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12 June 2012

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Dear Expert Panel members

I was the President of the Australian Competition Tribunal (ACT) between 2008 and 2011.

The Expert Panel is carrying out a two stage review of the limited merits review regime by which decisions of the AER can be called into question in proceedings before the ACT.

I have read the two Consultation Papers and the Interim Stage One Report that have been published by the Panel. I have also read several of the submissions that the Panel has received. In light of that material I thought it might be helpful for the Panel if I were to explain certain features of the current review regime which may not be evident from the information which has been provided to it. At the same time, it might also assist if I deal with some aspects of the reforms proposed in submissions. There is a risk that unless they are closely analysed the adoption of one or other of them may have unintended consequences. Finally, certain of the submissions make incorrect statements on important matters of law. I will point out the most obvious errors.

I should make it clear that it is not my intention to provide a detailed analysis of the issues which the Panel must consider in order to assess the effectiveness of the current regime. Rather, I will refer to what seem to be deficiencies in certain of the submissions and identify problems with some of the proposals. I will not, except to a limited extent, express concluded views on those proposals.

Limited Merits Review

The nature of the jurisdiction conferred on the ACT is properly described as limited merits review because the ACT is not at large when it reviews a decision of the AER. The applicant for review must establish error on the part of the AER.

There are three grounds of review:

- a material error of fact
- an incorrect exercise of discretion
- unreasonableness.

The role of the ACT is not, as some submissions suggest, simply to substitute its preferred decision when reasonable minds may differ.[1] The ACT can only interfere with a decision if error is shown or if the AER has acted unreasonably.

There is also a financial threshold that must be satisfied. Speaking broadly, the amount derived from the grounds the subject of the review application must be $5 million or 2% of revenue.

The procedures of the ACT

One expectation of government when conferring powers of decision-making upon administrative tribunals is that it will provide an expeditious and fair method of dealing with issues with less formality than found in court proceedings. Tribunals such as the ACT are not expected to follow court procedures. Their procedures should be flexible, directed to ensuring that the matters in issue are dealt with expeditiously and fairly.

Regrettably, the ACT conducts itself with as much formality as a court. Indeed the procedures are largely a mirror of the court process. Hearings are conducted in a courtroom. Parties are represented by solicitors and counsel. The lawyers address the ACT as they would a court. Under this system, lay persons are not given any encouragement to take part, and when they do they are at a disadvantage.

The adoption of court processes also adds considerably to the cost of proceedings and, in some instances, prevents them from being dealt with expeditiously as they ought to be.

There are various ways in which the procedures could, and should, be reformed:

- At present, parties are permitted, indeed in most cases they are directed, to file written submissions. This is often a useful means of laying out the arguments. Properly drafted submissions enable both the parties and the ACT to reach a proper understanding of the issues to be dealt with.

  On the other hand, the ACT exercises little control over the length of submissions. More often than not, they are of inordinate length and complexity. The ACT should be required to impose greater discipline on the parties and limit the length of their submissions.

- Oral hearings are afforded to the parties in every case.

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[1] *Application by ActewAGL* [2010] ATPR 42-324 at [30]-[35]

There need not be an oral hearing in every case. Each ACT panel is comprised of a judge and two lay members who have been appointed for their expertise. There should only be oral hearings when the ACT members think that they would be assisted by hearing from the parties. Except in exceptional cases, the hearing should be confined to dealing with issues raised by ACT members.

- If there be oral hearings, ordinarily lawyers should only be heard on questions of law. Other issues can be addressed by appropriate lay personnel from the parties. This is a far better method of relaying information.

- Oral hearings should not take place in a courtroom and should not mimic courtroom formalities.

- The ACT should publish a practice note which to provide guidance to parties about how proceedings are to be conducted. This would be of great assistance particularly to parties who do not regularly appear before the ACT. Last year a day long meeting with interested parties took place where the contents of a practice note were discussed in detail. A draft exists among the ACT papers.

What factors does the ACT take into account?

In the course of dealing with an application for review, the ACT will consider questions of law, issues of fact and questions of mixed law and fact.

Questions of law are usually confined to the construction of the relevant legislation, eg the National Electricity Law and the National Electricity Rules. These questions of law must be resolved solely by the presiding member, who is a Federal Court judge.

In its first Consultation Paper the Panel raised the question: To what extent is the [ACT] required to take account of policy objectives? Has this been done to date?

It is important to appreciate that precedent which is binding on the ACT (and binding on all courts in Australia) instructs that in interpreting a statute or subordinate legislation it must give preference to a construction that would promote the purpose or object underlying the statute over a construction that would not promote that purpose or object. So also do the rules for construction which are to be found in the relevant laws: see eg National Electricity Law Sch 2, cl 7. To ascertain purpose, a range of material may be taken into account to discover what is Parliament's intention.

