

MINISTERIAL COUNCIL ON ENERGY STANDING COMMITTEE OF
OFFICIALS REVIEW OF DECISION-MAKING IN THE GAS AND
ELECTRICITY REGULATORY FRAMEWORKS DISCUSSION PAPER,
10 OCTOBER 2005

JOINT OPINION

1. **Issues arising**

- 1.1 The Energy Networks Association (“the ENA”) has sought our legal opinion on issues raised by a Discussion Paper entitled *Review of Decision-making in the Gas and Electricity Regulatory Frameworks* prepared by the Ministerial Council on Energy Standing Committee of Officials (**Discussion Paper**).
- 1.2 The Discussion Paper identifies what it describes as two possible Models for review of decisions of the Australian Energy Regulator (AER). Model A is described as an option for limited “merits review” by the Australian Competition Tribunal (ACT). It is modelled on provisions of the Gas Pipelines Access Law

(GPAL). Model B is described as an option for judicial review by the Federal Court.

1.3 We are asked by Gilbert + Tobin to advise ENA on the following topics:

1. The extent to which review under each of Model A and Model B is amenable to addressing certain specified errors in regulatory decisions.
2. In respect of Model A, the effect of inclusion of only two of the existing grounds of review under the Gas Pipelines Access Law (“the GPAL”).
3. In respect of Model B, the characteristics, if any, which distinguish it from the judicial review that may be available - in any event - in respect of decisions of Commonwealth instrumentalities and its ability to cover the merits of a decision.
4. Whether Model A or Model B better coheres with recent Australian and international trends in administrative review of economic regulatory decisions.

1.4 We address each of these topics in order.

2. **Preliminary Observations**

2.1 Two preliminary observations are appropriate. The first concerns the relationship between Model A and Model B. The second concerns the nature of Model A.

- 2.2 The dichotomy the Discussion Paper draws between Model A and Model B is in an important sense a false one. Putting in place a facility for merits review (Model A) does not exclude judicial review (Model B). Judicial review will exist in any event and merits review may coexist with judicial review.
- 2.3 Whether or not a facility for merits review is in place, decisions of a federal regulatory body such as the AER are in principle justiciable in the Federal Court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) or the *Judiciary Act 1903* (Cth) s 39B(1) and (1A), and in the High Court under s 75(iii) or (v) of the Constitution. Under well established principles at common law and under s 10(2)(b)(ii) of the ADJR Act, the Federal Court or the High Court may decline to exercise its judicial review jurisdiction if there exists adequate provision for review by the merits review tribunal. However the Court has a discretion. Cases arise where the jurisdiction of the Court in judicial review is appropriately invoked despite the availability of review by a merits review tribunal. For example, in a case raising a short sharp question of law, arising in circumstances involving urgency, the Court may entertain the judicial review proceeding.
- 2.4 Moreover, a preference for merits review does not indicate a preference that there be no facility for a court to scrutinise the lawfulness of the decision of the merits review tribunal. Within such limits as may be specified in legislation, a facility for merits review provides an opportunity for fresh consideration of the facts, policy and legal issues by a tribunal. Typically provision is made for decisions of merits review tribunals to be appealable on questions of law. For example decisions of the Administrative Appeals Tribunal (AAT) and some, but

not all, decisions of the ACT may be appealed on questions of law to the Federal Court. In the absence of a statutory appeal provision, decisions of a federal merits review tribunal, like decisions of any other federal regulatory body, are in principle justiciable in the Federal Court, under the ADJR Act or the Judiciary Act and in the High Court under s 75(iii) or (v) of the Constitution. Model A is therefore never simply merits review. Like other administrative review processes it is itself subject to judicial review by a court and to appeals on questions of law to a court, if provision is made for such appeals. Model A also operates alongside judicial review of the primary regulatory decision, as described in Model B.

2.5 To describe Model A in its current form as merits review is also potentially misleading. As it has come to be used in Australia, the term “merits review” is usually taken as referring to de novo review in which the merits review tribunal has untrammelled jurisdiction on the materials before it to reconsider and re-exercise the power previously exercised by the regulator. That function has been described as reaching the correct and preferable decision on the material before the tribunal. In a modified form, the factual material available to the tribunal may be limited by restricting it to the material which was before the regulator and limits may be placed on the circumstances in which the tribunal can act. However it still has the function of simply exercising again the power rather than scrutinising the regulator’s decision to determine whether it was correct or involved error.

