Grounds for appeal -

representing the public interest in the review of regulatory decision making in the energy market

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CUAC provided Catriona Lowe and Denis Nelthorpe with a CUAC Initiated Research Grant to examine the process by which determinations of the Essential Services Commission are reviewed. The primary task of the project was to analyse and assess whether, or how, appeal arrangements can ensure consumer standing in the process and enhance consumer outcomes through minimising the risk of 'gaming' by regulated monopolies.

The views and interpretations expressed in this article are those of the authors and do not necessarily represent the views of the Consumer Utilities Advocacy Centre Ltd.

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Report to the Consumer Utilities Advocacy Centre
Catriona Lowe and Denis Nelthorpe

Table of Contents

Executive Summary

Access to affordable reliable energy is fundamental to consumers achieving a basic acceptable standard of living. Consumers also have an interest in the sustainable production of energy from the perspective of long-term access and the impact on the environment. As such there is considerable public interest in the outcomes of regulatory processes relating to energy, including the ability to seek review of these decisions where appropriate, to participate in reviews sought by other parties and ensuring that any review process appropriately balances the interests of all parties and is generally appropriate with reference to the decision-making process and the nature of the decision..

This report examines the present appeal arrangements under the *Essential Services Commission Act 2001* from a public interest perspective and makes recommendations regarding amendment to those arrangements in light of public interest concerns and experience to date. A detailed outline of the project brief and methodology adopted appears in Appendix A.

Part 1 of the report discusses the public interest in the review of regulatory decision making, sets out the terminology used in the report and examines a number of matters of context, specifically, the purpose of a review mechanism, reforms currently proposes in the National Electricity Market and the role played by legislation in setting the boundaries of a review process.

Part 2 of the report outlines the scope of review offered by merits and judicial review options.

Part 3 of the report examines the current review mechanism in Victoria. Appeals that have taken place utilising the provisions in the *Essential Services Commission Act 2001* and its predecessor the *Office of the Regulator General Act 1994*. It examines in particular the problems that have been identified as a result of appeals to date. In particular:

- Where they have applied, consumer representative organisations have been denied standing to bring appeals or to appear at the appeals as interested parties;

- The Appeal Panel considers only those issues identified by the party/s bringing the appeal, not the determination as a whole with the result that only those aspects of a determination that are unfavourable to the appellant are likely to be the subject of an appeal (often referred to as cherry-picking);

- Where an appeal is brought on the grounds of error of fact, the Appeal Panel is required to review a determination in a short period of time, and as noted above does not hear from all stakeholder groups. In contrast a determination is based upon detailed consideration of data provided by the distribution businesses and significant consultation with stakeholders over an extended period of time.

Part 4 of the report examines the tests that apply in other Australian and International jurisdictions.

Part 5 examines the relative strengths and weaknesses of a judicial or merits review model based on their ability to fulfil the following criteria:

- Accountability
- Regulatory certainty
- Correct initial decisions
- Including stakeholder views
- Minimising gaming
- Minimising delays and costs

The report concludes in Part 6 that a judicial review model, together with amendments to the ESC Act to ensure standing to organisations representing the public interests and to provide guidance to the regulator in relation to decision making parameters and methodologies as is consistent with the framers' desired scope of review, should be preferred.

Any review model chosen in relation to economic regulatory decision making should have real as well as theoretical capacity to maximise access to public interest organisations and to minimise the possibility of gaming by regulated entities to the ultimate cost of end use consumers.

Judicial review meets this threshold as it provides the greatest likelihood of participation by public interest organisations. It offers more limited grounds upon which review may be sought and the nature of the grounds available, focusing as they do on legal correctness and process, are such that it will limit the ability of the regulated businesses to game the process by picking and choosing elements of the decision. In addition, the issues canvassed in a judicial review application are more traditional ground for public interest organisations both in terms of issues relating to the process in respect of which the organisations are likely to be concerned and their experience in bringing appeals of this kind.

The report makes the following recommendations:

Recommendation: *That the ESC Act be amended to include the standing rule as outlined in ALRC Report No.78 and that the provisions apply both in relation to the bringing of appeals and intervention in appeals by other parties.*

Recommendation: *That consumer and user groups' standing to bring appeals and to intervene in appeals brought by other parties is expressly enshrined in the ESC Act.*

Recommendation: *That the ESC Act be amended to provide exemption from costs orders to consumer and public interest organisations specified in the regulations or gazetted by the Ministers (save in the case of frivolous or vexatious applications).*

Recommendation: *That the ESC Act should be amended to make it clear that the costs exemption applies to applications to intervene in appeals brought by other parties as well as appeals.*

Recommendation: *That the ESC Act adopts a judicial review model for the review of economic regulatory decisions, together with amendments to the Act to ensure standing to organisations representing the public interests and to provide guidance to the regulator in relation to decision making parameters and methodologies as is consistent with the framers' desired scope of review.*

1. Introduction

1.1 The Public Interest

Access to affordable reliable energy is fundamental to consumers achieving a basic acceptable standard of living. Consumers also have an interest in the sustainable production of energy from the perspective of long-term access and the impact on the environment.

As such there is considerable public interest in the outcomes of regulatory processes relating to energy, including:

- the ability to seek review of these decisions where appropriate;

- the ability to participate in reviews sought by other parties; and

- ensuring that any review process appropriately balances the interests of all parties and is generally appropriate with reference to the decision-making process and the nature of the decision..

The ALRC in its report *Beyond the door-keeper: Standing to sue for public remedies* also notes a number of benefits of public interest litigation:

- *development of the law leading to greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law (which in turn should lead to less disputes and less expenditure on litigation)*

- *economies of scale*

- *impetus for reform and structural change to reduce potential disputes (for example, a test case can encourage the development of rules and procedures designed to ensure greater compliance with a particular law)*

- *contribution to market regulation and public sector accountability by allowing greater scope for private enforcement*

- *reduction of other social costs by stopping or preventing costly market or government failures.*[1]

It also recognises the importance of facilitating access to justice for parties capable of representing the public interest:

> *The Commission considers that the rules for standing, intervention and friends of the court should facilitate, and not impede, access to the legal system. These rules are an essential element in*
>
> - *ensuring that a party with a legitimate cause of action has access to the courts to pursue that action in accordance with the proper administration of justice*
>
> - *ensuring that the validity of government decisions and legislation can be tested and that other 'public rights' can be protected*

[1] ALRC 78 para 2.35.

- *enhancing the amount and nature of the information courts possess when making a decision that has implications beyond the parties to the proceedings.*[2]

In the energy context, consumer, environmental, legal service and welfare organisations may wish to intervene on behalf of a number of constituents with public interest concerns over and above the immediate outcomes of a price determination.

These might include:

- Interests of low income and disadvantaged customers impacted by short or medium term considerations.

- Interests of environmentally focused customers concerned by longer-term implications of a decision.

- Interests of a future customers impacted by the lack of consideration of inter-generational equity of a decision.

This report examines the present appeal arrangements under the *Essential Services Commission Act 2001* from a public interest perspective and makes recommendations regarding amendment to those arrangements in light of public interest concerns and experience to date. A detailed outline of the project brief and methodology adopted appears in Appendix A.

1.2 Terminology

The review options canvassed in this report do not necessarily have a commonly understood definition, and are utilised by a range of parties including the courts, regulators and legislators in a variety of ways.

It is considered helpful, therefore, to define the way in which the terms are used in this report. Where terminology is used by other parties to mean different things, this is noted in the relevant section of the report.

De novo review De novo means 'from the beginning' and is used to refer to a complete rehearing of the relevant decision. The reviewing body stands in the shoes of the original decision maker and makes the relevant decision all over again.

Merits review There is overlap between the concepts of de novo and merits review. Merits review involves examination of the merits of the original decision, including review of all information before the original decision maker.

[2] ALRC 78 para 2.36.

In the context of energy regulation, reference is usually made to 'limited merits review' which means some but not all aspects of the original decision are open to review. Statutory grounds and/or thresholds generally determine which aspects are open to review.

