Energy Action Group

Submission to the Review of Decision Making in the Gas and Electricity Regulatory Framework, Discussion Paper

Funded by a grant from the NEM Advocacy Panel

This submission comprises two parts.

Part A

A submission by the Energy Action Group on the availability of consumer advocacy resources to participate in Regulatory Review Processes.

Part B

A legal opinion on the value of Merits Review by
Debbie Mortimer SC
Jason Pizer

Part A
Introduction

The Energy Action Group is a membership based, 28 year old, not for profit incorporated association looking after the interests of less -than -160 MWh consumers across the NEM and less- than 10 TJ gas consumers across the East Coast of Australia.

It is worth noting that EAG has a policy objective of where possible working closely and collaboratively with other consumer groups across the National Electricity Market and the National Gas Access Regimes.

The EAG has actively participated in ten electricity and gas Market System Operating Rules, Transmission and Distribution pricing determinations since the reform actively started in 1996 across the east coast of Australia and the NEM.

The organisation has had two appearances before the Australian Competition Tribunal (ACT). The first appearance was as an intervenor in the application by GasNet to Review the ACCC revenue determination listed No 14 in Annexure C in the Discussion Paper. The second appearance along with the Energy Users Association of Australia, Amcor, BHP Billiton and Orica was in relation to the matter trying to revoke the Federal Minister of Energy Decision to uncover two thirds of the Moomba to Sydney Pipeline.

This submission will make significant use of EAG's experiences in these two ACT appearances and on the legal advice, that we have been receiving over the past three years, coupled with the organisations experience in a number of regulatory determinations.

The Review of Decision Making in the Gas and Electricity Regulatory Framework Discussion Paper provides a concise and comprehensive analysis of the major options available. This one of the best papers looking at options put out by the Ministerial Council on Energy Senior Committee of Officials (MCE-SCO) to date.

The Review of Decision Making in the Gas and Electricity Regulatory Frameworks Discussion Paper has to be examined in the light of the relevant legislative requirements. **However, it is important to note that the Discussion Paper fails to address the history, dynamic and performance of the regulatory and regulatory review arrangements.**

This submission is written assuming that in time most of the jurisdictional regulatory functions are going to be transferred to the Australian Energy Regulator and the Australian Energy Markets Commission and will be appealable before the Australian Competition Tribunal. EAG is aware that the Utility Regulators Forum coordinated from the ACCC acts as a clearing house, a discussion forum and allows interchange between regulators so there is some coordination between them on the various approaches to gas and electricity regulatory determinations across the Commonwealth. The Forum is further enhanced with each of the jurisdictional regulators having an Assistant Commissioner role at the ACCC.

Any examination of the submissions to any of the ACCC and jurisdictional regulatory determinations shows that with the odd exception, consumer and consumer advocate submissions particularly those representing the less -than -160 MWh for electricity and 10 TJ for gas consumers, only address a few of the questions asked by the regulator in any of their issues, discussion and draft determinations.

Consumers and consumer advocates have been minimal participants in the various national and jurisdictional gas and electricity regulatory processes and consultations since 1990[1]**.**

This point is further highlighted by the relative resources devoted to regulation and regulatory resources powers and decision making capacity.

Currently many (if not all) Australian economic gas and electricity utility regulators have to fulfil two functions. The first function is to regulate and provide certainty to regulated entities subject to gas and electricity regulatory regimes under the National Electricity Law (NEL) and National Gas Pipeline Access Law (NGAPL). The second unofficial function is to balance and compensate a regulatory determination for an almost non existent consumer input against an almost certain appeal by the regulated entity if they have the right to do so. This is indicated by the number of appeals by gas transmission companies listed in Annexure D of the Discussion Paper.

It is implicit in the regulatory objectives of the NEL and the NGPAL is to ensure that the regulated business has long term viability as well as certainty.

Gas and electricity market objectives

One of the most important objectives of the National Electricity Law and the Gas Access Law is to benefit of consumers**.**

The National Electricity Law 2005 provides a single market objective

7 National electricity market objectives:

The national electricity market objective is to promote efficient investment and effective use of electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability, safety of the national electricity system

The Council of Australian Government National Gas Pipelines Access Agreement and the Gas Pipeline Access (South Australia) Law 1997 have the following multiple objectives:

2 Access objectives:

[1] The two organisations that have a long term history of involvement are the Business Council of Australia promoting the reform program and the Energy Action Group trying to make a contribution on Community Service Obligations to protect vulnerable consumers from the negative impacts of the reform program.

2.1 To establish a uniform national framework for third party access to natural gas pipelines that;

a) Facilitates the development and operation of a national market for natural gas;
b) Prevents the abuse of monopoly power
c) Promotes a competitive market for natural gas in which customers may choose their suppliers, including producers, retailers and traders
d) Provide rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users
e) Provides for dispute resolution

The implicit objective of Gas Pipelines Access (South Australia) Law 1997 (GPAL) is to try and establish competitive markets with inter basin competition and a competitive intra basin pipeline to the consumer, or to ensure that the relevant regulator attempts to emulate competitive outcomes for the monopoly transmission owner using light handed incentive regulation regime to deliver the desired outcome.