2.6 The form of review contemplated by Model A is significantly more qualified than “merits review” in that widely understood form. Its nature was explained by the ACT in *Application by Epic Energy South Australia Pty Ltd* (2003) ATPR 41-932 at

[20]. The jurisdiction of the ACT, although involving a re-hearing on the merits, is one to be exercised only for the correction of error. It is only if the ACT is satisfied that the AER made an error of the requisite kind that the ACT can go on to correct that error by setting aside or varying the decision under review.

3. The extent to which review under each of Model A and Model B is amenable to addressing certain specified errors in regulatory decisions

3.1 We now turn to answer the more specific aspects of the question as to whether each of Model A and Model B provides a basis for addressing certain kinds of error made by primary decision-makers as follows.

(i) Errors of fact

3.2 Errors of fact may be addressed fully in Model A but only in a very limited way in Model B.

3.3 In judicial review, there is very limited scope for the corrections of errors of fact. The court's role is limited to reviewing errors of law. It is to review the legality of the decision and not to trespass upon the merits (this being giving weight to various items of evidence and drawing factual inferences from that evidence, and determining policy). There is no error of law in making a wrong finding of fact.

3.4 However, on judicial review, courts may on occasion scrutinise factual findings to determine whether or not an error of law has occurred because of:

- (i) the absence of a jurisdictional fact which is a precondition to the exercise of power;
- (ii) the absence of any evidence at all to support a factual finding;
- (iii) in an extreme case, a failure to give weight to a relevant consideration which is a fundamental factor in the decision may amount to failure to take the consideration into account at all; or
- (iv) *Wednesbury* unreasonableness (the decision being one that is so unreasonable that no reasonable person could have reached it).

3.5 Ground (i) can only arise where there is a particular form of statutory provision. Grounds (ii), (iii) and (iv) are always theoretically open but have proved in practice to be very difficult to establish.

(ii) Errors of law

3.6 By definition, errors of law may be corrected in Model B. Most but not necessarily all errors of law may also be corrected in a somewhat indirect manner in Model A.

3.7 Where full merits review of a decision is available, the merits review tribunal can, and ordinarily must, decide questions of law. That is because the tribunal must always reconsider and re-exercise the power of the regulator whose decision is under review, by applying the proper construction of the relevant legislation. To do so, it must take a view as to the meaning of that legislation. The view taken

by the tribunal may or may not be different from that of the regulator whose decision is under review. If the regulator has made an error of law, it may be corrected by the tribunal standing in the shoes of the regulator and re-making the decision upon a correct view of the law. If the tribunal makes an error of law, then a statutory appeal or facility for judicial review of the tribunal's decision may be pursued.

- 3.8 The structure of Model A departs from full merits review by restricting review to circumstances where an applicant is able to establish either an error in the regulator's finding of facts or an "incorrect" or "unreasonable" exercise of discretion. The notion of an "incorrect" exercise of discretion doubtless encompasses one that is incorrect in law. To that extent, the ACT is empowered to discern and correct errors of law in the decision of the AER. To a limited extent, the ACT might also on occasions correct legal error as an incident of its correction of findings of fact. That is because there are circumstances in which the making of a particular finding of fact may involve a legal error: for example, because a wrong test has been applied to assessing the evidence. However, as Model A currently stands, the restrictions on the kinds of error which the ACT must find before it acts, means that the ACT cannot correct an error of law which arises from the application of non-discretionary criteria to the facts. If under the National Electricity Law ("NEL") or the GPAL the AER misconceived or mis-applied a statutory test that does not involve exercise of a statutory discretion, the error would not be made in the exercise of a discretion and would not be capable of correction under Model A. We do not understand the reason for that limitation and consider that Model A could sensibly be modified to allow the ACT to act in any case where it finds the decision of the

AER to be “incorrect” in an unrestricted sense, not merely where the error relates to the exercise of a discretion.

3.9 There is, we think, particular merit in allowing the ACT to correct for legal error given that the distinction between errors of fact and errors of law becomes blurred to the extent that economic or technical concepts are embodied in statutory formulae. We discuss below the difficulty of dealing with such concepts in a court.

(iii) Errors of jurisdiction / authority

3.10 Errors of jurisdiction or authority are errors of law. What we have said in relation to the previous heading applies.

(iv) Procedural errors

3.11 Procedural errors such as a denial of procedural fairness can be addressed in Model B, that is, through ordinary judicial review. Model A does not allow for the correction of procedural errors, however, as outlined in paragraph 3.14, in practice this is generally achieved through the actual operation of merits review proceedings.