Administrative review Administrative review is a more limited form of review than either de novo or limited merits review. The reviewing body essentially undertakes a review of the process by which the decision was made and the legality of the decision. Issues considered include:

- Whether the decision was outside power or 'ultra vires'
- Whether principles of procedural fairness were observed
- Whether there was bias on the part of the decision maker

Judicial review Judicial review is a form of administrative review undertaken by a court.

1.3 Context – the purpose of review

Review is not an end in itself. The provision of a right of review serves a number of purposes, including:

- Providing incentives for correct first-instance decision making.
- Encouraging consistent application of principle, methodology and decision.
- Enabling correction of significant errors.

In considering the appropriate model for review in a particular context consideration must be given to the nature of the decision and decision maker and the process of decision-making. The benefits of the preferred option should outweigh the costs. The perspective of the party that ultimately bears the cost, in this context, the consumer, should be central to the cost benefit analysis.

Further, it should be borne in mind, as pointed out in the Ministerial Council on Energy's (the MCE) Discussion Paper on *Review of Decision-Making in the Gas and Electricity Regulatory Frameworks* (the MCE Discussion Paper), that good decision-making does not flow only from the review mechanism. There are a range of factors that contribute.

- *Strong institutional structure of the decision-makers: e.g. …member appointments and external policy accountabilities,*

internal management, public reporting requirements and financial accountabilities;

- *Role clarity for decision-makers within the energy sector via the statutory conferral of functions and powers;*

- *Clear and effective procedural and consultative requirements…as to how the decision makers will perform their economic functions;*

- *Clear and effective rules for economic regulatory decision-making removing layers of inconsistent objectives and principles in favour of a body of rules designed to structure and guide the exercise of regulatory discretion;*

- *An appropriate review mechanism for specified decisions.*[3]

1.4 Context – National Market Reforms

On 10 October 2005, the MCE released its Discussion Paper. It focussed on review models for the national regulation of gas and electricity as undertaken by the Australian Energy Regulator (AER) and certain Ministerial decisions relating to gas access.

It essentially considers two options – limited merits review by the Australian Competition Tribunal and judicial review - having quickly discarded the option of de novo review.

On 2 June 2006, the MCE released its *Decision on Review of Decision-Making in the Gas and Electricity Regulatory Frameworks* (the MCE Decision). The MCE's Energy Market Reform Bulletin No.63, notes that the decision:

> *[A]nnounces the implementation of a limited merits review model for economic regulatory decisions in the gas and electricity access regimes. The decision has been carefully constructed to balance the interests of all stakeholders.*

It is acknowledged that in reaching its decision the MCE received submissions from some consumer representative bodies. However those submissions did not necessarily support a merits review model. Two organisations, recognising the absence of funding for consumer organisations to participate in merits review processes, supported (albeit reluctantly) a judicial review model.

[3] MCE Discussion Paper, paragraph 1.8 at 2

The MCE's chosen model is significantly relevant to this report in view of the scheduled handover of distribution regulation from the Essential Services Commission to the Australian Energy Regulator in 2007.

While acknowledging the relevance of the MCE decision, detailed consideration of the optimum review model from a consumer and public interest perspective remains an important exercise. This is particularly the case in Victoria in view of the current review of the *Essential Services Commission Act.* This report suggests that whilst the MCE decision makes significant effort to avoid some of the problems evidenced by the limited merits review model in place in Victoria, for the reasons outlined, those measures can only have limited success. Thus this report can help develop a considered consumer position regarding review of the ESC Act that can also be developed and advocated at the time the national regime is reviewed.

The MCE Decision notes that review of the model is to be undertaken by the MCE within the first seven years of its operation to examine its effectiveness in achieving the MCE's stated objectives. In view of the matters outlined in this report and the further information provided by recently concluded appeals[4] a review before the expiration of seven years is more than justified. Two or three years is a preferable timeframe.

1.5 Context – The role of legislation

It is outside the scope of this report to suggest amendments to the regulatory framework or enabling legislation save as it relates to the review model to be utilised. Nevertheless, the inclusion of regulatory principles, methodology and other guidance to the regulator is a critical element of an effective decision making process, and in turn any review process (whether merits or judicial review). This is generally accepted. For example it has been noted that "the effectiveness of the appeal mechanisms depend importantly on the clarity of the law that is being applied."[5]

From a consumer perspective the framework should posses the following elements:

- Clear guidance to the regulator as to the regulatory decision making process, including an obligation to consult and take into account the views of stakeholders, including consumer representative bodies;
- Clear guidance as to the methodology to be followed; and
- Principles upon which decisions are to be based.

The legislation setting out the regulatory framework has a significant impact on the scope and basis of review. In the case of merits review, legislation will

[4] For example the appeals relating to the 2006-2010 Electricity Distribution Price Review.
[5] JT speech at 3.

generally specifically outline the scope and nature of review, including grounds of review, who may seek review and the nature of the review body.

The scope of judicial review is significantly impacted by the degree to which the legislation details the process of decision-making and factors to be taken into account. A greater degree of specificity significantly enhances the scope for the court to determine whether legal reviewable error has occurred. This is discussed in more detail in section 2.2.13.

It has also been suggested in consultation that ESC Act should oblige the regulator to include information in determinations regarding the impact of decisions on different customer classes. Such a matter is beyond the scope of this report but is worthy of further consideration.

2. Review Options

2.1 Merits review

2.1.1 What is merits review?

The Administrative Review Council define 'merits review' to mean:

> *the process by which a person or body:*
>
> - *other than the primary decision-maker;*
> - *reconsiders the facts, law and policy aspects of the original decision; and*
> - *determines what is the correct and preferable decision.*
>
> *The process of review may be described as 'stepping into the shoes' of the primary decision-maker. The result of merits review is the affirmation or variation of the original decision.*[6]

As noted above, in the context of energy regulation, reference is usually made to 'limited merits review' which means some but not all aspects of the original decision are open to review. Which aspects of a decision and are open to review and by who is generally determined by statute.

Thus examination of merits review is a much more 'case by case' exercise and is somewhat less open to the exposition of general principles than is judicial review.

2.1.2 Scope of merits review

[6] Administrative Review Council, *What Decisions should be Subject to Merit Review?* Commonwealth of Australia, May 2005.

In examining merits review as an alternative to judicial review in the Victorian context, reference must first be had to the scope of merits review as presently defined. The ESC Act (and its predecessor, the ORG Act) outlines two grounds of merits review:

- there has been bias; or
- the determination is based wholly or partly on an error of fact in a material respect.

Understanding of the scope of review offered by these grounds is then to be gleaned from decisions that have been made in appeals brought under them. To date appeals have been based on the second ground. It can be envisaged, however, that an appeal on the ground of bias would be guided substantially, if not wholly, by the common law developed by the courts regarding the bias principle. See section 2.2.7 for a discussion of the basis of review this ground offers.

Turning back to the first ground, it is noted that a review of cases to date does not disclose an overarching principle regarding how a material error of fact is to be identified. Rather, the Appeal Panels have taken a case b case approach. Thus, for example, in considering whether or not an error was material, the Appeal Panel in AGLE's appeal in respect of the 2001-2005 distribution price determination stated in relation to the first ground of appeal relating to efficiency carry over and management induced growth:

> *that while the ORG recognised that scale economies existed, it was very difficult to measure them and hence it was very difficult to measure any impact that additional management induced growth would have on unit costs. Any measure for purposes of efficiency carry over would be inherently arbitrary. For these reasons, the Panel is of the view that the Office took a fair and reasonable decision in the circumstances. The Panel did not accept that there was an error of fact in a material respect.*[7]

The Panel went on to say that:

> *The Panel is of the view that a rule of thumb applied in its area is an appropriate exercise of judgment based on reasonable grounds. It accepts that given the complexities in efficiency measurement, that it was in the interests of all parties to have a simple rule based on reasonable grounds, that avoided the necessity for micro-analysis.*[8]

In relation to ground 2 – the Efficiency Carryover calculation and Expenditure on Growth in Excess of Forecast Growth:

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[7] Statement of Reasons for Decision by Appeal Panel under Regulation 15 of the Office of the Regulator General (Appeals) Regulations 1996 in relation to the electricity distribution price determination 2001-2005 at 5.

[8] See above note 7.

