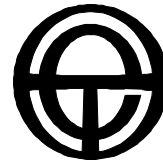


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Submission

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks Discussion Paper

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Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

1. Introduction

1.1 Wider merits review

Good government requires independent examination and validation to protect the public interest and therefore Total Environment Centre is pleased to see the Standing Committee of Officials has proposed to canvass opinion on the type of review for decision making in this framework.

Since the Australian Energy Regulator (AER) was established as a government entity within a legal framework, the potential for judicial review already exists (for instance under the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*). An independent merits review, however, gives greater accountability for a specialist and evolving subject to a wider public, who may not have access to the judicial system in terms of finances and/or standing. It is essential that broader matters be brought to bear, as a myopic economic or legal interpretation of policy will simply bring the regulatory system into disrepute over time, given the range of impacts it can have.

A wider merits review – in contrast to a limited merits review – is Total Environment Centre's preferred option, since it is important that there is improved public access to decision making. It is also essential that there be provision for wider public comment once any proceedings have commenced. Review of decisions could be regarded as the most basic practical and legal safeguard available to both the industry and the public. As is stated in the discussion paper, "2.22 Merits review will provide a more extensive type of review than judicial review, and enable correction of a greater range of regulatory errors that may have significant adverse consequences on participants, including network and service providers." That is, review of decisions can benefit not only end users (consumers) but also the providers.

There are precedents, which illuminate the dangers of relying solely on judicial review, for example:

The removal of merits review from the NEM [National Electricity Market] regulation is one of the most serious and dangerous proposals currently at hand, particularly in light of the SNI/Murraylink affair. ... removal of merits review ... would mean that the multitude of assessments, judgments, implementation of protocols, economic and technical tests required to order, operate and develop this huge and complex system could be conducted without any independent examination and validation of the 'facts'. It would give carte blanche to a wide array of practices prejudicial to the public interest and allow system operators virtual unaccountability. As seen with the economic/regulatory/legal controversy over SNI/Murraylink, neither jurisdictions nor regulators understood the most important safeguard in their own Code against strategic uneconomic investment. In this case, it was only the existence of merits review that brought to light key flaws in the Regulatory Test, NEMMCO's incompetence and the need for an overhaul of economic regulation within the NEM.¹

Rather than being a limited review, there should be the potential for *any* person to initiate proceedings. There is a precedent for this in the process for changes in the National Electricity Rules, that is, a Rule Change may be initiated by, "Any other person – any

¹ Gavan McDonnell (Feb 2005) *COAG's Quandary: What to do with the Energy Markets Reform Program? A Review*. Total Environment Centre & Alternative Technology Association, p. 52.

stakeholder or interested person such as end use customers not registered or stakeholder groups." (AEMC briefing) This still allows industry members to initiate proceedings if they consider they have been excluded from the decision-making process.

1.2 Flexibility in a changing environment

Review is particularly important while new systems are being set in place. The restructuring of the National Electricity Market (NEM) will clearly take some time to achieve, considering that the Rules themselves have only just taken effect in their new form. Moreover, it is clear that the whole area of distribution and retail coming under the sphere of the AER – not to mention the addition of the regulation of gas – will inevitably lead to some upheaval within the administration of the new system. This possibility is exacerbated by the current differential in context across the jurisdictions. In this case, a merits review model is the most appropriate as it allows for more flexibility in standing to commence proceedings and for a wider coverage of review matters. It presents a greater ability for the system to adapt over time in response to technological change, shifting economic regulatory practice, and the evolving energy markets reform process; a merits review system offers greater flexibility and wider community participation.

The review system itself may change in the future because of the possible establishment of a consumer advocacy body (in the light of the Ministerial Council on Energy's consideration of consumer advocacy mechanisms). If such a body is set up then it should also be given standing to initiate proceedings under a merits review system.

Best practice may take some time to achieve, and so the facility for review – as widely as is practicable – is critical. Although we are restricting our comments to the electricity framework, similar principles apply also to the gas regulatory framework.

2. Response to Questions

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

Answer: Model A; although the review should not be solely a limited merits review but open to any person to initiate proceedings.

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?*

Answer: For electricity, yes, particularly due to the instability of the current system referred to above (that is, a system in flux).

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?*

Answer: It is essential that there be provision for non-industry groups to commence proceedings. It is open to question whether, "the regulator adequately represents the interests of the public including consumers ..." (S6.24) There are many instances where that has not been the case, and public interests may in fact be wide and varied. To allow consumer advocate groups standing to commence proceedings gives the potential for wider participation by end users in decision-making procedures, since any regulator may fail to consider particular issues.

This also applies to smaller companies seeking to enter the market, particularly at the distribution network level. There are many difficulties raised for small generators and demand management service providers, for instance, which may be overlooked by the regulator. There needs to be provision for these companies to participate adequately in the process at the same standing as the larger, established companies.

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

Answer: Those with a 'sufficient interest' should be able to join proceedings; that is, those who consider the original decision was in fact not made in their best interests. This would act as a counterbalance to potential "material regulatory error" (S6.24). Naturally those who pass a materiality test for 2(b) would also pass that test once proceedings have commenced. However, if consumer advocacy groups are excluded from commencing merits reviews, then it is essential that they are able to join once the proceedings have begun (for the reasons raised previously).

Once proceedings are under way, "a wider range of persons will be permitted to intervene in the proceedings to put their views, such as persons 'adversely affected' and/or those with a 'sufficient interest' in the matter. There could be specific provision to allow for consumer advocacy groups to intervene in a matter." (S2.4) Total Environment Centre recommends specific provision be established for *any person* to intervene.

Issues raised should refer to matters included in the National Electricity Law, the National Electricity Rules, and the grounds for review as set out in Question 2(d).

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.

Answer: It appears that sufficient reason has been presented in the discussion paper; that is, that it should be based on an error in fact-finding by the decision-maker; or that the exercise of the decision-maker's discretion was incorrect or was unreasonable. This is a less onerous hurdle to be satisfied than for a judicial review, allowing for greater scrutiny of the original facts and, therefore, potentially for electricity consumers.

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?*

Answer: In principle, it makes sense that evidence could be restricted to AER policy matters. However, the fact that the AER has yet to develop policy makes it difficult to adequately address this issue at this time, nor is it clear what kind of policy is to be developed (other than "how to exercise its discretion in economic regulatory decisions").

It would depend in particular on the standing of the policy; that is, whether consent is specifically given on the basis of following the AER policy. Normally such policies are guidelines rather than law, and therefore may be open to question in a court. The same principle should be followed whether the review is a judicial or merits review, whether expectations are met or not. Certainly any review body could refer to the policy in terms of consistency of decision making (such as, has the policy been only applied in the case under review; or has the policy been ignored only in that case). This would have bearing on the "unreasonableness" of the original decision, such as with gaming as mentioned in the paper.

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?*

Answer: No comment.

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.*

Answer: Total Environment Centre considers that the legislative requirements are sufficient, as long as a merits review option exists. Judicial review is already available under the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*. The AEMC and NEMMCO are open to judicial review under the regimes of the jurisdictions.

S16 appears adequate: that is, that the operator should be, "informed of material issues under consideration by the AER; and given a reasonable opportunity to make submissions ...". S35 allows for the operator to "recover the efficient costs of complying with a regulatory obligation; and provide effective incentives to a[n] ... operator to promote economic efficiency in the provision by it of services that are the subject of a transmission determination ...". This is standard procedure. In this context, S36 is adequate in terms of judicial review, alongside merits review.

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

Answer: No comment.

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

Answer: No further comment.