The Gas Pipelines Access (South Australia) Law 1997 has made provision for disputes resolution, outlined above under Section 2 Access Objectives 2.1 e). Annexure D of the Discussion paper indicates that there have been 4 appeals to judicial bodies against regulatory determinations by regulated gas entities. Three of these appeals were to the Australian Competition Tribunal and the fourth appeal was before the Western Australian Supreme Court. This latter appeal, has provided the most exhaustive appeal to date, is the Dampier to Bunbury Re Michael Ex parte Epic Energy (WA) Nominees Pty Ltd WASCA 231.

Only one of the four appeals listed in Annexure 4 had consumer involvement with EAG acting as an intervenor, the Application by GasNet Australia (Operations) Pty Ltd ACompT 6 (23 December 2003).

In the remaining three cases consumers didn't have the standing, expertise or financial resources to either appeal in their own right or to try and intervene in any of the proceedings.

Both the Energy Action Group and the Energy Users Association of Australia were declared not appropriate applicants in the Application for Review of the Decision by the Minister for Industry Tourism and Resources published on the 19th of November 2003 in relation to the Application for Revocation of Coverage of Certain Portions of the Moomba to Sydney Gas Pipeline System in the Australian Competition Tribunal File No 6 of 2003 at the second Directions hearing on the 12th of February 2004. Reasons for the ruling were published on the 4th of March 2004.

This ACT ruling raises the questions of the standing of consumer advocates under the Gas Pipelines Access (South Australia) Law 1997 and needs to be resolved in the next round of revisions of the GPASAL in the South Australian parliament.

There remains the question of standing particularly if a consumer or consumer advocacy body has not participated in any of the processes involved in the initial regulatory decision making before the appeal is initiated.

Part B of this submission makes some pertinent points on this issue

The Dampier to Bunbury case has major ramifications for both regulators and consumers across the Commonwealth[2], but no consumer group could have under-written the expenses of joining or intervening in this particular appeal. Major resource constraints ensure that consumers are also further heavily disadvantaged in long drawn out litigation. This problem would be exacerbated if the risk of costs were involved.

Most pro bono legal schemes are heavily limited by time and the costs of litigation. The ability of consumers is further reduced by having limited access to the credible expert witnesses that are required to mount a specialist appeal like a regulatory revenue determination or an access arrangement.

These resource limitations almost by default limit a consumer appeal applicant to cross examination and to using the material disclosed under the discovered process to mount their appeal.

When these factors are added together consumers have an extremely difficult time in attempting to mount an appeal against a regulatory determination or an access arrangement in their own right.

The gas and electricity market objectives detailed above need to be looked at in conjunction with The Review of Decision Making in the Gas and Electricity Regulatory Framework Discussion Paper which details some specific objectives for the regulatory review regime.

Paragraph 1.7 states that;

> *"Review is not an end in itself but a means to ensure accountability for regulatory decision- making. But review is not the only mechanism by which accountability is achieved and must be part of a broader regulatory frame work.*

Paragraph 1.8 goes on to say;

> *"Transparent fair and reasonable decision making that also produces economically efficient outcomes is also a product of:*
>
> *i. Strong institutional structure of the decision-makers; eg. AER member appointments and external policy accountabilities, internal management, public reporting requirements and financial accountabilities;*
>
> *ii. Role clarity of decision makers with in the energy sector via the statutory conferral of functions and powers;*
>
> *iii. Clear and effective procedural and consultative requirements in the NEL and the NE Rules and in the Gas Access Pipelines Regime as to how the decision-makers will perform their economic function;*

[2] One of the important issues under appeal is the Dampier to Bunbury pipeline asset values.

iv. Clear and efficient rules for economic regulatory decision making- removing layers of consistent objectives and principles in favour of a body of rules designed to structure and guide regulatory discretion;

v. An appropriate review mechanism.

Paragraph *1.10*

Some criteria relevant to developing an appropriate review scheme are

- *Maximising accountability;*
- *Maximising regulatory certainty;*
- *Maximising the conditions for decision makers to make a correct initial decision;*
- *Achieving the best possible decisions possible;*
- *Ensuring that all stakeholders interest are taken into account, including those of service providers network providers and consumers;*
- *Minimising the risk of gaming*
- *Minimising the time delays and costs*

Comments on Discussion Paper Paras 1.7

EAG agrees with the sentiments of Para 1.7 of the Discussion Paper.

EAG agrees in principle with objectives outlined in Para 1.8 about what should happen. Unfortunately in practice, the reality and the application to regulatory principles is substantially different to the principles outlined in Para 1.8.