> *The Panel accepts that it was appropriate for the Office to adopt a rule of thumb, to implement the efficiency carryover, given the difficulties in distinguishing between windfall and managerial factors in determining costs, revenue and efficiency. Granted this, the Panel recognised that it is essential that as far as possible the rule of thumb adopted be an accurate indicator of efficiency.*
>
> *…*
>
> *The efficiency measure, as adopted by the Office in the rule of thumb, is inconsistent with the Office's objectives for the efficiency carry over as enunciated on p83 of the Determination to the extent that it fails to scale for cost changes as a result of changes in size and scope of operations.*
>
> *…*
>
> *The Panel decided that the use of a rule of thumb to measure efficiency which did not make allowance for changes in scale and scope of the business constituted an error of fact in a material respect.*[9]

In relation to Ground 3 – the Efficiency Carryover and Depreciation in relation to capital expenditure:

> *The Panel found the case presented by the Office…was reasonable and does not accept that failure to specifically allow for changes on depreciation due to capital under (or over) spend constitutes an error of fact in a material respect.*[10]

Ground 4 was withdrawn prior to hearing. The ORG conceded an error in relation to Ground 5. In relation to Ground 6 – Definition of Relevant Tax, the Appeal Panel's reasons stated that:

> *The Panel accepts that it was a deliberate part of the model that changes in relevant tax would not be able to be passed through to the consumer. It also notes that distributors were invited to comment on consequences to the benchmark revenues flowing from any particular tax change.*
>
> *Furthermore the Panel noted that the Office sought independent expert advice in the form of the BDO Report. This report made reference to the Ralph Report and it was published on the Office website during the policy formulation stage of the Determination…The Panel noted that no response was forthcoming from any of the distributors at that time.*
>
> *The Panel concluded that the Office has clearly stated how it would handle any potential tax changes and thus there had not been any error of fact in a material respect.*[11]

[9] See above n.7 at 9.
[10] See above n.7 at 15.
[11] See above n.7 at 21.

Thus experience to date suggests that an Appeal Panel may have regard to some or all of the following sorts of factors:

In relation to assumptions or rules of thumb:

- The ease or difficulty of measurement of the relevant fact/s.
- The extent to which the assumption or rule is accurate.
- Whether it is consistent with the decision-maker's objectives.
- The relevance of the arguments put in support of the approach to the decision-maker's overall objectives.

In relation to decisions:

- Whether the decision was fair and reasonable in the circumstances.
- Whether the case presented for the decision was reasonable.
- The impact of the decision in practice.
- Whether the decision maker sought expert advice.
- Whether a decision stated how variables will be handled.
- Established industry practice.
- Whether it was open to the decision-maker to form the view it did based on the evidence before it and the surrounding circumstances.
- Whether the parties affected by the decision were provided with the opportunity to comment on the proposed approach and whether they in fact did so.

As can be seen from the above analysis the scope of the appeal available pursuant to 'limited' merits review as defined by the ESC Act, is in fact quite broad.

2.1.3 Limiting the scope of review

Given the scope of merits review is in essence defined by the relevant statue it may be considered there is broad scope to put in place limitations on the grounds for review without going as far as the limitations placed by judicial

review. This is the path chosen by the MCE Decision, which seeks to restrict appeals in a number of respects.

The grounds of review proposed under the MCE Decision are:

- that the decision-maker made an error of fact that was material to the decision;
- that the exercise of the decision-maker's discretion was incorrect having regard to all of the circumstances;
- that the decision-maker's decision was unreasonable having regard to all of the circumstances.[12]

As a general comment, it is noted that the grounds for review are extremely broad, opening almost all aspects of a decision to review. Taking guidance from decisions made in respect of current review frameworks, it is suggested that the grounds proposed under the MCE decision are in fact significantly broader than those currently available under the majority of state based review mechanisms.

The MCE Decision then seeks to limit the breadth of review in a number of ways. First by requiring that leave be granted by the Australia Competition Tribunal (to whom the appeal lies) for the bringing of a review. The granting of leave is in turn restricted to certain circumstances, namely, where:

- The application is brought within 10 business days of a final decision;
- Where an economic regulatory decision is involved the amount at issue exceeds $5 million or 2% of the annual regulated revenue of the applicant, whichever is the lesser. Alternatively, if quantification is not readily possible, that the amount in issue is material in terms of the regulated revenue. In all other cases (i.e. non-revenue errors) the ACT is satisfied that the error is a material one; and
- The ACT is satisfied there is a serious question to be tried.[13]

The degree to which these limitations are likely to be effective is examined in detail in Section 3.3.3. For present purposes it is sufficient to note that this report outlines significant practical impediments to the success of the limitations.

2.1.4 Public Interest Considerations

[12] See MCE Decision at 4.
[13] Ibid.

As a general rule, public interest organisations will have limited resources with which to engage in a review process. For this reason, those organizations will prefer a judicial review to a merits review or de novo hearing.

A merits review may still expose a public interest organisation to a relatively open ended process which may involve considerable time, cost and resources. A lengthy process may not only be costly, but may also discourage the involvement of pro-bono participation from the legal and accounting professions.

Whilst the MCE has addressed this issue to some extent, there is a need for an awareness of the significance of cost considerations in the decision making processes if public interest input is to be sought by governments and regulatory agencies

2.2 Judicial review

2.2.1 What is judicial review

The Administrative Review Council describes judicial review as follows:

> '*Judicial review' has a number of facets. It can be described broadly as the function or capacity of courts to provide remedies to people adversely affected by unlawful government action.*
>
> *Such a description identifies the primary elements affecting the breadth of judicial review:*
> - *the extent of the jurisdiction of courts to hear and determine disputes arising in relation to government action or inaction*
> - *the range of government action or inaction in relation to which relief can be sought if that action or inaction is unlawful. This element has several aspects*
> - *the source and nature of the power being exercised*
> - *the nature of the decision maker*
> - *the nature of the decision*
> - *the available remedies and the circumstances in which the remedies might be refused on discretionary grounds*
> - *the people entitled to seek relief from a court with jurisdiction to hear and determine disputes of this nature*
> - *the procedural and substantive limitations on the grounds of review.*[14]

The Report goes on to state that:

> *Judicial review is thus not directed to the merits of a decision in circumstances where Parliament has vested an executive officer with*

[14] Administrative Review Council *The scope of judicial review* Report to the Attorney-General, April 2006.

> *the power to make a decision. It is not part of judicial review for a judge to replace a decision he or she considers wrong. Judicial review and the rule of law are limited to consideration of whether a decision was made within the limits of the power or duty imposed on the decision maker.*[15]

A process that can apply to such a breadth of subject matter and circumstance can be difficult to define. The questions subject of this report – namely the form of review of energy regulatory decisions that is preferable from a consumer and public interest point of view - can perhaps best be illuminated by examining the grounds upon which judicial review permits a review of a decision.

It should be noted at the outset that there are areas of overlap amongst the grounds outlined below. It should also be noted that the report does not purport to cover all possible grounds of review but those most likely to be applicable to decisions by an economic regulator and those which touch on areas where debate regarding the scope of review has centred.

Finally, it should be noted that the grounds outlined in paragraphs 2.2.2-2.2.6 could be broadly termed errors of jurisdiction. This classification is significant in a number of respects.

In order for a decision to be reviewable in respect of an alleged error of jurisdiction that error must be such that the decision-maker's "exercise or purported exercise of power exceeds its authority or power."[16] In considering this issue in relation to the (then) Office of the Regulator General's 2001-2005 pricing determination, Justice Gillard in *TXU Electricity Ltd v. Office of the Regulator General & Or.s* made reference to a number of authorities that articulate this principle:

> *In RSL v Liquor Licensing Commission (1999) 2 VR 203 at 210, Phillips JA after referring to what the High Court said in Craig's case*[17]*, stated -*
>
> > *the task for the court… must be to distinguish between, on the one hand, those matters which the tribunal is given the jurisdiction to decide, and even to decide wrongly (so that the error does not go to jurisdiction), and on the other hand those in respect of which, while it may have the power to enquire into them, it does not have the jurisdiction to decide wrongly (so that the error does go to jurisdiction)." (Emphases added).*

[15] See above n.14 at 30.
[16] *TXU Electricity Ltd v. Office of the Regulator General & Or.s* [2001] VSC 153 (17 May 2001TXU Decision at 68.
[17] *Craig v. South Australia* (1994) 184 CLR 163 at 175-6.

