A paper for the Twelfth ACCC Regulatory Conference

Brisbane, Queensland, Australia

Friday 29 July 2011 (day two)

Breakout session 3: Legal - Review of Regulatory Decisions: Trends

Peter R D Gray[1]

RECENT DEVELOPMENTS AND CURRENT ISSUES IN AUSTRALIAN COMPETITION TRIBUNAL PRACTICE AND PROCEDURE

1. This presentation is intended to complement an aspect of Harriet Gray's paper (presented in the same session of the conference), *Shaping utility regulation: Seminal decisions of the Australian Competition Tribunal and other review bodies*.

2. As Harriet's paper explains, the Tribunal's jurisdiction that has seen the sharpest growth in recent years, and that now represents the largest workload for the Tribunal, is review of regulatory decisions of the Australian Energy Regulator (**AER**). That is where I want to focus in my presentation today.

"Limited merits review" by the Tribunal under:

- **National Electricity Law Part 6 Division 3A Subdivision 2**
- **National Gas Law Chapter 8 Part 5 Division 2**

3. I will focus on the way the Tribunal has gone about reviewing the AER's electricity transmission and distribution determinations and natural gas access arrangement decisions since 2008 under the limited merits review framework in the National Electricity Law (**NEL**) and the National Gas Law (**NGL**). The limited merits review framework is in substantially the same form under the NEL and NGL.

4. I will begin with the key policy decision made in 2006 by the Council of Australian Governments' Ministerial Council on Energy (**MCE**) as to the preferred form of the review regime.

5. I will then mention where the sources of power governing practice and procedure in the Tribunal in relation to energy matters are to be found and (broadly speaking) what those provisions say.

---

[1] Member of the Victorian Bar. Liability limited by a scheme approved under professional standards legislation.

6. Then I will give you my perspective on a few of the issues and pitfalls in the workings of the review mechanism that have been identified and addressed since 2008, and to comment on some of the issues that are likely to keep resurfacing in future reviews.

7. I will finish by going back to the start and leaving you with a few questions as to whether and to what extent the MCE's objectives are met by the way the review mechanism works in practice. It is timely to consider these issues, because the MCE will be prompting a review of the regime soon, as it is required to do within the first seven years of experience of the review regime: NEL s 71Z; NGL s 270.

Review model – MCE policy choices

- **time limits**
- **leave requirement**
- **restrictions on material & submissions**
- **grounds of review**
- **costs**

8. The MCE's policy decision was issued in June 2006, during the process of bringing energy regulation under a national framework and cementing the AER in the role as regulator for all revenue and pricing determinations in the participating jurisdictions.[2]

9. It is clear from the MCE's policy decision that the experience of merits review by the Tribunal under the review mechanism in the Gas Pipelines Access Law (**GPAL**) was a significant influence on the choices made by the MCE.

10. The MCE decided to adopt a model of "limited merits review" of the AER's decisions. That is, the review is limited as to material which may be considered, and as to the preconditions for relief, and moreover the review is subject to certain other restrictions and qualifications.

11. The various features chosen by the MCE for the review model have each necessitated creative and practical procedural responses. The Tribunal has shown a lot of flexibility in adopting responsive procedures, and it has done so with the active co-operation of the practitioners for the AER and service providers. The spirit of co-operation in this endeavour has - in my experience - been very good.

12. It is worth touching upon a few of the features chosen by the MCE for the review model, and thinking about what the MCE was trying to achieve.

---

[2] The MCE made its decision on this topic in May 2006 and released it on 2 June 2006, entitled *Review of decision-making in the gas and electricity regulatory frameworks*.

13. The MCE said little on the specific topic of "procedure" save for referring to time limits, certain issues concerning stays, the role of the leave mechanism and costs.

14. However, it is clear that overall the MCE was seeking a balance between various potentially competing objectives.

    (a) Principal amongst these was an objective of promoting confidence in the regulatory process, which the MCE sought to do by conferring fairly extensive powers on the Tribunal to correct error in a range of significant decisions, and conferring a conditional ability on the Tribunal to receive fresh information.

    (b) The MCE had an equally important objective of encouraging expedition and certainty and also of discouraging any strategic withholding by service providers and others of information or arguments.

Time limits

15. The MCE was emphatic on the question of time limits, although perhaps in the end the full force of the MCE's ideas on this point did not find their way into the legislation.

    (a) The MCE had wanted a time limit of ten business days to commence an application.

    (b) In the end an application for leave must be lodged by an applicant for review within 15 business days. This is in strict terms. The Tribunal has not to date had to consider what to do with a late application, but it is unlikely that there would be power to extend time.

    (c) The MCE did not address the time that might elapse between an application for leave being lodged and leave being granted, and a gap exists in the legislation on this point.

    (d) The MCE wanted what it called a "strict indicative" time limit of 65 business days for the Tribunal to make its determination on the review, albeit capable of being extended for 20 business days at a time.

    (e) In the end, the legislation provides for a three month target or standard period, to commence upon the grant of leave (not upon the lodging of the application for leave), and it may be extended.

    (f) In a moment, we shall see that the target time limit has been more honoured in the breach than in the observance.

Leave requirement

16. The MCE decided to introduce a leave requirement accompanied by leave criteria designed to filter out obviously unmeritorious grounds, and to prevent a proceeding on revenue-related grounds that did not meet a particular financial threshold (the lesser of $5M or 2% of annual revenue). Such grounds and proceedings would just contribute to delay and uncertainty without sufficient justification. Certain of the leave criteria also serve as a disincentive against strategic withholding of information.