Comments on Discussion Paper Paras 1.8 i, ii and iii

How can a strong institutional structure provide confidence to market participants and consumers when the ACT has found that each of the three cases brought before the Tribunal had some errors or omission by the regulator ACCC?

Clarity of objective and statutory powers don't help if the regulatory process requires the regulator to make regulatory judgements based on theoretical models using data developed from weak regulatory guidelines open to wide interpretation by the applicant. Clarity doesn't help when a regulatory determination has inconsistencies or significant oversights.

For instance, clear and effective procedural and consultative requirements don't help near the end of a regulatory process at a time where the regulator is racing to meet a deadline for a final determination. This was particularly true for the recent ACCC electricity transmission determination for Transgrid and Energy Australia and the ESC(V) Electricity Distribution Pricing Determination 2006-2010.

Consumers are the major loser in the failure of the regulator to provide sufficient time for all parties to a regulatory determination to examine all the public material used for a regulatory determination. This practive makes it almost impossible for consumers

and the various consumer advocacy bodies to effectively participating in any regulatory determination[3].

Comments on Discussion paper Para 1.8 iv

Almost all of these objectives require regulatory judgement. It is not unfair to say that there are numerous instances where regulators have adopted more conservative positions in their Determination so as to minimise an appeal against their determination. The two classic parameters are the equity beta's and the market risk premium in the Capital Asset Pricing Model-Weighted Average Cost of Capital section of a determination.

EAG has examined at least twenty Australian regulatory access and revenue determinations and actively participated in nine regulatory determinations. There is the assumption in the Discussion Paper that using all of the management tools outlined in the Discussion Paper Paragraph 1.8 will deliver a balanced outcome for all parties and that regulators are making transparent, fair and reasonable decisions.

The building block approach to light handed incentive regulation uses a number of theoretical tools for determining the asset values (like Depreciated Optimised Asset Values), the rate of return on the Regulated Asset Base (based on Capital Asset Pricing Model Weighted Average Cost of Capital), the return of Capital (depreciation) and the operations and maintenance expenditure. All of the parameters of light handed incentive regulation are subject to regulatory judgement.

Comments on Discussion paper Para 1.8.10

Under the current appeal arrangements the regulated entity, with one significant exception, has been able to benefit from running an appeal against the regulator. The important exception is still under appeal the Dampier to Bunbury Re Michael Ex parte Epic Energy (WA) Nominees Pty Ltd WASCA 231.

A number of these objectives outlined in Para 1.8.10 will be achieved in the long term if there is stability in the regulatory arrangements and consumers are able to actively participate in the appeals process.

There is massive resource asymmetry between the major parties -regulated entities, regulators and consumers.

It is instructive to try and examine the levels of financial resources[4] available to the three parties- regulated industries, the regulator and consumers.

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[3] The latest example of this problem has been the recent ESC (Victoria) Electricity Distribution Price Review determination where the final decision and the consultants reports used as a basis of the decision were released on almost the same day.

[4] This is a simple attempt to compare the relative level of resourcing between the participating parties. EAG is aware that like is not being compared to like. The industry figure will probably never be public. The ESC will publish their expenses in the Annual Report 2004 -5 and 2005 -06. Several consumers groups received funding from the NEM Advocacy Panel, which helped to facilitate their participation in the regulatory process.

The recent Essential Service Commission (Victoria) Electricity Distribution Pricing Review regulatory determination provides a useful example of the resource asymmetry providing a typical example what can be seen across the Commonwealth regulatory environment.

In the 1999 Office of the Regulator General Electricity Distribution Price Review, the five distribution businesses were awarded $ 67 m (real 1999 $) for the five year regulatory period 2000 to 2005 to meet their regulatory obligations. If they spent under this amount, under incentive regulation they got to keep the surplus. If they spent over the regulatory allocation it came from their pockets.

The five businesses were awarded revenue by the regulator that gets paid for by consumers so that they can participate in the regulatory regime. The businesses have the incentive to reduce their regulatory costs and to keep the under-spend. If their costs of regulatory compliance is over the amount allocated in the regulatory determination then the over- spend comes off the businesses bottom line.

EAG understands on the limited evidence currently available that the Essential Services Commission spent $ 7 -.8 m on the Electricity Distribution Price Review Determination over the two years 2004 and 2005.

While all consumers involved in the ESV process received and spent less than $ 180,000 over the same time frame from all funding sources.

This financial resource asymmetry is repeated for every regulatory determination across the Commonwealth.

This resource asymmetry is carried through to any appeal process, whether it is Model A, B or any variant or alternative model that may be adopted.

There are two significant resource differences–

1) Asymmetry of the quality of legal resources and consultants available to industry appellants compared to regulators and consumers.

   It is in the regulated industries interest to use the best available legal representation and credible consultants for an appeal, so they try to employ the best available legal and economic resources at the time of their appeal.