There will be cases where the grammatical or literal meaning of a statutory provision does not give effect to the ascertained purpose and therefore cannot prevail. It must give way to a construction which will promote the underlying purpose or object.

On the other hand, policy considerations have no part to play when the ACT considers whether the AER had made a material error of fact. In that area the ACT looks only at the information that was before the AER to reach its conclusion. In a handful of instances policy considerations

may affect discretionary decisions and will be considered by the ACT on a review. But the number is so small as to be irrelevant.

Questions of construction (and therefore questions of policy) may arise when a decision is challenged on the ground that it was unreasonable. This is because it is sometimes argued that a decision is unreasonable when the AER has erred in its construction of the relevant statute or rule (eg the National Electricity Rules or the Gas Rules).

How broad is the ACT power once error is found

On a review the ACT will only reconsider the AER decision to the extent necessary to address the grounds of review. It is not permissible for the ACT to reconsider the whole AER decision. The reason it is not permissible is as follows:

- An application for review must specify the grounds of challenge: eg Electricity Law s 71B(2)(b);
- The grounds are limited: s 71C(1);
- Persons permitted to intervene may raise new grounds: s 71M.

From this structure of the Electricity Law (and the equivalent Gas Law) it is apparent that the ACT's consideration of a reviewable decision is limited to the grounds raised, either by the applicant or an intervener.

Several submissions erroneously contend that the AER may raise new grounds, complaining that the AER has not done so in the past. The AER cannot raise new grounds. The Electricity Law provides that the AER can raise any matter that relates to a ground of review raised by a party: see s 71O(1)(a). That is to say, in relation to a ground of review that is relied upon by a party or intervener to challenge an AER decision, the AER may raise issues concerning that ground that neither the party nor intervener wishes to raise. In practice, however, the need to do so will rarely arise. The AER may also raise the consequences that may result from a successful review (s 71O(2)) presumably as part of a submission that no order should be made.

Interveners

Decisions made by the AER and the ACT have their most immediate effect on transmission businesses, distribution network service providers and consumers.

Certain user groups who represent consumers have standing to apply for review of an AER decision: eg Electricity Law s 71B. In addition, users or user groups can, with leave, intervene in review proceedings commenced by a transmission or distribution business. And, as has been mentioned, if leave to intervene is granted, the intervener can raise new grounds for the review of the AER's decision.

While those rights exist, one submission to the Panel states that "through lack of resources, information and important technical expertise … it is practically impossible for third party user groups [to intervene]".[2]

There is no reason to doubt the correctness of this assertion. Not only is the assertion likely to be correct in relation to the ability of user groups to intervene in an existing proceeding, it is likely also to be true in relation to the institution by the user group of an application for review.

The inability of an intervener to effectively participate in existing review proceedings must be seen in its proper context.

In review proceedings there are two parties before the ACT, the party seeking review (eg a transmission or distribution business) and the AER. It has been suggested that the role of the AER in defending its decision is limited to providing assistance to the ACT and that the AER does not truly defend its position.[3]

With respect to those who hold this view, an examination of the conduct of the AER in proceedings before the ACT will show the position to be quite the opposite. True it is that the ACT expects the AER to provide it with assistance. That assistance, however, comes in the form of a detailed justification of the AER's decision together with an explanation why it has not fallen into the errors alleged by the reviewing party.

If there be any doubt about this, all the Panel need do is choose at random one proceeding before the ACT and examine the submissions filed by the parties and glance quickly at the transcript of the hearing. It will be evident that the AER fully defends its decision.

It follows that, apart from the possibility of new grounds being raised, an intervener will usually have little to say on top of what is put by the parties that could assist the ACT. In other words, the disputing parties are well equipped to, and do, point out all relevant material and raise all relevant arguments. In that event, the participation of a user group will add little to the process other than to add to the costs the parties will incur.

That said, it should be acknowledged that there is a problem arising from user groups' inability to institute their own application for review or raise new grounds in an existing proceeding. This is a problem that could be corrected.

The following would need to be implemented by appropriate legislation:

- The industry involved should be required to provide funding to selected user groups to allow them to play an effective role in both the process of decision-making by the AER and in the review process.

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[2] Report Barrier to Fair Network Prices August 2011 at p 9
[3] Major Energy Users Inc Submission, p 5

- Intervention by selected user groups should be permitted as of right, though the nature and extent of their participation will necessarily depend upon the likely contribution they will make.
- User groups should be given access (on appropriate terms as to confidentiality) to information that would be needed to participate in the AER and review process.