Restrictions on material/information

17. The restrictions imposed on the material that may be placed before the Tribunal were clearly intended by the MCE to limit the Tribunal to the material that had been before the AER for the purposes of the AER making the decision under review, unless and until a ground of review were to be established, at which point the Tribunal could exercise a discretion to admit fresh material (provided it had not been withheld before). This represented a potential expansion of the evidentiary limit compared to experience under the GPAL. As we will see in a moment, the statutory language used to bring this feature of the review mechanism to life has created some controversy.

Restrictions on submissions

18. There had been a restriction on raising matters (agitating grounds and making submissions) in the GPAL review mechanism, and this restriction was carried through with variations into the current regime. This creates an incentive on service providers (and others) to put all their cards on the table during the process before the AER.

Grounds of review

19. The MCE decided to reject *de novo* review and to impose a requirement that an applicant must establish grounds of review. This choice was influenced by the experience of review by the Tribunal under the GPAL. There are a number of similarities in the grounds retained from the GPAL and carried into the current framework. It was also intended that the grounds that could be raised should be subject to the provisions imposing restrictions as to matters that can be raised by a party. On the topic of matters that can be raised by a party, the AER is in a special position, and can raise matters related to grounds raised by others and potential impacts on the reviewable regulatory decision. The MCE explained this feature of the regime in its 2006 policy decision.

20. The MCE wanted to facilitate matters being raised which would serve to counteract a bias toward selective scrutiny of those aspects of a decision tending to result in

more favourable outcomes for service providers. Thus the MCE decided to give consumer interveners the ability to raise grounds, and these would naturally have a potential counterbalancing effect in relation to grounds raised by service providers. Further, the MCE intended the regulator to be able to point out other matters potentially counterbalancing grounds raised by service providers.

Costs

21. Appropriately enough in an area where considerations of efficiency are paramount, the MCE wished to impose incentives favouring efficient commencement and conduct of proceedings. My reading of the MCE policy decision is that an order for costs was intended to be the default position against a service provider which is unsuccessful in its application, but where a service provider is partially successful and partially unsuccessful, the costs outcome is left open. The costs provision ultimately enacted in the merits review regime confers discretion on the Tribunal to order that a party pay all "or a specified part" of the costs of another party. There was intended to be a presumption against making a cost orders against the AER or consumer interveners save in exceptional circumstances.

Sources of procedural powers

- ***Competition and Consumer Act 2010*** **- s 44ZZR & Part IX Division 2 (in part)**
- ***Competition and Consumer Regulations 2010***

22. On 1 July 2008 a procedural framework was established which mirrored in many respects pre-existing procedural provisions applicable in the context of other Tribunal jurisdictions. Its key features were as follows:

    (a) Section 44ZZR was added[3] to the *Trade Practices Act 1974* (Cth) (since renamed[4] the *Competition and Consumer Act 2010* (Cth) (**CCA**)).

    (b) Regulations 7B to 7D were added[5] to the *Trade Practices Regulations 1974* (since renamed[6] the *Competition and Consumer Regulations 2010*).

    (c) Certain procedural provisions of Part IX of the CCA and of the regulations are picked up and applied to Tribunal review under the NEL and NGL:

---

3 See Item 80 of Schedule 1 to the *Australian Energy Market Amendment (Gas Legislation) Act 2007* (No 45, 2007).

4 See item 2 of Schedule 5 to the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (No 103, 2010).

5 See Item 3 of Schedule 2 to the *Trade Practices Amendment Regulations 2008 (No. 3).*

6 See item 1 of Schedule 1 to the *Trade Practices (Australian Consumer Law) Amendment Regulations 2010 (No. 1).*

(i) s 44ZZR of the CCA picks up and applies provisions of the CCA including s 103 of the CCA (which confers general procedural powers on presidential members)[7]; and

(ii) regulation 7B picks up and applies a number of pre-existing regulations.[8]

(d) Regulation 7C requires the Tribunal to maintain a register of applications for review made under a State/Territory energy law.

(e) Regulation 7D establishes a detailed regime governing the exclusion of confidential material from the register maintained under regulation 7C and from the Tribunal's website.

(f) Part III of the CCA, entitled *The Australian Competition Tribunal*, applies generally – see for example the President's power to give directions on procedure to Deputy Presidents under s 39(2) of the CCA.

23. The general pattern of the procedural provisions is to be non-prescriptive and to confer broad discretions on presidential members concerning procedure in these matters. The President has a power to give directions binding the Deputy Presidents as to procedural matters.

---

7 Section 103(2) of the CCA. Section 103(1) provides that the procedure of the Tribunal is (subject to the CCA and the regulations) within the discretion of the Tribunal, that the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of the CCA and a proper consideration of the matters before the Tribunal permit, and that the Tribunal is not bound by the rules of evidence. See also ss 105 (power to take evidence on oath), 106 (hearings to be in public except in special circumstances), 107 (evidence in form of written statement), 108 (taking of evidence by a single member) and 110 (representation).

8 Regulations 17 (title of proceedings, pursuant to Form H, scheduled to the regulations), 18 (lodging of documents with the Registrar), 19 (allocation of a File Number to a proceeding), 21 (address for service), 22(1)(a) and (aa) (procedural directions may include directions for statements of facts and contentions, production of documents and evidence, and appointment of persons to give reports), 22(2) (directions may be made by presidential members), 22A (evidence may be by statement supported by statutory declaration), 23 (orders and determinations), 25 (summons power), 26(1A) (implications of non-compliance), 28M(1)(c) (Tribunal may inform itself), 28M(2) (Tribunal may allocate and limit time for presentation of case), 28M(3) (Tribunal may direct argument in writing), 28M(4) (Tribunal may direct hearing by different modes of communication) and 28P (evidence may be taken by a single member).

Issues re:

- **leave to apply for review**
- **intervention**
- **restrictions on raising grounds and issues**
  - **applicants and interveners**
  - **AER**
- **evidentiary restrictions**

24. I am now going to turn to some of the issues that have arisen and pitfalls that have appeared in the course of matters heard and determined under the merits review regimes of the NEL and NGL since 2008.