2) The legal dynamic for the majority of regulatory decision appeals to date is that a well resourced appellant is questioning a number of items in a regulatory determination that were made using regulatory judgement. Given the theoretical nature[5] of many of these regulatory judgements it is reasonably painless for a regulated entity to develop an appeal for either a Judicial or a Merits Review on the grounds outlined in the Discussion Paper. The growing complexity of the Capital Asset Pricing Model, Weighted Cost of Capital Model (CAPM WACC) determination across the ACCC/AER and the

[5] Capital Asset Pricing Model, Weighted Cost of Capital Model is used to determine the rate of return to the businesses and is a theoretical finance model. Allocating depreciation under Depreciated Optimised Replacement Cost uses another theoretical model.

jurisdictional regulators desire to minimise appeals against a determination demonstrate this point.

Most jurisdictions governments and the Commonwealth try to limit the cost of legal representation available to the regulator and the expenses of getting expert witnesses for an appeal. This financial constraint limits the ability of the regulator to "defend" or justify a determination.

There is an important set of omissions in Annexure 4 in the Discussion Paper. The table should have included the number of parties involved in the appeal. Whether any party intervened in the appeal or another party contested the applicant's application for review! An estimate of overall cost of the judgements had on the regulated entities revenue requirements compare to the estimated costs or running the appeal. This analysis should have also included the costs to the regulator to fight the appeal and the overall costs to consumers who in the end will have to fund the revised final determination.

Part B of this submission points out that a robust appeals process should enhance the decision making process. However given the massive asymmetry of resources between the parties there exists a one sided review arrangement favouring regulated businesses.

Regulated industries.

Every regulatory determination awards some operations expenditure (opex) to enable the regulated industry entity to comply with the regulatory reporting arrangements and guidelines.

Under both the old Australian Consumer and Competition Commission (ACCC), the new Australian Energy Regulator (AER) regime and the various jurisdictional regulatory arrangements, the regulated businesses are able to control the quality and form of information submitted under the various regulatory guidelines. Clearly it should be in their interests to comply with the regulators requests for information however the recent judgement by the Essential Services Commission Appeal Tribunal[6] raises some serious questions about the availability of information to the regulator. This problem is further exacerbated by a set of weak regulatory guidelines that allows regulated entities to produce information that is difficult for the regulator to interpret.

Consumers -the underwriters and beneficiaries of the MCE reform program.

Even a cursory examination of any gas or electricity regulatory determination across the Commonwealth shows that very few consumer organisations provide any meaningful and significant inputs to the regulatory consultation process.

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[6] Essential Services Commission Appeals Panel Reference E2/2005 in the matter of Electricity Pricing Determination 2006-2010 in respect of United Energy and in respect of the Essential Services Commission Act 2001 and in the Matter of an Appeal by Alinta Network Services Pty Ltd 12th September 2005.

The most major consumer organisation that have been making the major contributions on behalf of consumers in both gas and electricity revenue and access arrangements is the Energy Users Association of Australia. (EUAA) has been able to participate in over twenty regulatory determination and access arrangements. The second significant organisation is the Major Energy Users Incorporated (MEUI), a coalition of the Energy Users Coalition of Victoria, the Energy Consumers Coalition of South Australia and the Electricity Markets Reform Forum.

In the case of large consumers (more than 160 MWh/a) a number of representative organisations[7] have been involved at the jurisdictional regulatory level and occasionally at the ACCC/AER level but this involvement has been on specific issues, not broad involvement across a regulatory determination.

In the case of the less -than -160 MWh consumers the only organisation that has attempted to be involved across the gas and electricity markets is the Energy Action Group. Almost all the other submissions to any regulatory revenue and access arrangements consultation process have represented sectional interests, mainly low income consumers and usually on specific issues[8] raised in the regulatory consultation process.

The vast majority of consumers and consumer advocates, particularly those representing less than 160 MWh consumers,[9] do not understand the regulatory regime let alone have the capacity to make a submission to regulatory access or revenue determination. This area of regulatory participation has been left to large representative bodies like EUAA and MEUI and occasionally the EAG.

The total current annual turnover of gas and electricity consumer advocacy groups across the Commonwealth is in the order of $ 3.0 m.[10] The two major funding schemes, the NEM Advocacy Panel and the Victorian government funded Consumer Utility Advocacy Centre, have revenue streams of just under $ 1.7 m/a and spend around over $ 500,000/a of their total revenue on management costs and overheads.

Under these arrangements no consumer advocacy organisation has the financial or expert resources to initiate litigation or an appeal before the ACT.

It is clear from a cursory examination of almost all consumer submissions made to AER regulatory determinations that **the majority of consumer advocacy organisations currently do not have the expert or financial resources to mount and sustain an appeal before the ACT, given the current advocacy resourcing arrangements.**

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[7] Property Council of South Australia, Major Employers Group Tasmania and Commerce Queensland.
[8] Total Environment Centre, Public Interest Advocacy Centre - Utilities Consumer Advocacy Project. Consumers Utilities Advocacy Centre, various council street lighting groups, Queensland Consumers Association etc.
[9] This point is reflected in the MCE decision on Consumer advocacy arrangements mentioned in the 4th of November MCE Meeting Communiqué www.mce.gov.au
[10] Each Victorian distribution business was awarded approx $2.6 m/a for regulatory const in the ORG 1999 Electricity Distribution Pricing Determination

EAG currently provides the only example to date of a consumer advocacy group sustaining intervenor status in the Application by GasNet Australia (Operations) Pty Ltd ACompT 6 (23 December 2003).