As is apparent from what His Honour said, the issue whether the error was one which affected jurisdiction was primarily one of construction of the instrument, which gave the power or authority to the body to make the decision - see p.211.

At p.215 His Honour concluded -

> *"Accordingly, in a case like the present the essential search must be for the task which is confided to the body whose decisions are under attack; for only if that body strays beyond that task will there be a want or excess of jurisdiction." (Emphasis added).*

In my respectful opinion, that is the task which faces the court on a judicial review such as the present. It is clear from the limited nature of the jurisdiction that the court is not hearing an appeal and generally is not concerned with the merits of the decision. It is concerned with the decision-making process. Did the decision-making body make an error which showed that it did something which it did not have the power or authority to do?

Where review is sought on the basis of jurisdictional error there are also impacts on the nature of the material that the reviewing court can consider. In particular, as the High Court outlined in Craig's case:

> Where the writ [of certiorari] is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to 'the record' of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

2.2.2 *Wednesbury* unreasonableness

First and perhaps most importantly, judicial review permits a review of the factual basis of a decision in very limited circumstances- namely that, having regard to all of the circumstances, the decision is one that no reasonable decision maker could have reached based on the material before her. This is commonly referred to as *Wednesbury* unreasonableness, a reference to the seminal case in which the principle is elucidated:[18]

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could have come to it then

[18] *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 KB 223.

> the courts can interfere…but to prove a case of that kind would require something overwhelming…[19]

2.2.3 Taking an irrelevant consideration into account or failing to take a relevant consideration into account

What will be a relevant or irrelevant consideration will be largely determined by the statute conferring the discretion on the regulator – the more specific the statute is regarding what are relevant and irrelevant considerations, the broader the basis of judicial review of that decision on this ground may be. Conversely, where there are no or few limitations placed on the discretion, the basis of review is likely to be narrower. However for the reasons outlined above in relation to jurisdictional error this ground of review is not as broad as it sounds. Some mistakes of relevancy (or irrelevancy) have been found by courts to be permissible i.e. not giving rise to an error at law.

For example, in *Anisminic Ltd v. Foreign Compensation Commission*, Lord Wilberforce noted that:

> A tribunal may quite properly and validly enter upon its task and in he course of carrying it out may make a decision which is invalid – not merely erroneous. This may be described as 'asking the wrong question' or 'applying the wrong test' – expressions not wholly satisfactory since they do not, in themselves, distinguish between doing something which is not in the tribunal's area and doing something wrong within that area – a crucial distinction which the court has to make.[20]

In essence, the former, doing something that is not in the tribunal's area, is reviewable. The latter, doing something wrong within the tribunal's area is not reviewable under this ground.

In attempting to place some certainty around the boundaries of reviewable and non-reviewable error on this ground, commentators have posited, "judicial review for illegitimate considerations is designed not to replace the administrator's opinion with the judicial view, but to ensure that the administrator thinks about the key issues. Differences of opinion will be tolerated if the administrator has addressed the major concerns."[21]

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[19] See above n.18 at 230

[20] [1969] 2 AC 147 at 210.

[21] See for example Aronson, M., & Franklin, N., *Review of Administrative Action* Law Book Company, 1987 at 32.

2.2.4 Error of law

This ground of review encompasses error in the interpretation of statues or documents relevant to the decision making process. Unlike other types of jurisdictional error, any errors of law are reviewable.

The question then arises as to the distinction between an error of law and an error of fact. This question is one that remains the subject of significant debate in administrative law. At one end of the spectrum are questions of pure law for example where a statute utilises terminology with a legal meaning and the decision maker determines the import of that meaning. At the other end of the spectrum are questions of pure fact, which are not reviewable. Debate unsurprisingly tends to centre on questions that involve both issues of law and fact, the issues of law being those open to review. Thus for example, the application of a legal question to a set of determined facts will be reviewable, however, the determination of those facts will not be reviewable under this ground.

This for example, in *Hayes v. Federal Commissioner of Taxation* Fullagher J noted that:

> "[W]here all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the questions is one of law only."[22]

Finally, it should be noted that the position as outlined in *Hayes* must be qualified where the provisions of the statutory enactment use words with an ordinarily understood meaning (as compared to an ordinarily understood legal meaning). In such a case, courts have found that where the question to be determined is whether the facts as found fall within that word or words, provided the finding is reasonable, it will be a question of fact and not law and thus not reviewable.[23]

2.2.5 Improper internal rules or policies or application thereof

This ground is a more specific exposition of the ground relating to error of law. It relates to the internal guidelines, policies or procedures that a decision-making body generally formulates to guide the exercise of its discretion and to inform parties involved in its processes.

In essence this ground encompasses two principles:

- That decision based on policies or procedures that incorrectly interpret the governing statute are reviewable.

[22] (1956) 96 CLR 47 at 51.
[23] See for example Aronson & Coleman at XX.

- That policies or procedures should not be absolute i.e. they should allow for the pleading of a 'special case' as to why the policy or procedures should not apply.[24]

2.2.6 Jurisdictional error or ultra vires

This ground of review encompasses error on the part of the decision-maker in interpreting the scope or extent of his or her jurisdiction and or decision making power. This scope of review offered by this ground is particularly amenable to expansion through detailed treatment of the scope of jurisdiction in the relevant statute.

2.2.7 Bias

Bias on the part of the decision-maker can manifest itself in a variety of ways that will give rise to a reviewable decision. These include factors applying to the circumstances of the decision maker and also to the manner in which the decision is made. Further, the appearance of, rather than actual basis can also render a decision open to review.

Examples of types of bias include:

- Pecuniary or financial interest in the outcome of the decision.
- Personal relationship with a party or parties affected by the decision.
- Prejudice.
- Prejudgment of the issue at hand or failure to give genuine consideration to a relevant matter.

2.2.8 Failure to accord procedural fairness

As this ground implies, it is concerned with the process of reaching a decision rather than the decision itself. It is concerned to ensure that a decision maker reaches a decision having accorded the opportunity to input to affected parties and stakeholders and has followed fair procedures. As with other grounds discussed above, the degree or nature of procedural fairness to be observed by a decision-maker will be impacted by the relevant legislation which can for example specify that certain parties must be consulted and

[24] See for example *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

require that certain steps are taken, for example types or stages of consultation.

Some general guiding principles or factors can be considered in forming a view regarding whether or not procedural fairness has been accorded in regulatory decision making:

- The giving of notice of the decision making process and its purpose to interested parties. Such notice must be sufficient to enable the party to attend and present argument.

- According interested parties an opportunity to be heard.

- Conducting decision-making processes in a fair and efficient manner.

- Disclosure of the basis of reaching a decision.

This last principle has limitations in a regulatory decision making context. As noted by Aronson and Coleman, "a duty of full disclosure in the administrative context may be modified in three principle ways. Allowances may be made, first for the receipt and use of confidential information, secondly for the influence of the decision-maker's expertise and experience; and thirdly for institutional decision-making."[25]

Factors that will not generally influence considerations of procedural fairness in a regulatory decision making context (but that may do for other decision makers) include:

- The fact that the ultimate decision maker did not personally conduct hearings or hear submissions.

- The fact that authority to hear certain matters was delegated (provided the delegate of that authority has properly reported to the decision maker).[26]

- Failure to adhere to the rules of evidence.

2.2.9 Bad faith or improper purpose

This ground provides a right of appeal where a decision maker has been improperly motivated in reaching his or her decision, whether by personal dishonesty, fraud or spite in the case of bad faith, or more generally a purpose that is outside the scope of the statute conferring decision-making power in the case of improper purpose.

[25] See Aronson & Coleman at 184.
[26] See for example *Local Government Board v. Arlidge* [1915] AC 120.

2.2.10 Impermissible external influences

This ground primarily relates to situations where the decision maker has not erred in reaching the decision but has been influenced improperly by external factors for example through the application or duress or by fraud on the part of an external party (for example in the provision of incorrect information to the decisions maker).

Impermissible external influences may flow from the parties subject of the decision or the relevant Government or Minister in the case of an independent authority.