Leave to apply for review

25. A leave requirement is imposed by the merits review regimes under the NEL and NGL, as is clear from s 71B(1) of the NEL, which provides "An affected or interested person or body, *with the leave of the Tribunal*, may apply to the Tribunal for a review of a reviewable regulatory decision". Section 245(1) of the NGL is in similar terms. Both of s 71B(2) of the NEL and s 245(2) of the NGL then provide that an application must:

    (a) be made in the form and manner determined by the Tribunal; and

    (b) specify the grounds for review being relied upon.

26. Save for regulation 17 (which requires that an application be titled in the manner of Form H), there is no prescribed form or practice direction as to the manner and form in which applications under the NEL and NGL are to be made to the Tribunal.

27. A majority or consensus practice has emerged amongst service providers and their representatives to the effect that only one application is typically filed, styled "Application for leave and application for review by the Australian Competition Tribunal". The application is initially an application for leave and, upon the Tribunal granting leave, it then stands as the substantive application. A high degree of specificity as to the grounds of the application is desirable. The grounds must be those of the kind specifically permitted by s 71C(1) of the NEL or s 246(1) of the NGL. Attempts merely to adopt, in general terms, any such grounds on which other service providers might ultimately be successful in related proceedings, are impermissible. The grant of leave may be limited to particular parts of the application and may preclude other parts being run. On some occasions after the grant of leave, applicants have filed a further document reflecting the matters that have been the subject of the grant of leave.

28. There are various criteria for a grant of leave: a serious issue requirement (s 71E NEL / s 248 NGL), a financial materiality threshold (s 71F NEL / s 249 NGL), a requirement that certain categories of potential applicants are excluded if they did not make submissions or comments pursuant to an invitation from the AER, or did so late and the submission or comment was not taken into account by the AER (s 71G NEL / s 250 NGL), and certain circumstances give rise to a discretion to refuse leave (s 71H NEL / s 251 NGL). There are restrictions on the matters that may be raised by parties (s 71O NEL / s 258 NGL), and it may be necessary to consider these restrictions at the outset, as they might logically be thought to preclude a grant of leave.[9]

29. Aspects of the leave requirements caused a degree of uncertainty from the outset due to aspects of their drafting. Much of that uncertainty has been allayed since the Tribunal (constituted by the then President, Finkelstein J, and Mr R Shogren and Mr R Davey) published an explanatory decision on the topic in *Application by Energex Limited (No 4)* [2011] ACompT 4 (***Energex No 4***)

30. In *Energex No 4*, the Tribunal expressed some forthright views against what it considered to be a drift towards an overly-textualist approach reliant on recent High Court cases,[10] and the Tribunal relied on earlier High Court cases mandating a more purposive and contextual approach.[11]

31. Two key points of uncertainty arose where a single application contained many grounds on many different topics:

    (a) In what manner should the serious issue requirement be applied - to each ground in turn, or to the application as a whole?

    (b) In what manner should the financial materiality threshold be applied - to each ground in turn, or to the application as a whole, or to particular constellations of grounds directed to discrete aspects of the decision under review?

32. The serious issue requirement is not couched in terms that make the answer clear. Under s 71E of the NEL (see also s 248 NGL) leave must not be granted "unless it appears to the Tribunal that there is a serious issue to be heard and determined as to whether a ground for review … exists".

---

9 In practice, these restrictions have seldom if ever been employed at the leave stage, but the AER has at some leave hearings reserved its position on their potential application to particular specified grounds later in the proceeding.

10 In particular, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).

11 *Bropho v State of Western Australia* (1990) 171 CLR 1 at 20 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ).

33. Contrary to the literal meaning of the provision, extrinsic material and a purposive approach suggested that this criterion should be applied to each and every ground in an application. If this were not so, what would be the purpose of allowing clearly unmeritorious grounds to be subject to the grant of leave simply because there happened also to exist a seriously arguable ground for impeaching the same decision? The Tribunal decided that the serious issue requirement in s 71E is to be applied to each and every ground in an application in turn.

34. The financial materiality threshold is set out in s 71F (see also s 249 NGL) and applies to a revenue or pricing determination, and where "the ground for review ... relates to the amount of revenue that may be earned by a ... service provider that is specified in or derived from that decision". In such a case, the Tribunal must not grant leave "unless the amount that is specified in or derived from the decision exceeds" the threshold, namely the lesser of $5M or 2% of annual revenue.

35. The Tribunal in *Energex No 4* regarded this statutory language as being incapable of literal application. There was, in particular, no doubt that the words "unless the amount that is specified in or derived from the decision" could not be given their literal meaning: this expression had to mean some variant or other of the amount *in issue*. At the very least, additional words to that effect had to be implied.

36. But was the financial materiality threshold to be applied separately to each ground, to aspects of the decision under challenge, or in some way cumulatively?

37. In the event, the Tribunal accepted a submission by the AER, informed by policy and supported by extrinsic material, that the financial materiality threshold calls for an aggregate of the amount in issue to be calculated *by reference to those grounds which meet the serious issue requirement*. The threshold is met if the aggregate at issue as a result of those grounds, cumulatively, exceeds the lesser of $5M or 2% of annual revenue.

38. In short, the Tribunal has now, after a bedding-down period of three years, sorted out the intricacies of these leave provisions, some of which contained surprising drafting necessitating a robust purposive approach to interpretation to make them work.

39. In addition, there are other leave provisions[12] which serve to reinforce incentives against strategic withholding of information, but the Tribunal has not been asked to apply these other provisions in any of the cases to date.

---

[12] See ss71G and 71H NEL / ss 250 and 251 NGL.

