

# Review of decision making in the gas and electricity regulatory frameworks

Submission to  
Ministerial Council on Energy  
Standing Committee of Officials

National Competition Council  
November 2005

## Introduction

The National Competition Council appreciates the opportunity to comment on the discussion paper on options for review schemes in the gas and electricity regulatory frameworks, issued by the Ministerial Council on Energy Standing Committee of Officials (SCO) on 10 October 2005.

While the paper concentrates on appeal/review arrangements for the decisions of regulators, similar issues arise in the context of decisions on whether particular facilities are made subject to regulation. It is the nature and scope of reviews in that context that is of particular interest to the Council, although the Council considers its comments are likely to apply generally.

## Background

The National Competition Council plays a central role in the regulation of infrastructure in Australia. Under the *Trade Practices Act 1974* (TPA), the Council advises the designated government Minister on whether a particular infrastructure service should be “declared” for access. If declared, access to that service is then governed by part IIIA of the TPA.

The Council plays a similar coverage advisory role under the *Gas Pipelines Access Law* in providing advice on whether access to particular gas pipelines should be regulated by the provisions of the National Third Party Access Code for Natural Gas Pipeline Systems (Gas Code).

In addition to its role as a coverage advisory body, the Council advises whether to certify a state or territory access regime as an “effective” regime for access to infrastructure services. If a state or territory regime is certified it is given primacy as the means of regulating relevant infrastructure. This removes the possibility of declaration.

## Appeal arrangements

Part IIIA and the Gas Code provide for three step decision making processes to determine whether to (a) declare an infrastructure service for access; (b) certify a state or territory access regime as effective; (c) cover (or revoke coverage of) a gas pipeline under the Gas Code.

1. The Council considers the application against the statutory criteria, undertakes a public consultation process and formulates a recommendation.
2. The designated Minister considers the application against the same criteria as those observed by the Council and publishes a decision.
3. The parties may apply for a review of the Minister's decision to the Australian Competition Tribunal (Tribunal).

The current arrangements make available a full merit (*de novo*) review by the Tribunal for declaration and certification matters and for coverage matters under s.38 of the Gas Code. This constitutes a full reconsideration of the matter.

The Council considers that *de novo* appeal/review provisions significantly increase the time and cost of finalising a part IIIA/Gas Code application, without a corresponding improvement in outcomes. Further the provisions create incentives that can undermine earlier stages of the process. In particular, parties have scope to reserve their position and not fully participate in the Council's processes, in the knowledge they can later provide material to the Tribunal that is not available to the Council or Minister. New lines of argument, additional factual and opinion evidence and, on occasions, new parties are all permitted in what are termed 'review' proceedings.

In considering fresh material, the Tribunal may be hampered by having fewer resources than those available to the primary decision maker. The adversarial nature of Tribunal proceedings contrasts with the Council's investigative or inquisitorial approach, which permits a wide range of

information to be considered. By comparison, the Tribunal is limited to information put before it, and may not have the benefit of submissions from two similarly resourced parties.

The Council considers that a review process should make regulatory decision making accountable. But rather than establishing accountability against a first instance decision, a *de novo* “appeal” process in essence provides a substitute for the primary decision making process by allowing “another roll of the dice” – arguably by a less well resourced and specialised adjudicator. In practice, an appeal on a part IIIA/Gas Code matter is viewed by most parties as an opportunity for a different outcome, rather than a review of the first instance decision.

The Council considers that the current appeal framework creates uncertainty, allows parties to impede the primary decision making process and can impose significant delays on stakeholders. It is the Council’s view that review and appeal proceedings should focus on issues of principle. The Council considers that the Tribunal should not be permitted to substitute an alternative judgment unless it is shown that the first instance decision is wrong in principle.

For these reasons, the Council agrees with the SCO’s proposal to limit the grounds for review of a decision of the Australian Energy Regulator and Ministers. From its experience in part IIIA and Gas Code matters, the Council considers that the type of problems outlined above could be avoided by focusing the appeal body’s jurisdiction on detecting errors of fact and errors of discretion by the primary decision maker. In this context, there should be an onus of proof on the appellant to show that the primary decision maker erred in a material way.<sup>1</sup> In making a judgment, the appeal body should also be required to specify the error(s) it considers warrants an alternative decision.

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<sup>1</sup> This requirement applies in relation to appeals against determinations of the New Zealand Commerce Commission (see Attachment 1).

The Council also agrees with the SCO's proposal to limit the evidence in a review to material that was available to the primary decision maker. There will be some instances, however, where new factual material emerges subsequent to the primary decision. Given this may reflect a material change in circumstances, it would clearly be inappropriate to exclude such material. The Council would therefore advise strict limitations on new evidence, allowing only the inclusion of factual updating information that was not available at the time of the primary decision.

The Council considers that placing strict limits on the grounds for review, and on new evidence, would improve the quality of material available in the primary decision making process and reduce the scope for gaming behaviour. This would improve the timeliness of decision making, and provide greater certainty for the parties.