If that occurs:

- the review process may be extended and therefore be more expensive but;
- the review may produce better results; and
- in any event, the review process will be seen to be balanced.

Remission

Relevant statutes deal with remission. For example, s 71P(4) of the National Electricity Law provides that in deciding whether to remit a matter to the AER the ACT must have regard to the nature and complexity of both the subject matter under consideration and the reasonable decision.

In general, the ACT has adopted the following practical guides. If the ACT is armed with all the relevant information, it will not remit a matter. That would simply be a waste of time and resources and impose an unwarranted cost burden on the parties.

If additional information is required to arrive at the correct decision the ACT will consider whether it is more efficient to receive the information itself and resolve the matter once and for all or remit to the AER. Efficiency considerations will include any additional time it may take for the matter to be reconsidered by the AER.

If the proper disposition of the matter requires both further information and involves complex issues the ACT will remit.

Delays

The relevant statutes impose strict time limits within which the ACT must hand down its decision. Those times can be extended and they often are.

There are several reasons for delay. The principal reasons are:

- The time taken up with a leave application;
- The time it takes the parties to be ready for a hearing;
- The availability of parties' counsel;
- The inability to appoint a tribunal because of prior commitments of tribunal members;

- Waiting the determination of the same issue raised in different proceedings before the ACT.

It is worth making a comment about each reason.

- Leave application – An application to review to the ACT cannot be made as of right.

  Leave is required: eg National Electricity Law s 71B. Leave is granted only where the applicant for leave can show there is a "serious issue" is raised: s 71E.
  An examination of the cases will show that no, or almost no, application for leave is refused for failure to show seriousness. In only a handful of cases a particular ground of review is not allowed to go forward.

  The leave process is both time consuming and expensive. The AER has sensibly adopted the approach that it will indicate, as soon as it is able, whether or not it will oppose the grant of leave. When leave is not opposed, the hearing can be quite short.

  Nonetheless, the leave process has little to commend it. If the limited merits review regime is to remain, consideration should be given to removing this part of the process.

- Preparation – A significant amount of time and energy is taken up while the AER puts together what is referred to as the review related material; that is information upon which the AER has based its decision. The AER ought to be required to keep a running list of the material during the course of its decision-making. That list should then be prima facie evidence of the information that comprises the review related material.

  The volume of material that is filed with the ACT is an issue. It is usually vast and most of it is never referred to. The ACT should be able to impose costs penalties on the lawyers when this occurs.

- Availability of counsel – To date the ACT has attempted to accommodate counsel's calendar. Usually counsel who have appeared before the ACT have particular expertise and it is thought to be in the interests of the parties that they have their counsel of choice. At the same time the ACT's attempt to accommodate counsel has resulted in delays in several cases. Parties should accept that the ACT cannot properly discharge its duties and at the same time fit in with counsel's availability. In any event, if oral hearings are largely eliminated, the problem of availability of counsel will diminish.

- Availability of ACT members – This has been a difficulty in many cases. There are several causes. First, there are insufficient judges appointed to the ACT. Second, some judges do not give priority to ACT work. One or two additional appointments should be made. More important, arrangements should be made with the Chief Justice that judges appointed to the ACT give reasonable priority to tribunal work. Third, because of other work commitments it is sometimes difficult for lay members to be available on short notice. Perhaps nothing much can be done about this.

- Deferral – It is not suggested that this should change. It occurs to avoid inconsistent decisions which would bring the process into disrepute.

By way of final comment, though the ACT often takes too long to hand down its decisions, it would be wrong to assume that the complexity of the issues is a regular cause. For the most part,

the ACT has sufficient expertise to deal in a timely fashion with the complex issues that are often raised for its resolution. Of course there will be occasions when the complexity of a matter will require a decision to be handed down beyond the standard time.

Number of review applications

In its Interim Stage One Report, the Panel examined the number of decisions which have been reviewed by the ACT. Most decisions of the AER are taken on review. A number of submissions argue that this is because the regulated body has little or nothing to lose by doing so, because:

- The ACT is limited to reviewing grounds raised by transmission or distribution businesses and other parties to the review;
- It is rare for user groups to raise grounds for review, because it is too expensive for them to effectively participate in reviews. As a consequence, the practical reality is that transmission and distribution businesses monopolise and 'cherry-pick' the grounds that come to the ACT for review;
- The AER is hamstrung in defending its decisions on review;
- The ACT tends to either affirm the AER's decision (in which case the transmission and distribution business is effectively no worse off, the legal costs of the failed application being minor in the scheme of things) or make a ruling more favourable to the NSP.