Intervention

40. There are different requirements to be met by interveners depending on who they are and the character of the review proceeding that has been commenced.

41. The relevant jurisdiction's Energy Minister may intervene as of right, without leave of the Tribunal (s 71J NEL / s 253 NGL).

42. A service provider to whom the decision applies may also intervene without leave of the Tribunal, in an application made by another person (s 71J NEL / s 253 NGL). It seems somewhat unlikely that this scenario would occur, but it is possible. An affected or interested person or body may commence a review, and that expression is defined to include not only the service provider most concerned, but also another service provider whose commercial interests are materially affected, or a user or consumer association.

43. There are other provisions dealing with intervention by process participants and user or consumer interveners (ss 71K and 71L NEL / ss 254 and 255 NGL), which turn on the Tribunal's satisfaction that quite detailed criteria are met. For user or consumer interveners, the criteria require the Tribunal to consider the utility of the intervener raising the matters it wishes to raise. This has led the Tribunal to require specificity in the user or intervener's identification of such matters, for example in the EUAA's intervention in the *ElectraNet* case in 2008.[13] It has also justified the Tribunal's approach in that case and subsequent cases of limiting grants of leave to specified matters.

44. There is a provision enabling an intervener to raise grounds even if they are not raised by an applicant (s 71M NEL / s 256 NGL) – that is logical because there would be little utility in an intervener raising grounds if they were already raised by an applicant. However, an interesting potential implication of this provision (read in conjunction with s 71J NEL / s 253 NGL) arose in the most recent Victorian electricity distribution network service provider hearings. There the Minister intervened as of right, and there was no requirement for an application as such. In that scenario s 71M of the NEL merely permits the Minister to raise any ground. Another intervener will generally also raise new grounds, but in the case of other interveners there will first have been an application to intervene specifying the grounds the intervener will raise; not so in the case of the Minister.

45. Only the Minister is likely to be in the special position of not having to submit an application at all. Theoretically, if someone other than the service provider the subject of a determination applied to review the determination, then the service provider could intervene as of right, and would likewise not have to lodge an

---

13 *Application by ElectraNet Pty Limited No 2* [2008] ACompT 2 (Justice Goldberg (President)).

application, but this scenario has not arisen yet, and (as I said before) seems unlikely to arise.

46. In the interlocutory stages of the most recent Victorian electricity distribution network service provider proceedings,[14] the Victorian Minister pointed to his rights under the provisions enabling his intervention as of right, and initially he did not commit to any particular grounds. In the absence of a specific provision requiring identification of grounds by the Minister, procedural fairness in any event dictated that grounds had to be formulated and notified to interested parties at a reasonably early stage, and this was duly done in accordance with Tribunal directions.

47. An important limitation on the scope of the intervention provisions was identified by the Tribunal in rejecting EnergyAustralia's application to intervene on gamma issues in the Queensland and South Australian electricity distribution network service provider review proceedings in 2010.[15] EnergyAustralia argued that it had a sufficient interest to intervene by reason of the fact that gamma was a common parameter in the calculation in due course of the WACC which would apply to it (along with other service providers). The AER opposed this application. The Tribunal rejected the application, deciding in effect that EnergyAustralia's interest was merely in the character of supporting the establishment of a favourable precedent, and the Tribunal regarded this as insufficient.

Restrictions on grounds, submissions and issues

48. There are certain restrictions imposed on parties against raising "matter(s)" (s 71O NEL / s 258 NGL). The interpretation to be placed on this use of the word is one connoting grounds, submissions and issues. The rules that apply in this respect differ between applicants and interveners on the one hand, and the AER on the other.

49. I will deal first with the position of applicants and interveners.

50. For applicants and interveners - the rule is that they "... may not raise any matter that was not raised in submissions to the AER before the reviewable regulatory decision was made" (s 71O(2) NEL / s 258(2) NGL).

---

14 File No 6 of 2010, an application by United Energy Distribution Pty Limited "Re: Application under s 71B of the National Electricity Law for a review of a distribution determination made by the Australian Energy Regulator in relation to United Energy Distribution Pty Limited pursuant to clause 6.11.1 of Chapter 6 of the National Electricity Rules"; File No 7 of 2010, an application by SPI Electricity Pty Limited in relation to its distribution determination; File No 8 of 2010, an application by CitiPower Pty in relation to its distribution determination; File No 9 of 2010, an application by Powercor Australia Limited in relation to its distribution determination; and File No 10 of 2010, an application by Jemena Electricity Networks (Vic) Ltd in relation to its distribution determination.

15 *In the matter of Energex Limited* [2010] ACompT 3 (Justice Middleton (Deputy President), Mr R Davey and Mr R Shogren).

51. The Tribunal's approach to a similar restriction in GPAL matters was quite beneficial to applicants, and likewise the approach under the current regime is to allow quite expansive submissions provided there is a connection with matters raised before the AER.

52. The Tribunal articulated the general test for whether a "matter" was raised in the relevant sense in 2009:[16]

> "... the matters to which the Tribunal can have recourse include the subject matters raised, the issues raised and the materials relied upon in support of the position or proposal put forward ... prior to the final determinations, as being relevant to those determinations. It is only if a matter, whether by way of argument or evidentiary material, cannot be identified as broadly arising out of a matter fairly raised before the determinations under review were made, that it will not be permitted to be raised in the review ...".

53. However, the general test is not easy to apply where multiple determinations were made by the AER at the same time, and multiple review proceedings are commenced in tandem. In such circumstances, a particular matter may have been raised in connection with one determination made by the AER but not in relation to the others. Does the restriction on the raising of matters apply to the latter? It is submitted that the restriction does apply in such circumstances. This question has arisen in the most recent Victorian electricity distribution network service provider proceedings.[17]

54. A variation on this theme can arise as follows: service provider "A" raised a matter in relation to its determination and service provider "B" did not do so, however, when the AER considered the relevant topic in the course of making its determination for each of A and B, it reached conclusions relying on the matters advanced by both. In such circumstances, it is submitted that in principle the matter has been raised in connection with both determinations, and the restriction does not apply.