The process for price determinations is usually long, drawn out and consultative. It is likely that all parties will have had numerous opportunities over several years to raise concerns about bias, procedural fairness or internal processes and rules. It would be expected that parties would be aware of such serious concerns and would have had opportunities to raise those concerns well before the final determination.

2.2.11 Non reviewable grounds

It is also instructive to consider briefly, grounds that have been found to be outside the scope of judicial review. These include:

- Giving "undue weight" to one factor over another.[27]
- Taking into account irrelevant considerations that do not have a significant effect on the decision.[28]

2.2.12 Powers of the Court where reviewable error is found

The Supreme Court of Victoria has an inherent judicial review jurisdiction arising from the common law. It also has the jurisdiction conferred by the *Administrative Review Act 1978*.

At the Commonwealth level, the Federal Court has its jurisdiction conferred by the *Administrative Decisions (Judicial Review) Act 1977*. The case law that has considered the scope of the court's powers is usefully summarised in the MCE Discission Paper:

[27] See *Pickwell* v. *Camdenn London Borough Council* {1983] QB 962 at 982.
[28] *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1985) 62 ALR 321.

Under the ADJR Act, the Federal Court has power to make the following orders: those quashing or setting aside the decision (or part thereof), orders remitting the decision back to the original decision-maker for further consideration, subject to such directions as the court thinks fit; orders declaring the rights of the parties; and orders directing any of the parties to do, or refrain from doing, any act or thing which the court considers necessary to do justice between the parties (see s.16, ADJR Act). In exceptional cases, the Federal Court may substitute its discretionary decisions for that of the body whose decisions is being reviewed, under the wide powers granted in s.16 (see Sordini v Wilcox (1983) 70 FLR 326). However, in most circumstances, the Court would generally find it appropriate to send the matter back to the decision-maker for re-determination. We note the dictum of Mason J in Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 CLR 24 at 40-41 that a court should not substitute its own decision for that of an administrator who has been vested with a discretion by statute, but rather, should outline boundaries for the exercise of that discretion.

2.2.13 The effect of legislation

The scope of judicial review can be significantly expanded depending on the approach taken in the legislation that empowers the decision maker.

This point is acknowledged by the MCE, who note in their Discussion Paper that:

> *The new NEL provides an example of how the scope for judicial review can be significantly increased if the legislation governing a decision-maker makes express and detailed provision for how the decision-maker must carry out its functions. This means that the Court will review compliance with those legislative requirements in relation to both the process followed by the decision-maker and the decision made. The usual basis for judicial review has, in effect, been augmented by the specific legislative requirements.*[29]

In the RIS relating to the National Electricity Law, the MCE also notes relevantly that:

> *Under this judicial review, because the Federal Court will have before it the specific requirements of the energy legislation, regulatory errors that have adverse economic effects will be more readily corrected than would be the case if the Court were able to consider only such issues as procedural fairness or jurisdiction.* [30]

[29] MCE Discussion paper para 2.33 at 9
[30] MCE RIS at XX.

Thus for example, sections 16, 35 and 36 of the National Electricity Law specify that:

- The national energy market objective must be taken account of.
- Registered participants in the NEM must be informed of material issues and given a reasonable opportunity to make submissions;
- A regulated transmission system operator must be provided a reasonable opportunity to recover its efficient costs of complying with regulatory obligations;
- Effective incentives must be provided to promote economic efficiency, including efficient investments and efficient service provision;
- The value of assets must be allowed for and regard had to any existing valuation.

Failure to comply with these requirements would likely constitute an error of law and be open to judicial review by the Federal Court.

There are countless examples of the capacity of legislation to expand or restrict the scope of judicial review. For example, the Court in *Minister for Aboriginal Affairs v. Peko-Wallsend* noted that:

> *It follows that in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power (emphasis added).*[31]

It should also be noted that statue can significantly limit the scope of judicial review. Thus for example section 62(1) of the ESC Act currently reflects the express intention of Parliament to limit the scope of judicial review of decisions of the Essential Services Commission to errors of law.

The Second Reading Speech in respect of the ESC Bill noted that:

> *Clause 62(1) of the bill provides, as does the corresponding provision of the Office of the Regulator general Act 1994, that proceedings cannot be brought in respect of a determination or provisional or final order except on the grounds that there was no power to make the determination or order or that the procedural requirements in relation to the making of the determination or order have not been complied with.*

[31] (1986) 162 CLR 24 at 40-4 per Mason J.

The government believes that this clause does not preclude questions or errors of law being considered by the court. The bill provides for an improved appeals process, which will satisfy the requirements of appellants being given a fair hearing and a considered decision on any appeal being made.

It is necessary to ensure that where the commission makes orders regarding compliance with determinations or with the terms of any licence, such orders should operate without risk of questions challenging the substance of the order being referred to court, except on the grounds outlined above.[32]

In the event a judicial review model is preferred section 62(1) of the ESC Act should be amended or repealed to enable the full scope of judicial review to apply to decisions of the Essential Services Commission.

***Recommendation**: In the event a judicial review model is preferred section 62(1) of the ESC Act should be amended or repealed to enable the full scope of judicial review to apply to decisions of the Essential Services Commission.*

3. Current Victorian test

3.1 Relevant provisions

Essential Services Commission Act 2001

The *Essential Services Commission Act 2001* sets out a right of appeal from determinations. The relevant sections are extracted below. It also provides that an Appeal Panel is to be established to hear the appeal. In turn, decisions of the Appeal Panel can be the subject of judicial review in the Supreme Court Victoria. This has occurred on one occasion.

Section 55 Appeals

(1) A person who is aggrieved by-

…

[32] At page 224.

(c) a determination of the Commission-

may appeal against the… determination in accordance with this section.

(2) The only ground for an appeal-

…

(c) under sub-section (1)(c) is that-

(i) there has been bias; or

(ii) the determination is based wholly or partly on an error of fact in a material respect.

Section 56 Appeal panel

(1) An appeal must be heard by an appeal panel consisting of 3 members—

(a) being a chairperson and 2 other persons appointed by the Registrar; and

(b) of which at least one must have knowledge of administrative law or of the law of procedure and evidence.

(2) An appeal panel is to be constituted from a pool of persons appointed by the Governor in Council because of their knowledge of, or experience in, one or more of the fields of industry, commerce, economics, law or public administration.

(3) An appeal panel must be constituted within 7 working days after notice of the appeal is lodged.

(4) An appeal must be heard and decided—

(a) in the case of an appeal under section 55(1)(a) or 55(1)(b), within 7 working days of the appeal panel being constituted, or if the appeal panel requires further time, within a further period not exceeding 7 working days; or

(b) in the case of an appeal under section 55(1)(c), within 30 working days of the appeal panel being constituted, or if the appeal panel requires further time, within a further period not exceeding 15 working days.

This section was revised at the time of introduction of the ESC Act, replacing the *Office of the Regulator General Act 1994*. Section 37 of the ORG Act enabled a person aggrieved by a decision of the Regulator General to appeal that decision on two grounds:

- Bias
- The determination is based wholly or partly on a material error of fact.

The Second Reading speech made in respect of the ESC Act notes in relation to the review mechanism that:

> *[the Essential Services Commission] will be more accountable for its decisions, with greater scope for stakeholder involvement in appeals processes and longer time lines for hearing appeals*[33]

In a similar vein, the speech goes on to note that

> *Part 7 [of the Bill] contains reformed appeal provisions, which among other things considerably extend the time lines for hearing of appeals. These changes are partly in response to concerns raised by regulated businesses over the adequacy of current time lines for appeals under the ORG Act and also reflect the often complex nature of economic regulation.*
>
> *Timelines for appeals against determinations made by the commission will be extended from the current 14 days under the ORG Act to 30 working days, with the option of an additional 15 working days if required. In addition, appeal arrangements have been reformed to allow for participation by interested parties and define a clear role for the commission as the proper contradictor in appeal proceedings.*[34]

The ESC Act essentially replicates the nature of available review under the ORG Act, that is merits review, and the grounds upon which such review may be sought.