EAG's contribution to this case was to offer an alternative position to the applicant GasNet on a range of issues that GasNet thought that they were disadvantaged by in the ACCC Final Determination. GasNet was sufficiently threatened on the issues relating to the Weighted Cost of Capital that they withdrew the contention of disadvantage from their application before it went to the Tribunal.

EAG as an intervenor was also denied the right to raise any issue not covered by the GasNet applicaction

GasNet's decision to withdraw the part of their application relating to WACC and the ACCC's interpretation of Market Risk Premium and equity beta's reduced the potential financial impact on consumers had there been a finding against the ACCC by the Tribunal on this issue.

It is clear that the current review arrangements minimise consumer and consumer advocates involvement in regulatory review processes. Consumer involvement can change the dynamic in the review process to the benefit of consumers.

The current review dynamic is the regulator vs the regulated applicant. This arrangement leaves open a finding by the Tribunal that the regulator erred in the determination, the question then comes "by how much" and the review body makes a judgement on the amount or sends the issue back to the regulator to revise the determination.[11]

The introduction of a competent consumer input in to the review process would demonstrate how the regulator had minimised and discounted consumers input into the regulatory determination.

Competent consumer involvement in regulatory determinations will take some of the pressure off regulators who may feel pressured to make their determination on the basis that they want to avoid a regulatory review.

Regulators

There are a number of objectives that AER and other jurisdictional utility regulators try to manage to under the various iterations of light handed incentive regulation approaches used across the Commonwealth.

The huge resource asymmetry between regulated entities, the regulators and consumers and consumer advocates leaves open the temptation for the regulators not just to judge an issue on its relative merits of an argument when making regulatory

[11] In the case of the Office of the Regulator General Appeal Panel judgement 16th October 2000, the ORG had to review their determination in the light of the findings by the appeal panel. The ORG redetermination and the appeals panel judgement added between $ 80 and 100 million to the 4 distribution businesses revenue requirements for the 5 year regulatory period ending 2005.

judgement but for then to try and represent the interests of consumers as well in their determinations in an attempt to redress the asymmetry between consumers and the regulated entity.

However any temptation to make an adjustment to a regulatory determination to address the issue of consumer resource asymmetry would be undermined by the type of review mechanism in place for the regulatory determination particularly if Option A, Merits Review is used.

The recent Victorian Essential Services Commission Electricity Distribution Price Review Determination 2006- 2010[12] highlights the problems and the asymmetry faced by the regulator and the regulated entity in a regulatory determination.

"7.27 Information asymmetry

The balance between over compensating and under compensating the distributors for their expenditure requirements is made more complex for the regulator given the information asymmetry that exists between the regulator and the distributor[13]. "

The AER has a number of specific objectives spelt out in the National Electricity Law 2005 particularly in Division 3 Part 16. The Gas Pipelines Access (South Australia) Law 1997 provides similar objectives, outlined on page 2 of this submission.

Underpinning the objectives outlined in the NEL and the GPASAL are economic objectives.

The first and most important objective is to try and emulate/simulate competitive outcomes for the regulated monopoly entity. The policy objective is to ensure that the regulated entity has some competitive pressure to perform, ensuring that the electricity single market objective is achieved.

The second objective is to ensure a viable industry and company long term. There is a potential conflict between a long term viable industry and competitive pressures on regulated businesses which is resolved by regulatory judgement.

The third objective is to provide sufficient incentives for the company to improve its performance against defined benchmarks. Under the incentive regulatory regime, a regulated entity gets to keep some or most of the benefits of achieving a better performance than the regulator determined bench marks.

Australian regulators have the same information asymmetry as consumers but they do have the ability to ask a business for information. The AER also has statutory powers of search and seize information from a regulated entity under the National Electricity Law 2005 Division 3 Part 2. The problem for the regulator is that the regulated business may not have the information in the format required or, as in the determination by the Victorian Essential Services Commission Tribunal[14] on related

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[12] Essential Services Commission (2005) Electricity Distribution Price Review Final Decision Volume Statement of Purpose and Reasons. (October) p 268

[13] This was ACCC experience in the recent Energy Australia and Transgrid Revenue Determination

14 Essential Services Commission Appeal Panel, Reference E2/2005 12th September 2005

party transactions, the collection of information for the ESC may be so onerous on the related parties that it would cost a substantial sum of money to collect as well as taking considerable time to assemble and evaluate the information.

