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.[1] In making a judgment, the appeal body should also be required to specify the error(s) it considers warrants an alternative decision.

[1] 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.