No doubt the number of applications for review is significant if the comparator is the number of decisions made by the AER. A different (or alternative) approach is to look at each decision the subject of a review application and calculate its many constituted parts. If that is the appropriate comparator the number of complaints is quite small.

In undertaking its review the Expert Panel would benefit from investigating the types of error about which complaint is made and to see whether they are likely to be repeated. In this regard in many reviews the same issue comes up for attack. For example, the assessment of the debt risk premium is the subject of regular complaint. There are other examples. As the ACT provides guidance to the AER for dealing with repeat issues the number of review applications will inevitably decrease. The next few years should show the results.

It is also important to observe the success rate of review applications. What is evident is that there have been significant (and repeated) errors in AER decisions. The fact that there are regular review applications is not, in itself a bad thing if the reviews consistently rectify errors. This is particularly so when, for the most part, the errors are not ones that could be rectified in judicial review proceedings.[4]

[4] The limited scope of judicial review is dealt with later.

Cherry-Picking

In the present context I take "cherry-picking" to mean that a limited merits review regime enables the applicant for review to complain about those parts of a decision which it finds unfavourable leaving to stand those parts that are favourable.

There are unstated assumptions in the cherry-picking argument. The assumptions are that when dealing with the various components of a decision that lead to a final decision, (i) the AER has erred in a reviewable sense in favour of a transmission or distribution business and (ii) the error is not reviewed because no intervener raises it. It may also be that an AER decision which may be in a range of possible decisions is arrived at in the context of other parameters. If the decision is looked at in isolation the consequence may be that it is considered to be incorrect. This view of the decision may be different if it is considered in context.

Before the cherry-picking argument is allowed to influence the outcome of the Panel review there ought be some assessment of at least the first assumption. To this point at least, the argument seems to be simply a matter of assertion. No party raising this contention has put forward concrete examples of erroneous favourable treatment of regulated businesses. The experience from cases before the ACT suggests that the trend of choice-making is to the benefit of the consumer. Of course, this assessment is limited because it is based only on cases where the complaint is that the decision has erroneously favoured the consumer.

As regards assumption (ii), providing proper resources to user groups to enable them to challenge decisions that, as a result of error, favour transmission or distribution businesses would go a long way toward eliminating the problem.

It may also be necessary to give the ACT the ability to consider the full context in which a decision is made before it arrives at the conclusion that an otherwise erroneous decision should be set aside. This is to overcome the potential problem that may be caused when parts of decisions are interrelated.

Judicial Review as an alternative

A convenient place to begin is with a discussion about the nature of judicial review. This is necessary for two reasons:

- Limited merits review was the regime adopted by Parliament as an alternative to judicial review;
- A number of submissions suggest that judicial review should replace the existing regime, but it is apparent that some proponents do not understand what it involves.

Public administration in Australia is largely carried out under statutory powers. Each relevant statute will specify the nature and extent of that power. The statute will usually place conditions upon the exercise of the powers it confers. Some of the provisions may be substantive (eg that there be a right to a hearing) and some may merely be matters of form.

The function of judicial review, which is a function that is exercised by superior courts of record (the High Court of Australia, the Federal Court of Australia and State Supreme Courts) is to prevent administrative bodies from exceeding their powers or neglecting their duties.

The important point to appreciate about judicial review (and it is a point that cannot be over-emphasised) is that it is the means by which a supervising court determines the limits of the power of a public authority. It does not have as its object the avoidance of administrative injustice or error.[5]

That this is so can be seen from the grounds upon which the supervising court can act. A court may intervene in the administrative process if there is:

- procedural impropriety – that is where the public authority fails to act fairly or ignores the procedural rules that have been expressly laid down for it to observe;
- illegality – that is where the authority exceeds the powers conferred on it;
- unreasonableness (sometimes referred to as "Wednesbury unreasonableness") – that is when the authority's act is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided would have acted that way.

It is important to appreciate that for historical and constitutional reasons the ambit of judicial review in Australia is narrower than in other common law countries, particularly England and Canada.

In Australia, so far as federal authorities are concerned, the reviewing court must find "jurisdictional" error before it can intervene. In other words, for constitutional reasons, errors made by administrative bodies are divided into those which are authorised (non-jurisdictional errors) and those that are not (jurisdictional errors). It is only with the latter kind of error that the court can set aside a decision.