One of the highlights of the regulatory regime is the high turnover of regulatory staff with a high proportion of those leaving regulatory positions joining industry organisations for considerably more money. Summed up, **the regulators train staff and the industry buys or poaches them.** It is rare for the reverse process to occur where the regulator employs ex utility staff.

Framework and comments on the arrangements outlined in the Discussion Paper

The single market objective of the National Electricity Rules and Law puts a strong emphasis on consumers benefiting from the implementation of those Rules and Law. The GPA(SA)L places a slightly different emphasis on the outcome for consumers, where consumers benefit from competitive outcomes. These benefits should be translated across to consumers if Australia had strong upstream inter basin competition and by competing transmission pipelines[15].

EAG concedes that many regulatory determinations are far from perfect and that all determinations are appealable or should be from both the regulated entity and the consumer side, with the different parties having the potential to change the outcomes of the regulatory determination on review.

Conclusion

The proposed review arrangements outlined in the Discussion Paper fail to empower consumers to participate in the regulatory review process.

There are a number of issues that the MCE SCO needs to clarify in relation to standing and the levels of funding to consumer and consumer advocates before the EAG or almost any other advocacy group could attempt to get involved in any review process relating to a regulatory determination.

Given the huge asymmetry between the regulated entity, the regulator and consumers, EAG reluctantly recommends that in the short term appeals rights be restricted to Judicial Review /Option B to minimise the overall costs to consumer.

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[15] The EAG, EUAA, Amcor, Orica and Endeavour Coal initiated an appeal to the ACT. Application for Review of the Decision by the Minister for Industry, Tourism and Resources Published on 19 November 2003 in Relation to the Application for Revocation of Coverage of Certain proportions of the Moomba to Sydney Pipeline System. Between Orica, Endeavour Coal, Energy Action Group Energy Users Association and Amcor and the Minister of Industry Tourism and Resources and East Australian Pipelines

<u>EAG strongly suggests that there be restricted rights of Review with a further review occurring in two years time to assess the ability of consumers to participte in any review process</u>

There however there should be a "light on the hill" to proceed to a more thorough review process in the future and that Merits Review be included in the next review in two years time.

Part B of this submission a legal opinion by Debbie Mortimer SC and Jason Pizer and highlights the benefits of Option A Merits Review as the direction of the "light on the hill".

Recommendations and a way forward

The key to effective consumer and consumer advocacy involvement in the both regulatory determinations and regulatory reviews is to build on the current experience of consumer advocate who have participated in the wide range of NEM regulatory proceeding. That the current group of consumer advocates with regulatory experience be given sufficient resources over a two year period to provide training and access to resources to the new employees of the proposed new consumer resource centre.

That this project must also involve senior members of the AER staff to assist in the training program along with experienced several senior barristers with regulatory appeal experience.

If the MCE agrees to either a more robust review process using Option B or to accept the utility industry position of Option A Merits Review it is imperative that consumer and consumer advocates have access to financial, legal and technical expertise needed to preparing and presenting an effective case to the Australian Competition Tribunal.

It is clear that consumers will be strongly disadvantaged without access to adequate resources to fight an appeal.

Part B

IN THE MATTER of:

REVIEW OF DECISION-MAKING IN THE GAS AND ELECTRICITY REGULATORY FRAMEWORKS

JOINT MEMORANDUM

Introduction

1. In October 2005, the Ministerial Council on Energy's Standing Committee of Officials released a discussion paper entitled "Review of Decision-Making in the Gas and Electricity Regulatory Frameworks" ("the Paper"). The Paper proposes two possible models for an appropriate review scheme:

   (a) Model A is a limited form of merits review by the Australian Competition Tribunal ("the ACT"); and

   (b) Model B is judicial review by the Federal Court.

2. We have been asked by the Energy Action Group to provide our comments on the questions set out in paragraph 2.61 of the Paper. We understand that advice is to be provided from the perspective of whether the review proposals are likely to produce satisfactory outcomes for consumers who may seek to review decisions covered by the review proposals.

3. We have been asked to provide this memorandum within a short time frame. We therefore concentrate on what we see as the principal issues.

Question 1: The form of review

4. The Paper makes it clear that there is no proposal for what it calls "de novo" merits review. It appears this option has been discarded because of the "high costs imposed, the regulatory uncertainty and the sheer impracticality of a review body re-making from the beginning a complex economic determination that was the product of a lengthy consultative process" (see

paragraph 6.2 of the Paper). We do not agree with this option being summarily discarded. It is not necessarily the case that such an option would involve higher costs: depending on the issues, a merits review of the kind already contemplated in the Paper may require substantially similar expense, especially since it is proposed to use the ACT as the appropriate tribunal. De novo merits review is the most transparent of all kinds of review, and the most likely to reach the correct or preferable administrative decision. Reaching the correct or preferable decision ought, in our view, be the aim of any merits review process, rather than as the Paper argues,[16] the need to ensure "accountability" for regulatory decision making.