It is clear that it was intended that the new provisions provided broader scope for the involvement of other stakeholders in the review process. This is a reflection of the fact that participation by consumer representative groups was denied in the appeal under the ORG Act from the 2001-2005 distribution price review. This is discussed further in section 3.3.2. However, it is to be questioned whether the revised provisions achieved the objective of broader stakeholder involvement. The new provisions have not been tested by an attempt to appeal or intervene by a consumer stakeholder group.

3.2 Appeals under the provisions

There were two applications for merits review under section 37 of the *Office of the Regulator General Act 1994* - the application for review by AGL Electricity, Powercor Australia, TXU Electricity and United Energy in respect of the 2001-2005 distribution price review and the application for review by

[33] Second Reading Speech *Essential Services Commission Bill* 23 August 2001 at 220.
[34] Second Reading Speech *Essential Services Commission Bill* 23 August 2001 at 223.

Paperlinx Ltd (formerly Amcor) in respect of the ORG's decision to approve tariffs lodged by TXU Electricity in 2001.

TXU also sought judicial review in respect of the original determination and its redetermination following the Appeal Panel's decision on the basis that the ORG had no power to make the determination.[35] In essence the application sought review of a question that had failed before the Appeal Panel. That "in making the determination, the Offie did not determine the charges on a price-based regulation adopting a CPI – X approach but in fact adopted the prohibited rate of return regulation approach."[36] TXU alleged that the ORG thereby had committed an error of law.

There has also been an appeal under the current ESC Act provision – the application for review by United Energy Distribution, SPI Electricity Pty Ltd, Powercor Australia Ltd and Citipower Pty Ltd in respect of the 2006-2010 distribution pricing determination by the Essential Services Commission.

The grounds of the appeals relating to distribution price reviews and the outcomes are set out in Table A following.

APPEAL	
ORG 2001-5	
APPELLENT	**APPEAL GROUND**
Powercor Australia Ltd	Ground 1a: Error in calculation of efficiency carry over
	Ground 1b: Failure to allow for non-forecast changes in area and load

[35] *TXU Electricity Ltd v. Office of the Regulator General & Or.s* [2001] VSC 153 (17 May 2001).
[36] See above n.35 at para 29.

	Ground 2: ORG wrongly determined the pre-tax WACC applicable to Powercor
	Ground 3 – Compensation payable to Powercor for damage caused by voltage variations
AGL ELECTRICITY LTD	Ground 1: The efficiency carryover calculation and management induced growth
	Ground 2: The efficiency carryover calculation and expenditure on growth in excess of forecast growth
	Ground 3: The efficiency carry over and depreciation in relation to capital expenditure
	Ground 4: Capital contribution to the cost of network connections augmentation
	Ground 5: Public lighting operations and maintenance expense
	Ground 6 – Definition of relevant tax
TXU ELECTRICITY LTD	Ground 1: Failure to differentiate between the WACC for urban a distributors
	Ground 2: Failure to add 1 percent premium to the WACC for the rural distributors
	Ground 3: TXU refers to the <u>further errors</u> of fact upon which the errors mentioned in 1 and 2 are based.

UNITED ERERGY LTD	Ground 1 – Factual errors – rate of return regulation
	Ground 2 – Error in calculation of efficiency carry over
	Ground 3 – Error in calculation of operating and maintenance cost allowance
	Ground 4 – Error in calculation of the cost of debt
ESC 2006-10	
CITIPOWER PTY LTD	Ground 1 - Costs of maintaining compliance with Electricity Safety Regulations
	Ground 2 - Successful appeal by other distributor
POWERCOR AUST LTD	Ground 1 - Costs of maintaining compliance with Electricity Safety Regulations
	Ground 2 - Successful appeal by other distributor
	Ground 3 - Incorrect calculation of operating expenses Impact of growth
	Ground 4 - Successful Appeal by other Distributor
SPI ELECTRICITY PTY LTD	Ground 1 - Costs of maintaining compliance with Electricity Safet
	Ground 2 - Impact of Interval metering

	Ground 3 - Wrongful calculation of MAIFI
	Ground 4 - Successful appeal by other Distributor
UNITED ENERGY DISTRIBUTION CENTRE	Ground 1 - Multiple errors of fact in determination of historical operating and maintenance expenditure Treatment of fees paid for services
	Ground 2 - Adjustment to operating and maintenance costs
	Ground 3 - S Factor
	Ground 4 - Successful appeal by other Distributor
ESCOSA 2005 - 10	
ETSA	Ground 1 - 2.5.1.1 The decision that easements should be includ Regulatory Asset Base at a value of $6 million.
	Ground 2 - 2.5.1.2 The decision that the value of equity β should, for the purposes of the CAPM, be 0.8;
	Ground 3 - 5.1.3 Two provisions of Part B referred to in ETSA Uti the Commission of 13 April 2005; namely, Schedule 1 (to include clarifying provisions) and the re-balancing control
	4. Confirm that price determination in respect of Schedule 1 (in relation to the 2 matters raised in ETSA Utilities' l Commission of 14 April 2005); and
	5. Make a subsequent price determination under Part 3 of the Essential Services Commission Act 2002 giving effect to th set out at paragraphs 2 and 3.

Table A

Table A illustrates significant expenditure of time and costs by a range of parties in circumstances where less than one third of the grounds appealed were successful and only minor adjustments to pricing determinations in favour of regulated entities were achieved. Costs of the process and any gains in revenue are ultimately borne by the consumer:

- The gains achieved by the regulated businesses as a result of successful appeals are ultimately added to the distribution component of consumer prices. The amounts in question can be significant, albeit small relative to the total amount involved in a distribution price review.

  By way of example, AGL Electricity in its appeal from the 2001-2005 distribution price review estimated the costs of the alleged errors to the business at $34.44 million over the regulatory period.[37] The grounds in respect of which AGL was successful involved a total of $7.6 million over the regulatory period.

- The costs incurred by the regulator and the businesses are also ultimately borne by consumers. The RIS developed by the MCE in relation to the proposed Decision Making Framework in gas and electricity markets estimated that the cost of running a limited merits review process might be up to $1 million.[38] The ESC estimates its costs of the appeal in respect of the 2006-2010 electricity distribution price review to be $1.2 million, excluding staff time.

It can also be argued that the number of appeals brought relative to the number of decisions made is high. Appeals have been made from both distribution pricing decisions in Victoria to date – a 100% average.

In relation to energy regulation appeals more generally, the ACCC notes that of 12 decisions to approve gas access arrangement since 2001, four have been the subject of appeal to the Australian Competition Tribunal[39] or a one in three average. The Energy Networks Association, in its submission to the MCE Discussion paper estimated that 1 in 6 decisions relating to gas access had been subject to review applications.[40]

The MCE Discussion Paper reviews revenue cap decisions in electricity and gas from 1998 to 2005. It concludes, "of 32 regulatory decisions in the gas industry between 1998 and 2005, four have proceeded to merits review."[41] It

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[37] See above n.7.
[38] Regulatory Impact Statement *Review of Decision-Making in the Gas and Electricity Regulatory Frameworks* at 13.
[39] Willet, E., *Energy Regulation: Past Experience, Present Challenges, Future Experiences* Speech to the Australian Institute of Energy, Melbourne, 13 August 2004 at 8-9.
[40] Energy Networks Association, Submission to the Ministerial Council on Energy, Discussion Paper *Review of Regulatory Decision-Making in the Gas and Electricity Regulatory Frameworks*, November 2005.
[41] MCE Discussion Paper at 61.

also concludes that there was one occasion on which a regulatory decision in electricity proceeded to merits review and there were also judicial review proceedings in relation to that regulatory decision. This omits the subsequent appeal from the 2006-2010 Victorian distribution pricing determination.

The MCE Discussion Paper makes the important qualification that merits review in respect of electricity decisions is only available in some jurisdictions and in limited circumstances.[42] In fact, merits review is available only in Victoria, the Northern Territory, Western Australia and South Australia and, save for WA, only in relation to distribution decisions not transmission decisions. It is also significant that distribution asserts in the Northern Territory remain under government ownership. Taking these factors into account, there have been four concluded and reviewable distribution pricing decisions and appeals have occurred in 2 of the 4 cases (both in Victoria).