One significant consequence of this distinction is that, contrary to several submissions that have been made to the Panel, errors of fact by the AER, even serious errors of fact, usually cannot be corrected by a reviewing court. First of all, an examination of the cases that have come before the ACT will show that none (or at least almost none) of the complaints about AER decisions concern jurisdictional errors. Second, putting aside errors in relation to jurisdictional facts, the rule that courts must apply is that "there is no error of law simply making a wrong finding of fact".[6] In other words, so long as there is some basis for a factual finding in the material before the public authority even if the reasoning process is illogical, no reviewable error has taken place.[7] For an error of fact to be reviewable it must be shown that there was 'no evidence' to support the finding.

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[5] *AG v Quinn* (1990) 170 CLR 1 at 35-36
[6] *Waterford v Commonwealth* (1975) 132 CLR 473 at 481, 483
[7] *Australian Broadcasting Tribunal v Bond* (1991) 70 CLR 321 at 356

Moreover, judicial review is not, as has been suggested in several submissions,[8] available on the Wednesbury unreasonableness ground where there has been an obvious mistake on a factual finding. Those submissions overlook the fact that Wednesbury unreasonableness is confined to the exercise of a discretion, and has no operation in findings of fact.[9]

In other countries judicial review has a wider reach. In England, for example, the courts long ago got rid of the distinction between jurisdictional and non-jurisdictional error. All errors of law are reviewable.[10] Further, in England there is wider scope to review findings of fact. A finding of fact may be set aside if the evidence taken as a whole is not reasonably capable of supporting the finding.[11]

In Canada judicial review is also available on grounds broader than in Australia. In that country an administrative decision will be set aside if either of two standards, "correctness and reasonableness," are breached.[12] Reasonableness looks into the qualities that make a decision reasonable, referring both to the process particularly in the reasons and to outcomes. It asks whether the decision can be explained on a rational basis. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.[13] A decision will be reasonable if it falls within a range of possible, acceptable outcomes.

The correctness standard is concerned with whether the public body has made an error. There would be relevant errors, for example, if the body did not have the authority to decide a particular matter.

De novo review as an alternative

In his paper "Transforming the Electricity Sector" Professor Garnaut contends that limited merits review is not appropriate. He argues that de novo review, as exists in the United Kingdom, is "a more balanced process". The assumption is that the risk that the overall outcome might be unfavourable will discourage a party from seeking review. Professor Garnaut goes on to note that appeals in the United Kingdom are rare.

The first point to make is that this seems not to be an argument that de novo review is superior to limited merits review. Rather, de novo review is put forward as a means of putting a brake on the number of review applications that are brought. The reason why de novo reviews should be

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[8] eg NCC submission p3
[9] *Minister for Immigration v SZMDS* [2010] HCA 16 at [128]
[10] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147
[11] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014
[12] *Dunsmuir v News Brunswick* [2008] 1 SCR 190
[13] *Dunsmuir* at [47]

stopped is that when they succeed costs to the consumer are increased. Be that as it may, the answer to the lack of balance argument is to establish a properly funded and resourced user group that is able to raise for review errors that favour the transmission or distribution business.

The second point is to understand what would be the consequences of setting up a regime of de novo review. The task of the ACT would be greatly expanded. I am not familiar with the amount of work involved when the AER arrives at the original decision but it is likely to be significant. Presumably a large group is put together to deal with a single regulatory decision. Several discrete areas of expertise are involved. Not uncommonly the AER engages the services of outside consultants. The time it takes to arrive at a decision can be a year or so. The process involves internal analysis as well as discussions with the applicant and public hearings.

To repeat, or largely repeat, this task is beyond the capacity of the ACT. More judges and lay members would need to be appointed. In addition it would be necessary to employ many professional and administrative staff. (The UK Competition Commission, by way of example, has 37 members and around 150 staff.) The ACT would also need funds to engage consultants – and it may be hard to find them as the best would likely already have been involved in the matter. Not only would the cost of running the ACT increase dramatically, de novo review would result in significant additional costs being incurred by the parties.

Finally, there are a range of possible explanations for Professor Garnaut's point that appeals in the United Kingdom are rare. The possible explanations include:

- the quality of the original decision;
- the cost of de novo review;
- the substantial time it would take to undertake a full review.

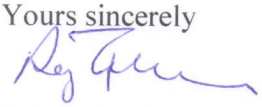
Choices

There are three alternatives:

- De novo review which will be very expensive and time consuming. Indeed, it is unlikely to be adopted once the government appreciates the likely size and cost of the organisation that will be required to carry out the task.
- Judicial review, the problem with which is that most significant errors cannot be rectified. As a result regulated businesses run the risk of being substantially underpaid.
- Limited merits review which can and should be reformed to overcome the obvious problems.

I would be happy to meet with the Panel if any of the observations I have made need amplification.

Yours sincerely



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