5. We are, however, constrained by the proposals in the Paper and we say no more about de novo merits review.

6. Subject to those comments and the comments set out in paragraphs 14 to 29 below, we have a strong preference for Model A. There are three main reasons for this.

7. First, we firmly believe that it is in the best interests of consumers if the chosen review system facilitates the correction of the greatest range of errors by the original decision-maker(s), and facilitates the making of the best administrative decision in all the circumstances. Merits review (even in the limited form proposed) will realise these objectives more readily than judicial review.

8. Secondly, we believe that merits review is more likely than judicial review to enhance the accountability of the original decision-maker(s). However, as we pointed out in paragraph 4 above, this objective ought properly to be seen as secondary (in any continuum of administrative decision making and review) to the objective of making the correct or preferable decision.

9. Thirdly, we are not persuaded that the three considerations set out in paragraph 2.50 of the Paper compel the conclusion that Model B should be adopted.

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[16] See paragraph 1.7

10. The first consideration (namely, *"the nature and complexity of certain regulatory decisions will increase the risk of regulatory error if the merits review body is not at least equally resourced with expertise"*) can be adequately addressed by providing the ACT with appropriate resources. Most tribunals are well used to resorting to expert assistance when it is required. We see nothing about this area that would render its decision making unusually complex in a manner that could not be ably assisted by expert opinion (whether appointed by the tribunal or provided by the parties).

11. The second consideration (namely, *"the interests of the range of stakeholders may be less likely to be factored into the final outcome as the merits review body does not provide a comparable investigative and consultative process to that which is used by the regulator"*) can be adequately addressed by the ACT giving the "range of stakeholders" a reasonable opportunity to express and advance their "interests" in the merits review process. Again, other tribunals, such as the Commonwealth AAT, have express provisions permitting the joinder of persons affected by a decision under review. The tribunal will also have the benefit of the consultative process that has already been undertaken and is just as able as the original decision maker to consider submissions made in that process.

12. The third consideration (namely, *"the time and cost of conducting such merits reviews are very substantial and can add significant delays to the decision-making process"*) appears to ignore the significant time and cost associated with having a judicial review proceeding heard and determined in the Federal Court. The time between lodging an application and hearing in the Federal Court is, in our experience, not substantially different from that in State or Federal administrative tribunals. The Federal Court has a well recognised capacity to expedite claims when circumstances require this; however, so do most tribunals. Further, the fact that the Federal Court is a costs jurisdiction and costs are awarded in almost all cases on the basis of an order in favour of the successful party is a significant adverse consideration from a consumer perspective. In reality, the spectre of costs orders is likely to reduce consumer participation in such processes and certainly act as a disincentive to the

bringing of any reviews.

Question 2(a): The decisions the subject of review

13. We have insufficient material, knowledge and time to comment on which decisions should be subjected to "Model A merits review" except to say that, as a matter of general principle, it is desirable to subject as many decisions to merits review as is considered practicable.

Question 2(b): Standing

14. We are strongly of the view that bodies representing consumers (such as the Energy Action Group) should have standing to commence a Model A merits review, as well (of course) as individual consumers themselves.

15. That is because:

    (a) the decisions that may become the subject of such a review can have a significant impact on consumers; and

    (b) both fairness and common sense dictate that consumers, and bodies representing them, have standing to challenge those decisions.

16. We would anticipate some opposition, particularly from participants in the industry, to allowing consumers, and bodies representing them, to commence a merits review. There could be little doubt, however, that any remotely fair merits review system in this area would need to accord standing to individual consumers. If that is the case, it is likely to be conducive to efficient and effective conduct of any review if a consumer group runs a proceeding, rather than (possibly) a host of individuals.

17. We would expect that industry participants would be concerned about consumers (or bodies representing consumers) commencing a vexatious merits review proceeding.[17] Nevertheless, the substantial cost of running a

[17] The word "vexatious" can comprehend a proceeding being instituted with the intention of annoying or embarrassing either the regulator and/or industry participant(s), a proceeding being instituted for a collateral purpose, and a proceeding that is obviously untenable or manifestly groundless: see *Cabot v City of Keilor* [1994] 1 VR 220 per Gobbo J.

merits review properly (in terms of retaining experts and legal representation) in itself acts as a significant deterrent to the commencement of a merits review proceeding for vexatious reasons. We see the question of vexatiousness as a distraction to the principal considerations – in our experience, very few proceedings are brought vexatiously when a comparison is undertaken with the total number of proceedings in any merits review jurisdiction. And further, vexatiousness is sometimes a matter of perspective rather than an absolute concept.

18. Moreover, some limited power to award costs against an applicant where the proceeding is properly characterised as vexatious could be considered, although in our view the introduction of any costs provisions can have a tendency to move a jurisdiction from a "no cost" jurisdiction to a "cost" one over time. Certainly, there is a temptation for the tribunal concerned to widen, rather than narrow, the categories of case in which costs might be awarded.