Even at the lowest estimate this is an appeal rate of 1 for every 6 decisions. This is an extremely high ratio of appeals particularly in view of the lengthy process involved in reaching the decisions and the minor adjustments achieved. Nevertheless, gains of around $1 million or more, whilst minor relative to the total amount involved in a distribution price review illustrate the incentive to regulated businesses to 'invest' in an appeal with the potential to improve revenue significantly relative to the (tax deductible) legal costs expended in bringing the appeal. This leads to the highly unsatisfactory situation whereby the regulated businesses have little to lose and much to gain by accessing the appeals process.

3.3 Identified problems

3.3.1 General

The appeals to date have identified or established a number of issues for consumers relating to the appeal mechanism. In particular:

- With one exception,[43] where they have applied, consumer representative organisations have been denied standing to appear at the appeals as interested parties or to bring their own appeals (standing).

- The Appeal Panel considers only those issues identified by the party/s bringing the appeal, not the determination as a whole with the result that only those aspects of a determination that are unfavourable to the appellant are likely to be the subject of an appeal (gaming).

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[42] Ibid.

[43] The Public Interest Advocacy Centre was recently successful in its application to appear as *amicus curiae*, or friend of the court, in *Application by Services Sydney Pty Limited* [2005] ACompT 7 – an application by Services Sydney for review of a decision by the NSW Premier not to declare certain interconnections and transport services provided by the Sydney Water Corporation under the Trade Practices Act.

- Where an appeal is brought on the grounds of error of fact, the Appeal Panel is required to review a determination in a short period of time, and as noted above does not hear from all stakeholder groups. In contrast, a determination is based upon detailed consideration of data provided by the distribution businesses and significant consultation with stakeholders over an extended period of time (nature of decision).

It has also been suggested that the current arrangements provide low-cost, risk free opportunities for distribution businesses to raise revenue at the cost of end-users.[44]

The MCE Regulatory Impact Statement acknowledged these issues and outlined a number of other considerations that factor against a merits review model for economic regulatory decisions:

- Merits review is highly likely to result in gaming and forum shopping by (rational and self-interested) energy providers.

- 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.

- 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.

- The time and cost of conducting such merits reviews are very substantial and can add significant delays to the decision-making process.

- There can be a 'free-rider' problem involved with merits review. Since the costs of a regulatory error are spread across all users, it is very unlikely that an individual user will pursue an appeal as they would bear the costs of the appeal, but any benefits from the correction of the regulatory error would be spread across all users.

- While various ACT decisions may be cited by some as proof of the need for merits review in the energy sector, the Federal Court has also dealt competently with complex economic issues in that sector. Therefore, it can be argued that there may be no particular advantage in having review by a specialist tribunal and it may only impose additional costs.

- End users may not have the resources to participate, while service providers with greater resources can be heard again and push their

[44] Victorian Minister for Energy Industries, *Australian Financial Review*, 9 January 2006.

interests further.[45] A big cost of appeals is the additional costs forced on consumers by the inroads made by network owners accessing reviews.

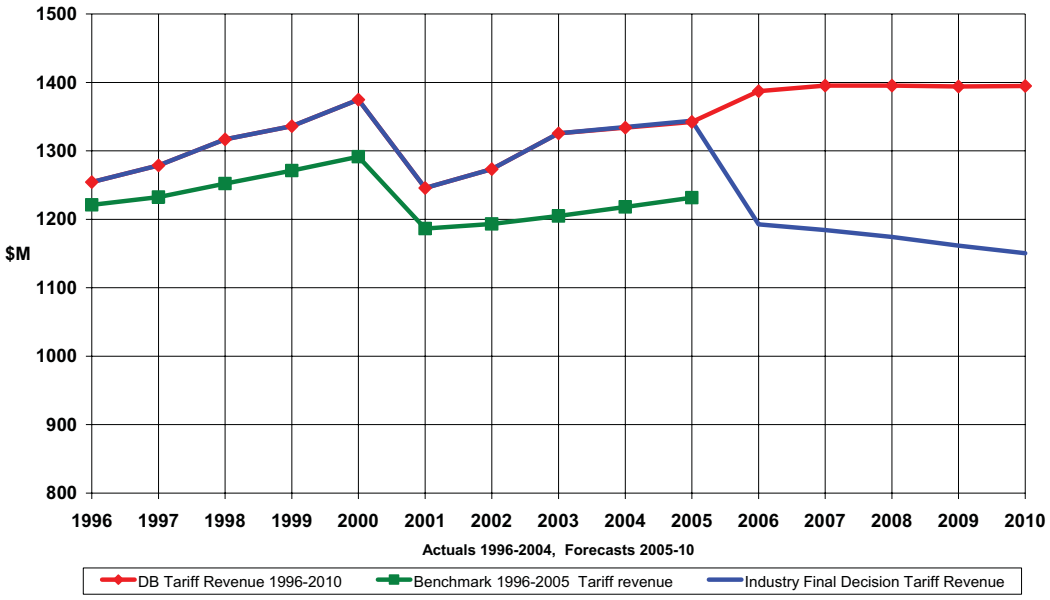
- There are large costs to the regulator of running an electricity or gas merits review of up to $1 million. This may entice the regulator to make decisions biased towards service providers in the knowledge that their decisions are unlikely to be appealed by end users who do not have the resources to get involved. [46]

The RIS also acknowledges the barriers faced by consumer and user representatives in accessing merits review processes and the consequent potential impact on regulatory decisions:

> *Generally, small to medium end users do not have the resources to apply for a review of decisions. This may result in decision-makers making decisions with the interests of network service providers in mind, as they would be the only parties able to appeal.* [47]

The fact that first instance determinations tend to err in favour of the regulated entities is illustrated by a graph appended by the ESC to its submission to the MCE in relation to its *Review of Revenue and Network Pricing Across the Energy Market*:

INDUSTRY TARIFF REVENUE



As can be seen , DB tariff revenue consistently out performs the benchmark

[45] This point also finds support in the submission by the ESC to the MCE in relation to its *Review of Revenue and Network Pricing Across the Energy Market*.
[46] MCE RIS at 12- 13.
[47] MCE RIS at 13.

tariff revenue with the resultant 'corrections' in 2001 and 2006 giving rise to the 'saw tooth' pattern of the graph.

The MCE goes on to note that the limitations proposed in relation to grounds of review in the merits review model outlined in the MCE Decision should reduce gaming incentives. However, as discussed in Section 3.3.3 this conclusion may be questioned.

3.3.2 Standing

Consumer or user representative groups have experienced difficulty obtaining standing to appear before merits review bodies both as an appellant and as an intervening 'interested party'.

The Consumer Law Centre Victoria (CLCV), Energy Action Group (EAG) and the Energy Users' Group (EUG) did not appeal but sought to intervene in the appeal by four of the five distribution business from the 2001-2005 pricing determination by the (then) Regulator-General.

In doing so, CLCV, EAG and EUG noted that:

> Our organisations are recognised as significant, responsible consumer bodies that represent energy consumers, especially low-income and disadvantaged consumers. We conform to the general tests of standing for organisations seeking to represent the public interest as articulated by the High Court in cases such as *Australian Conservation Foundation Inc v. Commonwealth* (1980) 140 CLR 493, *ACF In v. Minister for Resources* (1989) 19 ALD 70 and *North East Environment Council Inc v. Minster for Resources (No.2)* (1994) 36 ALD 533. We refer the Chairperson to the factors outlined in those cases that are relevant to our request:
>
> - Our organisations have previously made submission to the Office [of the Regulator General] in its ongoing review of the Victorian electricity retailing and distribution network;
> - We sit on the Office's consultative committee;
> - We have the proven ability to represent effectively the interests of Victoria's low-income and disadvantaged energy consumers;
> - We have conducted projects and conferences on matters of concern to the issues surrounding the provision of energy to Victorian consumers (eg the VESCAP); and
> - The States Government has, for some time, recognised our organisations as significant and important in representing the public interest in energy issues. This recognition manifests itself in funding arrangements, requests for information and submissions and invitations to participate on advisory committees.[48]

[48] Letter from Consumer Law Centre Victoria to the Chair, Appeal Panel dated 3 October 2000.