3.12 Ordinarily, if during a decision-making process review is sought in respect of a threatened denial of procedural fairness, a court may grant relief by way of declaration or injunction. In such a case the court is likely to exercise jurisdiction rather than decline to do so by reason of an alternative avenue of merits review. However if the regulator has made the decision and complaint is then raised

about a denial of procedural fairness and full merits review is available, a court may regard merits review as the appropriate course, particularly if other errors in the regulator's decision are also raised that are capable of being corrected on merits review.

3.13 Where full merits review of a decision is available, it is ordinarily not relevant to the merits review tribunal to inquire as to whether there has been a procedural error on the part of the regulator whose decision is under review. If there has, the error will be rendered irrelevant by the re-consideration and re-exercise of power by the merits review tribunal. Procedural errors are not so much corrected as overtaken. Their adverse effect is cured.

3.14 In its current form, Model A does not allow for the correction of procedural errors. As in the case of full merits review, the ACT is concerned with the outcome rather than the process: with the decision rather than the decision-making. The jurisdiction of the ACT to act where it finds error in the decision of the AER does not extend to procedural error: *Application by Epic Energy South Australia Pty Ltd* (2003) ATPR 41-932 at [28]-[29]. Even in the case of limited merits review under Model A, the correction of substantive error in the decision under review is in most (although not necessarily all) cases likely to overtake and to cure any prior defect in procedure.

(v) **Errors of discretion**

3.15 Errors of discretion can be corrected in Model B only where they involve errors of law. An example of such an error is failure to take into account a relevant

consideration which the regulator is bound to take into account. However a complaint about the weight given to a particular relevant consideration is a matter of the merits, which is not reviewable in judicial review. Questions about balancing market objectives also go to the merits. If the regulator has failed to construe a statutory provision consistently with statutory objectives, that may amount to a misconstruction. The regulator may fail to comply with a statutory requirement to have regard to certain matters such as objectives, and thereby act procedurally ultra vires. These are legal errors which may be agitated in judicial review.

- 3.16 Errors of discretion can be corrected in Model A if they amount to an “incorrect” or “unreasonable” exercise of discretion. We have already referred to our view that an exercise of discretion that involves an error of law is for this purpose “incorrect”. Model A in this respect encompasses all that is covered by Model B but goes further in allowing also a review of an “unreasonable” decision. The notion of an “unreasonable” decision appears to equate with the test for appellate intervention in discretionary decision-making by judges as stated in *House v The King* (1936) 55 CLR 499 at 505 rather than with the more extreme notion of *Wednesbury* unreasonableness: *Application by Epic Energy South Australia Pty Ltd* (2003) ATPR 41 – 932 at [30]. We do not favour the suggestion in the Discussion Paper at [6.29] which would replace “unreasonable” with “manifestly unreasonable”. To do so, we think, would be counterproductive. It would have the potential to raise the barrier to “merits review” even higher than that which ordinarily pertains to judicial review.

(vi) **Errors in technical and/or economic reasoning**

- 3.17 Errors of technical and economic reasoning rarely lend themselves to redress by way of judicial review. Model B is particularly unsuited to their correction. Model A is well-suited.
- 3.18 First, technical and economic issues are generally issues of fact or discretion which are part of the merits. Save where an error of law can be established, the court on judicial review does not interfere with such factual findings or exercises of discretion.
- 3.19 Secondly, the need to present the economic or technical error in the form of one of an error of law often results in a distorted representation in a judicial review action of the real concern about the decision-maker's reasoning.
- 3.20 Thirdly, the adversary process - in which a party with a sufficient interest in challenging a decision is required to demonstrate legal error before a court - has proved particularly expensive and cumbersome in circumstances where the error of law is alleged to have occurred in a technical or economic context. This is particularly so where the alleged error is *Wednesbury* unreasonableness or the misapplication of a technical or economic expression found in a statute. The problems include:
- the lack of any guarantee that the judges comprising the court will have any relevant technical or economic background;

- delay in the allocation of a hearing date and the giving of judgment;
- the necessity for the parties, if they are to establish the relevant technical or economic background, to lead expert evidence in admissible form;
- uncertainty as whether, and if so to what extent, that evidence will be admitted by the court at the hearing;
- uncertainty as to what is and is not a question of law and therefore an error of law if it has been decided wrongly; the virtual certainty that any expert evidence that is admitted will be controversial and controverted by other expert evidence: leading to the need for lengthy preparation and cross-examination; and uncertainty as to how far the regulator can play an active role in the proceeding given the principle in *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman*.¹ In *Hardiman*, the High Court observed that in judicial review proceedings the usual course for a decision-maker is to submit to such orders as the court makes, and only present a case to the court in exceptional circumstances. These are circumstances where there is no proper contradictor. The submissions should in general be restricted to submissions relating to the decision-maker's own powers and procedures. There would be a concern about an appearance of bias if a decision-maker such as the AER presented submissions adopting a partisan position and then the matter was remitted to the AER to be decided again.