19. In our opinion, the prospect of decision maker(s) and/or industry participants being subjected to vexatious merits review proceedings is slight and should not:

    (a) feature in the decision making process about the best form of review; or

    (b) alter the conclusion that consumers, and bodies representing them, should be able to commence a merits review proceeding.

Question 2(c): Intervention

20. For similar reasons, we are of the view that:

    (a) consumers, and bodies representing them, should be able to intervene in a "Model A merits review" proceeding;

    (b) an intervener should be able to raise issues for determination that had not previously been raised; and

    (c) the only circumstance in which an order for costs should be considered

against an intervener is where the case raised by them is properly characterised as vexatious. However, we reiterate our view that, from a consumer perspective, the best approach in a merits review jurisdiction is to have the jurisdiction completely free of the power to award costs.

Question 2(d): The grounds of review

21. As a matter of general principle, we hold the view that merits review in its "pure" form is both well understood and effective. We appreciate, however, that there may be sound policy reasons for preferring a modified form of merits review.

22. Subject to two comments, the proposed grounds do not appear inappropriate.

23. The first comment is that errors in fact finding may occur for a variety of reasons. It may be a misconstruction or misunderstanding of the facts as presented, it may be because of an omission to provide certain material or a failure to take it into account. It may be because information was not put before the original decision-maker if, for example, it was not created or had not been located despite reasonable searches. In our view it would be preferable for this ground to be expressed as *"the decision maker made a finding of fact that was wrong and that fact was material to the decision"*. Introducing the word "error" could introduce legal issues of characterisation that might complicate the process.

24. Second, in our opinion the second ground is not appropriately characterised as an error in the exercise of discretion. The statute authorising the decision may or may not confer a discretion in the legal sense, and arguments about this issue are best avoided in a merits review process. What ought be contemplated by this ground is an error in the decision-maker's judgment. Accordingly, we would prefer the ground to be re-cast as follows:

> "*That the decision is incorrect or is unreasonable*[18] *having regard to all the circumstances.*"

[18] A broader formulation here could include the word "unfair" if it was thought appropriate to introduce concepts of fairness.

Question 2(e): Admissible evidence and other documentation

25. We do not agree with the suggestion that no new information, issues or matters should be able to be raised before the ACT to establish a ground of review. Such a limitation can be productive of substantial injustice. It is also not conducive to decision making designed to reach the correct or preferable decision.

26. The possibility of an applicant or intervener "gaming" the process can be addressed by conferring an express discretion on the ACT to give little or no weight to material or information in circumstances where it concludes that the material or information has been withheld from the original decision-maker.

27. Lastly, we regard the requirement to provide relevant material to the ACT (and to the parties to the review proceeding) as both fundamental and of critical importance. The ACT can only be expected to make the correct or preferable decision if it has all the relevant material before it. It is often the case that merits review bodies have wide powers in relation to obtaining material and in practice it is frequently the case that the material and information which ends up before such a tribunal is much wider than that before the original decision maker. Such an outcome is conducive to good decision making. Material provided or available should extend, in relevant cases, to documentation held by the industry participant(s) the subject of the original decision. In this regard, to protect the confidentiality of such documentation, there could be the power to require another party to the proceeding to provide an undertaking as to confidentiality before reviewing such documentation.

Question 2(f): Costs

28 As already mentioned, a power to award costs where proceedings are vexatious might be contemplated. Again, we repeat our opinion that as soon as there is any costs provision in a merits review scheme, the tendency is for it to be used to a greater extent over time, rather than it being never or rarely used. Costs orders are powerful weapons, especially by those who are well resourced and seek to discourage challenges to their interests. Our principal

view therefore is that, from a consumer perspective, the review process should be free entirely of a power to award costs. However, if one were to be introduced, it should be very narrow and confined to the situation of vexatiousness. Consideration could also be given in that circumstance to a prescribed "cap" on the amount of costs that could be ordered.

29 In our view, the issue of vexatiousness is best addressed by equipping the tribunal with appropriate powers to control its own processes. If such powers are exercised firmly and in a timely fashion then vexatious proceedings should be of little concern. In contrast, the spectre of costs provides a great disincentive to ordinary consumer participation in review processes and this in our opinion is a very significant policy factor that tends against introducing any costs provisions.

Questions 3(a)-3(c)

28. In light of our answer to question 1 above, it is unnecessary to answer questions 3(a) to 3(c).

DATE: 7 November 2005.

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Glossary

AER	Australian Energy Regulator
ACCC	Australian Consumer and Competition Commission
EAG	Energy Action Group
EUAA	Energy Users Association of Australia.
GPA(SA)L	Gas Pipelines Access (South Australia) Law 1997.
MEUI	Major Energy Users Incorporated
MCE-SCO	Ministerial Council on Energy Senior Committee of Officials
NEL	National Electricity Law 2005
URF	Utility Regulators Forum
WACC	Weighted Average Cost of Capital