55. Another variation can arise as follows: a service provider raised a particular matter at some stage in relation to the determination to be made by the AER, but later took that matter off the table by conceding that the matter should not affect the determination. In such circumstances, does the restriction apply? This and related questions arose in the course of the Tribunal's rejection of Ergon Energy's application to review the AER's determination in relation to public lighting on *ultra vires* grounds in 2010.[18] In that case, Ergon had contended, during the

---

16 *Application by EnergyAustralia and Others* [2009] ACompT 8 at [316](f) (Justice Middleton (Deputy President), Mr R Davey and Mr R Shogren).

17 See footnote 14 above.

18 *Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)* [2010] ACompT 14 (Justice Middleton (Deputy President), Mr R Davey and Mr R Shogren).

development of the AER's framework and approach paper in 2008, that public lighting was not a distribution service and was outside the AER's regulatory competence. The AER disagreed and classified public lighting as an alternative control service, a predicate of which decision was that public lighting was a distribution service. In Ergon's regulatory proposal and at all times from then until the making of the AER's determination, Ergon agreed with the AER's classification decision. The Tribunal agreed with a submission by the AER that Ergon was precluded by s 71O(2) of the NEL from raising its claim in respect of public lighting services in the review by Tribunal.

56. At the same time as commencing its application in the Tribunal, Ergon also commenced a judicial review application against the AER in the Federal Court.[19]

57. The commencement by service providers of concurrent judicial review proceedings in relation to aspects of their claims concerning the AER's determinations, presumably as a hedge against the possibility that limitations on the scope of proceedings before the Tribunal might preclude those aspects being determined by the Tribunal, has been a reasonably common feature of reviews in recent years. The grounds available in the Tribunal (s 71C(1) NEL / 246(1) NGL) encompass material error(s) of fact, incorrect exercise of discretion and unreasonableness. Before and since the *Ergon* matter, there have been circumstances where procedural fairness and *ultra vires* grounds have been advanced in the Tribunal in support of the unreasonableness ground of review, and the same grounds have been advanced in parallel judicial review proceedings in the alternative seeking orders setting aside the AER's determination. In those circumstances, the relevant presidential member of the Tribunal has occasionally sat in a dual capacity: both as part of the Tribunal and also as a Federal Court Judge hearing the judicial review application.[20]

AER's ability to raise related matters

58. The restrictions that apply to the AER raising matters are different. The AER has express ability to raise "... a matter ... that relates to a ground for review ... raised by the applicant or an intervener [or] a possible outcome or effect on the reviewable regulatory decision ... that may occur as a consequence of the Tribunal ... setting aside or varying the reviewable regulatory decision" (s 71O(1) / s 258(1) NGL). The presence of this express permission to raise certain matters probably implies a restriction against raising matters that do not fall within this description.

---

19 *Ergon Energy Corporation Limited v Australian Energy Regulator* QUD 194 of 2010.

20 For example, this occurred in the most recent Victorian electricity distribution network service provider proceedings, during which Justice Foster (Deputy President) also sat in his capacity as a Federal Court Judge for the purpose of hearing a related judicial review application by United Energy Distribution Pty Limited against the AER, VID 989 of 2010. On the other hand, Ergon Energy Corporation Ltd's judicial review application in QUD 194 of 2010 was not heard by the presiding presidential member of the related Tribunal proceeding.

59. As Harriet points out in her paper, back in the days of the GPAL review mechanism, in the Tribunal's *GasNet* proceeding in 2003 the ACCC pointed to potentially counterbalancing matters in an attempt to dissuade the Tribunal from accepting the applicant's invitation to vary the decision under review, but the Tribunal's decision was reached in spite of those matters.

60. There should be scope for such arguments to be made under the present regime with more persuasive force, because (unlike the GPAL) the current framework requires demonstration of *material* errors of fact, and the AER has the express ability to raise related matters. However, I am not aware of the AER having successfully availed itself of its ability to raise related matters to dissuade the Tribunal from granting relief to date.

61. Ironically, the only instance in which the provision has (to my knowledge) rated detailed attention has been an occasion on which the AER wished to raised matters but felt driven to acknowledge that the provision was inadequate to allow it to do so. This occurred only recently, during the course of the most recent Victorian electricity distribution network service provider hearings.[21] There were five separate applications before the Tribunal, each commenced and constituted by a grant of leave in relation to a separate application document specifying particular grounds. In one application, a service provider contended that the AER had had no power to apply decrements to its revenue implied by the effect of an efficiency incentive mechanism which applied in an earlier regulatory period, and in another application, a service provider contended that the AER had had no power to apply decrements to its revenue implied by the effect of a service incentive mechanism which applied in an earlier regulatory period. The implications of these arguments were such that the power of the AER to have given effect to incentive mechanisms operating in earlier regulatory periods was cast into doubt in relation to all of the applications before the Tribunal. However, the AER informed the Tribunal that its ability under s 71O(1) of the NEL to raise matters was limited to raising matters *related to a ground of review in a particular application*, and thus did not enable it to raise these *ultra vires* issues in the applications in which there was no related ground of review.

Evidentiary restrictions

62. The evidentiary limit is couched as a restriction on the Tribunal having regard to any "matter" other than *review related matter* (s 71R NEL / s 261 NGL). The interpretation to be given to "matter" in this context is information, material or evidence.

63. The expression *review related matter* is defined by reference to a number of categories of material, some of which raise their own problems of interpretation.

---

[21] See footnote 14 above.