¹ (1980) 144 CLR 13.

- 3.21 Cases in which the last five of these difficulties (we do not intend to say, and should not be interpreted as saying, anything about the first two) have been encountered include *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd*,² *Visa International Service Association v Reserve Bank of Australia*,³ *Director of Animal and Plant Quarantine v Australia Pork Ltd*⁴ and *Vodafone Australia Ltd v Australian Competition and Consumer Commission*.⁵
- 3.22 In contrast, a tribunal such as the ACT, comprised of a judge with specialist knowledge and experience and tribunal members who can be expected to have some economic or technical expertise, is well equipped to address allegations of error in technical and economic reasoning. It is not bound to consider those errors within the constraints of errors of law and it is able to adopt flexible procedures without being bound by the rules of evidence or the adversary system.
4. **Model A: the effect of inclusion of only two of the existing grounds of review under the GPAL.**
- 4.1 Section 39(2)(a) of GPAL provides for review on three grounds. The proposal in Model A retains the first two grounds, but omits the third. This is review on the ground “(iii) *that the occasion for exercising the discretion did not arise*”.
- 4.2 In our opinion the removal of this “ground” in a merits review tribunal does not involve any loss of review rights. It is encompassed within review on ground (ii)

² (2002) 25 WAR 11.
³ (2003) 131 FCR 300.
⁴ [2005] FCAFC 206.
⁵ [2005] FCA 1294.

in s 39(2)(a), say where there the regulator's decision is invalid because by misconstruction of a provision the regulator has acted in excess of power, giving rise to an incorrect decision. If the unrestricted approach to "incorrect" in ground (ii) is adopted in Model A, as set out in paragraph 3.8 above, then removal of (iii) involves no loss of review rights. Review of the regulator's decision on the ground of the invalidity is available without need for resort to Model B. Ground (iii) may in addition or alternatively be intended to cover a situation where the procedure followed by the regulator was defective, say by reason of failure to comply with a consultation requirement, or even pursuit of an improper purpose or fraud. Ground (iii) may capture these kinds of errors while ground (ii) does not because the decision itself may not necessarily be "incorrect". In these kinds of cases tribunals exercising ordinary merits review have to proceed on the basis that there is a decision of the regulator in fact, or a purported decision by the regulator, and re-exercise the power. Even if removal of ground (iii) in Model A results in a loss of review rights in respect of these kinds of procedural defects, these are grounds which may be raised under Model B. Judicial review is in any event the more appropriate avenue for raising such issues.

5. **Model B: the characteristics, if any, which distinguish it from the judicial review that may be available – in any event – in respect of decisions of Commonwealth instrumentalities and its ability to cover the merits of a decision.**
- 5.1 Model B does not differ from existing provisions for judicial review of federal administrative decisions under s 75(iii) and (v) of the Commonwealth

Constitution and under s 39B of the Judiciary Act and ss 5, 6 and 7 of the ADJR Act.

- 5.2 No provision of a Commonwealth law can amend the original jurisdiction of the High Court under s 75(iii) and (v) of the Constitution. If Constitutional writs can always be sought in the original jurisdiction of the High Court in respect of a decision of a regulator under the NEL or the GPAL. If they are sought, the proceeding is likely to be remitted to the Federal Court. We do not therefore give further consideration to the jurisdiction of the High Court.
- 5.3 Model B does not propose any amendment to the ADJR Act or Judiciary Act so as to reduce the existing scope for review or to extend review to some additional ground in relation to economic regulatory decisions. Model B does not propose some special regime for judicial review of decisions made under the NEL and proposed NGL, such as that which has existed in the migration area. The sources of jurisdiction of the Federal Court, and the grounds of review available, will be the same as they are in principle for other federal administrative decisions which are unaffected by any exclusion in Sch 1 to the ADJR Act, privative clause, or other restriction upon the existing general federal jurisdiction conferring provisions.
- 5.4 The Discussion Paper canvasses in some detail the possibility of introducing special provisions relating to standing to seek merits review, but accepts at [6.11] without discussion that the “person aggrieved” test under the ADJR Act should apply in judicial review under the Act. While the Discussion Paper does not make this explicit, it may be taken that it does not seek to alter the normal test of

standing to seek review under s 39B of the Judiciary Act. In our opinion while there may be arguments similar to those appearing at [6.12] – [6.26] for restricting standing to seek judicial review, this is not a major issue. If there were to be instances of persons lacking a real commercial interest seeking to bring judicial review proceedings to interfere in these regulatory decisions, these could be dealt with within the ordinary processes of the Federal Court.

