepts that the reviewing body should have the same regard to the policy positions of the Ministerial Council on Energy as the original decision-maker; and,
- would argue that the matter of costs should be at the discretion of the reviewing body based on their analysis of the merits of the case.

If you have any queries on the content of this submission, please contact me or Diane Campbell at the ERAA Secretariat on (02) 9369 4296.

Yours sincerely,

Transmitted by email

Patrick Gibbons
Executive Director