For instance, one of the categories (s 71R(6)(c) NEL / s 261(7)(c) NGL) appears (if given a literal meaning) to permit any relevant material that *could have been* submitted to the AER to be submitted to the Tribunal, whether or not it was in fact submitted to the AER.[22] If this interpretation were adopted, it would virtually negate the evidentiary limit. The Tribunal has recently laid to rest any suggestion that the category should bear its literal meaning.[23]

64. Quite apart from drafting issues, the categories of *review related matter* leave scope for inventive procedural approaches: the categories include submissions in support of the application for review, and new information or material may be allowed (if it would assist and was not unreasonably withheld from the AER) provided that the Tribunal is of the view that a ground has been established. Taking advantage of the category relating to submissions in support of the application for review, during a hearing before the Tribunal in 2009 EnergyAustralia submitted expert material (bearing name and letterhead), characterizing that material as submissions.

65. As to the Tribunal's conditional power to accept fresh evidence in the event it is satisfied that a ground of review has been established,[24] the Tribunal has generally been unwilling to fragment its proceedings by conducting a threshold analysis of whether a ground is demonstrated, and has generally been content to receive limited fresh evidence in "escrow", on a *de bene esse* basis – that is, to receive it contingently with a view to considering it in the event that the Tribunal should later be satisfied that a ground has been established.[25] Although the power of the Tribunal to accept fresh evidence raises the potential for it to hear live (*viva voce*) evidence from experts, the Tribunal has not yet, to the best of my knowledge, heard *viva voce* evidence in a NEL or NGL matter.

---

22 In the case of network revenue or pricing determinations under the NEL or applicable access arrangement decisions under review under the NGL, this provision defines review related matter to include "any document, proposal or information required or allowed under the Rules to be submitted as part of the process for the making of the determination [decision]".

23 *Application by Jemena Gas Networks (NSW) Ltd (No 3)* [2011] ACompT 6 at [100]-[101] (Justice Finkelstein (President), Professor D Round, Mr R Steinwall):"If correct, this approach would turn limited merits review on its head. It would convert proceedings before the Tribunal into hearings *de novo* with all parties free to submit any relevant material. But we think the argument is not correct. It is only documents, proposals and information required or allowed “under the Rules” to be submitted to the AER which form part of the review related matter. To be required or allowed “under the Rules” to be submitted, the document, proposal or information (as the case may be) must be referred to in a rule."

24 Section 71R(3) of the NEL (and s 261(3) of the NGL) provides " ... if in a review, the Tribunal is of the view that a ground of review has been established, the Tribunal may allow new information or material to be submitted if the new information or material ..." meets specified criteria, including that it was not unreasonably withheld from the AER.

25 See, for example, *Application by ElectraNet Pty Ltd (No 3)* [2008] ACompT 3 at [80]-[82] and [110] (Justice Mansfield (Deputy President), Mr R Davey and Dr J Walker); *Application by EnergyAustralia and Others* [2009] ACompT 8 at [69]-[71] and [316](c) and (e) (Justice Middleton (Deputy President), Mr R Davey and Mr R Shogren).

66. There is a longstanding issue, not only under the present regime but also under the predecessor regime and in certain of the Tribunal related jurisdictions, concerning the extent to which information can be taken to have been before the regulator where that information is:

    (a) available to the regulator and in some sense referred to by a service provider; but

    (b) not actually provided to, or otherwise accessed by, the regulator in connection with the making of the decision under review.

67. Under the previous telecommunications review regime in the Tribunal, a rule of thumb had developed on this topic known as "Justice Goldberg's footnote rule".

68. The Tribunal has recently revisited this issue in the energy sphere, concluding that simply referring to material in a footnote, or by inference in a submission, will not generally put that material before the AER. The exception is "the case where it is plain on the face of the material that is actually given to the AER that it (the AER) is expected to obtain, consider and take into account the further material". The Tribunal identified relevant matters going to the point as depending upon "the extent of the material that is sought to be incorporated, the difficulty in locating that material, the precision with which parts of that material are identified and so on".[26]

Recent/current issues re:

- **confidential information**
- **statements of agreed facts**
- **extrinsic material**
- **determinations by the Tribunal**

Confidential information

69. There is quite a detailed confidentiality framework in the CCA and regulations. In summary:

    (a) s 44AAF of the CCA imposes confidentiality obligations on the AER;

    (b) regulation 7 item 1.2 permits information disclosure to the Tribunal under s 44AAF(3)(e) of the CCA;

[26] *Application by Jemena Gas Networks (NSW) Ltd (No 3)* [2011] ACompT 6 at [103] (Justice Finkelstein (President), Professor D Round, Mr R Steinwall).

(c) regulation 7D of the regulations imposes confidentiality requirements on the manner in which the Tribunal is to maintain the register of applications for review under State/Territory energy laws;

(d) s 106 of the CCA permits the closing of a hearing or the making non-publication orders to protect confidentiality or for other good reasons.

70. In spite of claims of confidentiality, disclosure is permitted for the purpose of Tribunal proceedings if that is necessary to accord natural justice (s 28Y NEL/s 326 NGL).

71. That said, it is also clear that the CCA, NEL and NGL place great importance on the AER's confidentiality obligations and confidentiality generally. Information disclosure decisions by the AER pursuant to Part 3 Division 6 NEL / Chapter 10 Part 2 Division 1 NGL are themselves reviewable by the Tribunal under Part 6 Div 3B NEL / Chapter 8 Part 6 Div 3 NGL.

72. My experience has been that the Tribunal shows a greater readiness to accommodate claims of confidentiality than might generally be expected in the courts. In the recent Victorian reviews, for the first time, the Tribunal closed the hearing on an entire topic before it. The *prima facie* position under the CCA s 106 is for hearings to be in public, but the Tribunal will exercise its discretion to close a hearing should a party have a good claim to confidentiality which needs protection.