- 5.5 The Discussion Paper at [2.32] – [2.40] states that Model B offers a different or “augmented” form of judicial review, because of ss 16, 35 and 36 of the NEL.
- 5.6 Sections 35 and 36 of the NEL confer on the Australian Energy Market Commission (“the AEMC”) a power to make the National Electricity Rules (“NER”). Sections 35(1) and 36 impose a duty, by 1 July 2006, to make the NER with respect to the topics set out in clauses 15-24 in Sch 1 to the NEL. Section 35(2) imposes a duty to treat the NER as AEMC initiated rules. Section 35(3) imposes a duty to achieve certain objectives in making the NER. However s 35 does not itself impose any duty to comply with the NER. Section 35 is intended to ensure that rules covering certain topics and consistent with specified objectives are made by the AEMC by a specified date. The time for AEMC’s performance of that duty has not been reached. NER have not yet been made under ss 35 and 36.
- 5.7 However pursuant to s 90(1) of the NEL, the old National Electricity Rules were made in July 2005, as the Initial National Electricity Rules (**Initial NE Rules**). The Initial NE Rules are poorly drafted. They tend to express requirements in

the passive voice, without identifying with clarity the powers conferred on regulators or the duties imposed on them.

- 5.8 Sections 35 and 36 would provide the basis for any possible argument in future that a rule in the NER is ultra vires or that the AEMC has failed to make rules as required. These provisions may also provide a basis for arguments about proper construction of the NER. However ss 35 and 36 do not provide a basis for arguing that a regulator has acted in a procedurally ultra vires manner. For that one needs to go to the rules of the NER themselves. The references in the Discussion Paper to ss 35 and 36 may have been intended as a shorthand reference to judicial review in respect of non-compliance with rules of the NER.
- 5.9 It is possible, for example, that rules of the NER made with respect to the topics in cl 24 in Sch 1 to the NEL (the procedure by which AEL makes a transmission determination) may be drafted in a sufficiently prescriptive manner and play a sufficiently important role in the regulatory scheme that, properly construed, non-compliance with them was intended to result in an invalid determination.⁶ However until the NER are made, consideration of the way in which the ground of review of procedural ultra vires could operate is speculative. All that can sensibly be said at present is that the ground of review of procedural ultra vires, available under ss 5(1)(b) and 6(1)(b) of the ADJR Act in respect of federal administrative decisions justiciable under the ADJR Act, is also available under Model B in ADJR Act review of decisions made by regulators under the NEL.⁷ There is nothing special about this form of judicial review. However it is true that

⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

⁷ The ground of procedural ultra vires is also available at common law under the *Judiciary Act* s 39B(1) and (1A) in respect of federal decisions justiciable under those provisions.

if a rule in the NER is drafted in a prescriptive fashion then in the event of the regulator's failing to comply with the rule the ground of procedural ultra vires provides a simple and powerful argument in judicial review for setting aside the decision. The scope and nature of this review, however, would continue to be affected by the lack of capacity for judicial review to address certain key types of deficiencies in primary decisions which is discussed elsewhere in this advice. Further, increasing the level of prescription in the NER to the level required to ensure Model B provides a framework for addressing key potential errors in decision-making would be likely to result in a set of lengthy, inflexible and detailed rules which may be difficult to apply in practice.

- 5.10 Section 16, which deals with the manner in which AER must perform or exercise AER economic regulatory functions or powers, belongs to a different category. The Discussion Paper assumes at [2.45] that a failure by AER to meet a requirement of s 16 will provide a basis for judicial review on the ground of procedural ultra vires. This requires careful analysis. Section 16(1)(a) is expressed in such general terms that it resembles an objective rather than a duty. A court would hold that it was not intended to be enforceable. On the other hand, s 16(1)(b) and s 16(2)(d) impose duties in such precise terms that they provide a basis for a procedural ultra vires argument. Section 16(2) provides that in making a transmission determination the AER "must in accordance with [the NER or the Initial NE Rules]" do certain things, which are expressed in fairly general terms. For the most part s 16(2) probably does no more than set the objects in accordance with which the NER is to be construed. The expressions "reasonable opportunity" and "efficient costs" in s 16(2)(a), and the expressions "effective incentives",