The Council notes that the SCO's proposed Models A and B limit the grounds of any review. The Council has a preference for Model A, in which the Tribunal – rather than the Federal Court – would undertake a limited form of merit review. The Council considers there is value in confining the role of the Federal Court to judicial considerations, rather than extending its role into merit considerations, even if these are relatively limited. In contrast, the Tribunal is a specialist administrative body with experience in the conduct of merit review. It has the expertise and capacity to deal with complex regulatory concepts arising in energy matters. In addition, the Tribunal's presidential member, a Federal Court judge, can determine questions of law that arise in the course of a hearing. Model A can also avoid significant costs and delay through the Tribunal's capacity to make a final decision on an appeal, rather than remitting the matter to the primary decision maker.

While the Council has focussed its comments from the perspective of the appeal/review of coverage decisions it is involved in, the Council considers that similar considerations are relevant to appeal/review arrangements for regulatory determinations of the Australian Energy Regulator.

## Attachment 1 to NCC submission

### **Extract from Judgment of New Zealand High Court in the Air New Zealand Qantas appeal (CIV 2003 4046590, 17 September 2004, Rodney Hansen J, Kerrin M Vautier, Lay Member)**

#### **Principles governing appeal**

[9] An appeal against a determination of the Commission is, by virtue of r 718(1) of the High Court Rules (as it was before amendment of the Rules on 24 November 2003), an appeal by way of rehearing. It is to be distinguished from an appeal *de novo* in which it is the duty of the appellate Court to reach its own independent findings and decision on the evidence which it hears or admits: *Shotover Gorge Jet Boats Limited v Jamieson* [1987] 1 NZLR 437, 440. In contrast, an appeal by way of rehearing is heard on the record of evidence given in the Court or tribunal of first instance and any further evidence received by the appellate Court pursuant to r 718(3) and (4). The approach to be taken to an appeal by way of rehearing was discussed in *Fletcher Metals Limited v Commerce Commission* (1986) 6 NZAR 33, 37 where Davison CJ said:

“The approach of the Court on an appeal by way of rehearing is that the Court considers the materials which were before the Tribunal appealed from and any additional material before the Court itself, such as further evidence received at the hearing of the appeal, and then makes up its own mind, carefully weighing and considering the decision appealed from and reversing it if on full consideration it comes to the conclusion that the decision was wrong: see *Coghlan v Cumberland* [1898] 1 Ch 701 applied in *EMI Manufacturing (NZ) Ltd v Collector of Customs* [1984] 2 NZLR 326, 342.”

[10] In the usual way, the onus of proof is on the appellants. They must show that the decision appealed from was wrong. It has been said that the onus is harder to discharge where a specialist tribunal, such as the Commission, has made findings in its specialist area: *Fisher & Paykel Limited v Commerce Commission* [1990] 2 NZLR 731 at 757 and *Rugby Union Players Association v Commerce Commission (No 2)*

[1997] 3 NZLR 301 at 311. This recognises that the constitution of the Commission, its powers of inquiry and the expertise and resources available to it, equip it, rather than the Court, to be the primary fact-finding and adjudicative body: *Foodstuffs (Auckland) Limited v Commerce Commission* [2004] 1 NZLR 145, 151 (PC), *Goodman Fielder Limited v Commerce Commission* (supra) at 16.

[11] In this case, the Commission carried out an extensive investigation over a period of ten months. The record of materials received and considered by it runs to 78 volumes. It issued a draft determination on 10 April 2003. It received submissions on the draft determination from 24 interested parties and extensive oral submissions from 14 parties in the course of a conference held under s 69B of the Commerce Act 1986 (the Act) which lasted six days. We have been referred to only a fraction of the evidence and written materials considered by the Commission. We must perforce give considerable weight to the advantages enjoyed by the Commission when reviewing its findings.

[12] In his submissions in reply, Mr Farmer QC sought to demonstrate that in reality the Court on appeal from the Commission will readily substitute its own views for those of the Commission. He referred in particular to judgments of this Court in *Fisher & Paykel Limited v Commerce Commission* (supra), *Telecom Corporation of New Zealand Limited v Commerce Commission* (1991) 4 TCLR 473, *Southern Cross Medical Care Society v Commerce Commission* (2001) 10 TCLR 25 and *Brambles New Zealand Limited v Commerce Commission* (2003) 10 TCLR 868 and of the Court of Appeal in *Telecom Corporation of New Zealand Limited v Commerce Commission* [1992] 3 NZLR 429 and *Commerce Commission v Southern Cross Medical Care Society* (supra).

[13] We see nothing in these decisions to suggest departure from the principles governing appeals by way of rehearing as repeatedly articulated in the authorities. In each case there were clear and compelling grounds for the Court to depart from the findings of the Commission. The Court did not simply adopt its preferred view of the facts. The significant onus on the appellant to demonstrate error was discharged. The cases confirm that respect for the advantages enjoyed by the Commission will not mean that its decision is to be rubber-stamped – see the Court of Appeal’s judgment

in *Telecom v Commerce Commission* (supra) at p 434. On the other hand, they affirm that there can be no proper basis for intervention unless the Commission has been shown to have erred in a material way.