Statements of facts

73. Until 2011, in my experience, "agreed" statements of facts were routinely ordered by the Tribunal in energy matters. In principle, an agreed statement of facts can be a useful tool. However, statements of facts in the Tribunal's energy matters had become very elaborate, having multi-colour coding denoting passages asserted by one party but disputed by another party, or otherwise not agreed, or contended to be outside the evidentiary limit, or to be opinion rather than fact (and so on).

74. During the early interlocutory stages of the most recent Victorian electricity distribution network service provider hearings,[27] Senior Counsel for the AER, Melanie Sloss SC, outlined the AER's concerns about the costliness and limited usefulness of elaborate statements of facts. The then President (Justice Finkelstein) accepted the submission and dispensed with statements of facts for the proceedings.

75. My own impression is that the absence of the statements did not adversely impact upon the running of the hearings, and the resources saved from being expended on preparation of statements of facts were probably very significant. My expectation is

[27] See footnote 14 above.

that this change of approach is probably now cemented for general purposes, although there may arise cases in the future that warrant an agreed statement of facts.

Extrinsic material

76. I have a couple of issues in mind on this point, each of which can be very briefly stated.

77. Firstly, I have already noted the robust purposive approach adopted by the Tribunal in *Energex No 4*. In that case, the Tribunal showed a willingness, somewhat in tension with the trend in current High Court authority, to resort to extrinsic material to resolve issues of interpretation of the NEL. I query whether this approach will be followed quite so robustly by subsequent Tribunals.

78. Secondly, I want to mention the specific provision empowering the Tribunal to have regard to extrinsic material in relation to the NEL/NGL and the National Electricity Rules and the National Gas Rules, namely clause 8 of Schedule 2 to the NEL/NGL. The presence of an express provision of this kind suggests that it was intended that resort to extrinsic material would be limited, and would not occur otherwise than in accordance with its terms.[28] However, the clause has certain deficiencies and ambiguities. For example, the definition of "Law extrinsic material", although cast in wide terms ("relevant material not forming part of this Law, including, for example - ..."), might be limited by reference to the kinds of materials appearing in the list of examples, which are all in the nature of parliamentary materials (save for material specially identified in the regulations). That genus of material appears to exclude say the MCE's 2006 policy decision, which would be an odd outcome. Further, the definition of “Rule extrinsic material” seems inapplicable in cases of Minister-made rules. It only applies to AEMC-made rules. This seems to be an unintended gap.

Determinations by the Tribunal

79. If the Tribunal grants leave to apply for review it falls under a duty to make a determination in respect of the application (s 71P NEL / s 259 NGL).

80. The better view is that the Tribunal has no power to make partial or interim determinations, but must make a unitary determination disposing of the entire application.[29] This "unitary determination" approach does not mean the

---

28 But note the courts' ability at common law to resort to material such as law reform reports to ascertain the mischief to which an enactment was directed: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

29 In *Application by Jemena Gas Networks (NSW) Ltd (No 4)* [2011] ACompT 8 at [6], the Tribunal (Justice Finkelstein (President), Professor D Round, Mr R Steinwall) said that this appears to be the "clear operation" of the relevant provisions, and that the Tribunal was not persuaded of the contrary for the following reasons: "In the first place, the whole review process is intended to be completed quickly (three months unless extended). Secondly, it will be a rare case where issues are split into separate hearings resulting in separate reasons. Thirdly, if the Tribunal could

determination can only take one form. The determination might for example vary part of the decision under review (s 71P(2)(a) NEL / s 259(2)(a) NGL) and otherwise remit the matter to the AER with directions as to other aspects of the decision to be remade (s 71P(2)(b) NEL / s 259(2)(b) NGL). It means that the determination must, at one time, dispose of the application for review in its entirety.

81. There is no certainty that the Tribunal will follow the unitary determination approach in the future. However, one recent example of the Tribunal taking note of the point occurred during the process of finalising the determinations in the Queensland and South Australia electricity distribution network service provider Tribunal proceedings. Certain (purported) partial or interim determinations had been made in those proceedings, and the AER raised the point with the Tribunal, constituted for a directions hearing by Justice Middleton (Deputy President). Justice Middleton indicated that the Tribunal would, out of an abundance of caution, be re-making those earlier (purported) determinations as part of a unitary final determination in each matter. In the event, this was done in time for the approval of pricing proposals that were then due for the following regulatory year.

Effectiveness of practice & procedure in promoting MCE policy goals?

- **time limits**
- **leave requirement**
- **restrictions on material & submissions**
- **grounds of review**
- **costs**

Time limits

82. I do not think the MCE's policy objectives have been met in respect of the topic of time limits.

83. I noted at the outset that the target time limit only applies from the time *leave* is granted, and that there is no requirement that the Tribunal determine a leave application in any particular period.

84. In spite of this gap, the intention must have been for the leave application to be dealt with quickly, and this is what the Tribunal has always done. Clearly the MCE intended that leave would not involve a preliminary trial or the sifting of the material in any detail. However, it is not easy to reconcile the need to decide leave

---

render separate determinations on one application, the system of judicial review would become unnecessarily complex. In particular, it would mean that there would often need to be separate judicial review applications to comply with the limitation period. That is hardly a desirable outcome."

applications quickly with the difficulty inherent in applying the leave criteria to complex cases.

85. The majority of the energy matters that have come before the Tribunal have been multi-issue applications, and (further compounding the complexity of the review task) most have arisen from a series of regulatory processes conducted by the AER involving multiple service providers in tandem. Resultant Tribunal proceedings reviewing the AER's decisions have also been largely conducted in tandem, with common hearings for common issues and break-out hearings for issues peculiar to particular service providers. This has been the pattern in NSW in 2009, Queensland & SA in 2010 and now Victoria in 2011. The efficiencies of conducting the regulatory and review processes in this manner are clear, but the complexities introduced by doing so are profound.