“efficient investments” and “efficient provision of services” in s 16(2)(b) involve issues of evaluation and allocation of resources. A court will be reluctant to construe provisions containing such expressions as statutory duties capable of enforcement. Moreover even if a Court is prepared to deal with such issues it is ill equipped to determine them. For example in *Re Michael; ex parte Epic Energy (WA) Nominees Pty Ltd*⁸ the Full Court of the Western Australian Supreme Court heard conflicting evidence from economists about the meaning of “economically efficient” but its decision on this issue was not effective or satisfactory. Sections 16(2)(c) and (d) at first glance appear to be more readily enforceable by a court. However the expressions “make allowance for the valuation of assets” and “any valuation of assets” involve evaluation of different methodologies and hence may be the subject of conflicting expert evidence. For the same reasons as those applying to s 16(2)(a) and (b), Model B is not appropriate for resolving such issues. Here Model A should be available.

6. Whether Model A or Model B better coheres with recent Australian trends in administrative review of economic regulatory decisions.

6.1 We proffer an opinion based on general principles of judicial and administrative review as they have been applied in Australia and upon our own experiences of practice in that field.

6.2 In our opinion merits and judicial review, can, typically do, and are intended to, happily co-exist. Merits review by a tribunal and judicial review may be

⁸ (2002) 25 WAR 511.

concurrently available without any adverse effects. The basis on which a court may decline to exercise jurisdiction is outlined in paragraph 2.3 above. While presenting Model B as a possible option to be compared with Model A, the Discussion Paper contains no suggestion that judicial review should be excluded. The NEL and GPAL do not contain privative clauses, purporting to oust judicial review. Such clauses in any event do not exclude judicial review in a case of jurisdictional error.⁹ A note to s 70 of the NEL (which provides for judicial review of decisions of the AEMC and NEMMCO), states that the AER is subject to judicial review under the ADJR Act. The Discussion Paper does not suggest that decisions of regulators made under the NEL and the GPAL should be listed in Sch 1 to the ADJR Act so as to render them not justiciable under the ADJR Act.

- 6.3 Any argument that judicial review should not be available to correct legal error in the making of economic regulatory decision should be swiftly rejected. Such decisions are of public importance and have dramatic impacts upon financial and a variety of other interests. The availability of scrutiny by court of their lawfulness must be accepted to be non negotiable.
- 6.4 The only real question is whether merits review by a tribunal should also be available and how that review should be framed. This is a question as to whether Model B should be supplemented by Model A and if so, precisely what form Model A should take. We have already pointed out in paragraphs 3.18 to 3.21 above the difficulties of leaving the review of technical or economic decision-

⁹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The errors which constitute jurisdictional error include excess of power (including making a procedurally ultra vires decision), denial of procedural fairness and most other grounds of review.

making entirely to the courts, and we have already emphasised that the courts have a discretion to refuse to entertain judicial review where merits review is available.

- 6.5 We are strongly of the view that a merits review of the economic regulatory decision-making of the AER is appropriate and desirable. We agree with the principles set out at [2.23] – [2.31] of the Discussion Paper regarding the benefits of merits review in improving the quality of decision-making. Those principles apply to both the electricity and the gas regulatory regimes. We do not accept the suggestion made in the Discussion Paper at [5.15] that there is a heavier burden for justifying Model A in the case of economic regulatory decisions in respect of electricity, as compared with economic regulatory decisions in respect of gas. In response to [5.15], it does not follow from the premise that the availability of judicial review has not reduced the quality of electricity regulatory decisions, that the availability of merits review would not improve the quality of such decision-making.
- 6.6 We regard the ACT as the appropriate tribunal in which merits review jurisdiction should be vested.
- 6.7 As to the precise form of Model A, we have no difficulty with confining the jurisdiction of the ACT:
- to the correction of error on the part of the AER;

- by reference to the material before the AER at the time of the decision under review.

6.8 However, for the reasons set out in paragraphs 3.8 and 3.9 above we would prefer to be less prescriptive as to the kinds of error that must be established before the ACT can act.

6.9 In addition, while we see the merit of confining the ACT primarily to the material before the AER, we think desirable that the ACT itself have the option of calling for further information where it considers that to be necessary to its understanding of some part of that material.

4 November 2005

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