86. Generally, the AER has not opposed leave in respect of particular grounds, and has limited its response to leave applications to insisting on specificity of the grounds to be dealt with in the application. The Tribunal has accepted the need for a good degree of specificity as a precondition of leave being granted, and as a precondition of leave to intervene being granted. On the expedited timetables which are desirable, it has probably not been practical for much more to be done prior to the leave stage.

87. After the grant of leave, the standard three month target period commences to run. Owing to the complexities and magnitude of the review task, an extension has invariably been needed.

88. The very first energy case before the Tribunal under the limited merits review regime of the NEL/NGL, *ElectraNet* in 2008,[30] came close to being concluded within the three months of leave being granted, but went over by one week. It concerned one confined issue, in relation to a regulatory "loose end" raised in transitional provisions regarding the establishment of the service provider's opening regulatory asset base. Most of the subsequent cases have been much more complex and have run substantially over the target time limit, a number have required multiple extensions, and one took almost a year to conclude and is still subject to a related judicial review proceeding.[31]

89. The Tribunal has read its power to extend the time limit for determination as empowering it to grant multiple re-extensions if required.

---

30 The leave decision in that case was made on 23 June 2008, *Re: Application by ElectraNet Pty Ltd* [2008] ACompT 1 (Justice Goldberg (President), Dr J Walker and Professor C Walsh). The final determination was made on 30 September 2008, *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (Justice Mansfield (Deputy President), Mr R Davey and Dr J Walker).

31 Ergon Energy Corporation Ltd's judicial review proceeding concerning whether its provision of public lighting is a distribution service, and thus comes within the regulatory competence of the AER.

Leave requirement

90. I have already commented on aspects of practice and procedure in relation to the leave requirement, in paragraphs 25-39 above.

91. To the extent that there had been uncertainty about the operation of aspects of the leave criteria, those doubts have been laid to rest after some years of experience with the regime.

92. Very few applications have been refused leave.[32] However, the efficacy of the leave requirement cannot be judged by the frequency of refusals of leave. My personal opinion is that the presence of the leave requirement has a useful normative effect on the quality of applications and on the specificity with which grounds are commonly framed in applications from the outset. It may not be possible to measure this effect, but I think it is real.

Restrictions on material and submissions

93. The true effect of the restrictions on material and submissions, again, cannot be measured. However, in my view, they provide a useful effect on narrowing the scope of the proceedings that would otherwise occur. That said, there have been difficulties in the application of these provisions. They are probably not as effective as they could be, for the reasons I have mentioned in the course of my general discussion of these topics at paragraphs 48-68 above.

Grounds of review

94. The NEL/NGL jurisdiction of the Tribunal involves cases which determine the allowed revenue for very large businesses, for an extended (five year) period. The stakes are high. There is every incentive for the regulated businesses to explore avenues to improve their position, even if only by a small degree. A increase in revenue by a fraction of a percentage over 5 years can translate to many millions of dollars for some of the regulated service providers.

95. In that context, in my view although (again) the effect of requiring service providers to demonstrate grounds of review may not be measurable, that effect is nonetheless real.

96. There seems little need to revisit the policy decision to eschew *de novo* review and to impose a requirement for the demonstration of various kinds of error. The grounds, particularly the "unreasonableness" ground, have proved an ample

---

[32] A rare exception was *Application by Energy Users' Association of Australia* [2009] ACompT 3 (Justice Middleton (Deputy President), Mr R Davey and Mr G Latta), which was an application for review (as opposed to an application to intervene) which was not supported by sufficient information to make it possible to ascertain the amount of revenue at issue as a result of the grounds the Association sought to advance.

foundation for the regulated service providers to have enjoyed a good measure of success in review applications before the Tribunal. There is a debate which should be had about the scope and character of the grounds that may be agitated, but that is beyond the reach of this paper.

Costs

97. If one simply reads the Tribunal's decisions in the area since 2008, the topic of costs would pass unnoticed. To date, no costs order has been imposed. This may be, at least in part, because no proceeding has been entirely unsuccessful. The AER has not sought partial costs orders in relation to those aspects of the applications brought that have been unsuccessful.

Conclusions

98. If there is any one theme that arises from experience of the above aspects of the review mechanism since 2008, it is that the energy cases in the Tribunal have turned out to be more complex and lengthy than was apparently foreseen by the policy-makers.

99. Compounding factors have included the bedding-down period that has been needed to reach a workable understanding of various aspects of the National Electricity Rules and National Gas Rules, various substantive transitional issues that have arisen from the staged movement across from the various jurisdictional arrangements to the single national framework, and certain complications arising from the necessary expedient of the AER conducting its consideration of regulatory proposals for service providers in tandem.

100. Although in most respects practice and procedure under the NEL/NGL limited merits review regime has adapted well to the challenges presented, in some respects the regime has not been suited to dealing with the challenges of complex and lengthy cases.

Presented: 29 July 2011

Note: as at 18 June 2012, the following further decisions have been published in cases referred to in the text of this paper: *Application by United Energy Distribution Pty Limited* [2012] ACompT 1 (Justice Foster (Deputy President), Mr G Latta AM and Professor D Round, 6 January 2012); *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8 (Justice Foster (Deputy President), Mr G Latta AM and Professor D Round, 5 April 2012); *Ergon Energy Corporation Ltd v Australian Energy Regulator* [2012] FCA 393 (Logan J, 19 April 2012); and *United Energy Distribution Pty Ltd v Australian Energy Regulator* [2012] FCA 405 (Foster J, 20 April 2012).