The Appeal Panel summarily denied the groups standing. The groups were afforded no opportunity to be heard on the issue, rather the decision was communicated by letter, which provided in its entirety:

> The Panel has considered your application on behalf of the Consumer Law Centre to intervene in the respective appeals by United Energy, TXU, Powercor and AGL which will be heard by the Panel commencing 6 October 2000.
>
> The Panel regrets that it must reject your application.
>
> The scheme of the *Office of the Regulator General Act 1994* is that the Panel can only deal with appeals and those only in the very limited time frame permitted by the Act. Such a legislative scheme cannot contemplate intervention by other parties however well intentioned they may be.
>
> If the Panel is wrong in its construction of the legislation it is of the view in any event that your body cannot demonstrate an interest sufficient to found standing. The Panel considered several cases in this regard including Transurban v. Allan 168 ALR 687. Time does not permit a detailed analysis of those cases.

The brevity of this response is attributed to time constraints. The 14 days allowed by the *Office of the Regulator General Act* for an appeal to be determined has been extended to 30 days under the ESC Act. Nevertheless, the fact that an Appeal Panel may determine that, due to time constraints, interested parties may be denied the opportunity to be heard on legitimate questions remains a serious concern.

It is also a concern that the nature and brevity of the response could be interpreted as a reflection of the seriousness with which the Panel regarded the application or the parties making it.

The Energy User Association of Australia (EUAA) and the EAG sought to appeal the decision of the Minister for Industry Tourism and Resources in relation to the application for revocation of coverage of certain portions of the Moomba to Sydney gas pipeline to the Australian Competition Tribunal. The ACT denied the groups standing on the basis that they were not adversely affected by the decision.[49] The ACT outlined its reasons as follows:

> *We were not referred to any authority which establishes the proposition that a consumer advocate organisation is adversely affected by a decision which relates to its objects and purposes and with which it disagrees on policy grounds. That proposition would appear to be contrary to* Right to Life Association (NSW) Inc v. Secretary,

[49] *Application by Orica Ic Assets Ltd & Ors Re Moomba to Sydney Gas Pipeline System* [2004] ACompT 2 (4 March 2004).

> Department of Human Services and Health *(1995) 128 ALR 238 per Lockhart J at 253-254 and (it seems) Beaumont J at 265-266, (upholding the opinion of Lindgren J at first instance), as well as being contrary to the opinion of Einfeld J in* United States Tobacco*. The proposition is too broad to be accepted as an appropriate test of standing across the board. It is not sensible to speak of this kind of corporation being adversely affected by a decision which relates to a topic about which it is interested by virtue of its objects and purposes. Its role as a public interest advocate is not affected by an actual decision which is arrived at one way or the other. Each organisation is to be distinguished from individual members who will have varied (perhaps connecting) commercial and personal interests.*
>
> *…*
>
> *Counsel for EUAA and EAG is correct to point out that there is scope for the organisations to participate in the process up to the point of the Minister's decision. Indeed, either corporation could, if so inclined, have sought revocation of coverage. That process indicates recognition of the wide ramifications of a decision to be made and of the advantages of a relatively open procedure, including the ability for the decision maker to receive material encompassing a variety of points of view.*
>
> *However, we agree with the submission for EAPL that this process concludes at the point of the Minster's decision. The requirement that the applicant for review be 'adversely affected' by the decision is at that point introduced for the first time. It is sensible that this be so. The Minister's decision is itself an informed and structured consideration of a recommendation of the National Competition Council, which in turn is the result of an informed and structured process. It does not follow that a person who played some role in these processes should be able to challenge the result. The two stage process is likely to have taken some time and will have a direct effect upon various parties immediately involved. A further merits review (albeit with statutory time limits which might be extended) will inevitably involve further uncertainty for a period and the incurring of expense by those involved. Furthermore, initiating a review by the Tribunal involves a significant commitment of public resources. It is reasonable that the legislature should have decided that a substantive further merits review should only be initiated by a person (including a corporation) with an interest sufficient to warrant these consequences,*[50]

These comments and outcomes illustrate the need to broaden standing rules to enable the effective participation of consumer and other organisations representing the public interest in merits review processes.

It should be noted that standing has also proved a vexed issue for public interest groups in seeking judicial review of administrative decisions. Indeed, it is administrative law principles on which the Appeal Panel and the Australian Competition Tribunal purport to base their findings.

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[50] See above n.49 para 12-16.

Whilst courts have recognised a role for advocacy organisations in the review of decisions that affect the public interest[51], it is not clear that representation of the consumer interest in relation to regulatory decision-making would be viewed as having a sufficient public interest character.

As can be seen, standing creates a significant first instance hurdle for public interest and consumer groups to overcome. The issue of standing has twice been the subject of consideration by the Australian Law Reform Commission – in Report No.27: *Standing in Public Interest Litigation* (1985) and in Report No.78: *Beyond the Doorkeeper: Standing to sue for public remedies* (1996). In both reports the ALRC recommended that the standing rule be significantly broadened to provide standing in public interest litigation to any person, save where certain limited exceptions apply.

The two reports differed in only one major respect. The first report recommended the adoption of the exclusionary test that has evolved primarily in the United Kingdom – namely that standing should be granted unless it can be shown that the person or body is 'merely meddling.' In the later report the ALRC rejected the 'meddler' test as too complex to apply and instead favoured the following framework:

- *A new general test for standing where <u>any person</u> may commence public law proceedings <u>unless</u> any relevant legislation provides otherwise or the litigation would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it as he or she wishes.*

- *A statutory framework for intervention to replace the current categories of intervenor and friends of the court.*

The new test for standing only applies to 'public law proceedings'. This is a shorthand expression used in the report to describe civil proceedings (including judicial review of administrative actions) that contain a broad public element in addition to any private rights. It

[51] For example see ALRC Report No.78 para 3.12: the courts have recognised that the conduct of litigation involving a public issue ought to be entrusted to an applicant who is capable of representing the public interest rather than to a person who simply has a special interest. In *Australian Conservation Foundation v Minister for Resources* the court developed a test for determining the capacity of an organisation to represent the public interest. First, the applicant must not be a mere busybody but must be capable of representing the public interest - in this regard the Foundation was an acceptable representative given its objects, its status as a national organisation and large financial enterprise with government funding and its leading role in the protection of the environment, including the forests that were the subject of the litigation. Second, the court must consider whether the applicant is recognised by 'current community perceptions and values' as being capable of representing the public interest. This approach has been followed in a number of recent cases allowing relatively small interest groups standing to seek judicial review.

corresponds approximately to 'public interest litigation' but the proceedings are defined in terms of the remedies sought rather than the purpose or effect of the claim.

In support of this proposition the ALRC noted the following matters:

The public has an interest in ensuring that government decision-makers are accountable and that their decisions are made in accordance with the law. The public also has an interest in ensuring compliance with legislation that creates public rights and duties. These are interests which must be capable of protection, when necessary, through litigation.

…

The current law on standing for proceedings of this kind is counterproductive. It acts as an extra source of unnecessary legal costs and delay. It does not act as an effective filter for disputes that are futile, vexatious or otherwise inappropriate for litigation. Such a filter is provided by other laws and discretions available to the court.

It also acts as an unpredictable technical barrier. In particular the 'special interest' test can be uncertain, complicated, inconsistent and overly dependent on subjective value judgements. This can make the legal system appear unfair, inefficient and ineffective.

The standing rules do not work as a gate guarding Australia against a flood of litigation or guarding Australian business against damaging and meddlesome interference. Experience over the last ten years indicates that there is not a flood of litigants waiting to be released and that, even if there were, standing tests are not an effective restraint.

Where there is a need for protection against damaging interference in government regulation of business and other activities, this requires better case management and better government decision making. The law of standing does not help.

The current law on standing is therefore a door-keeper that courts do not need as protection and litigants cannot afford.[52]

The ALRC also articulates the importance of the role played by intervenors in the public interest in informing the court:

In the Commission's view, to perform their law making role properly courts must have access to material relevant to the making of policy judgements as to what, if any, changes may be required to the law. In particular, techniques must be developed to enable judges to be better informed about community values. The involvement of intervenors and

[52] ALRC Report 78 Overview at 1-2

friends of the court in proceedings is one technique for helping courts obtain this information.[53]

The ALRC report also included draft legislation designed to affect the broader standing rule. Whilst the recommended legislation has not been enacted, it is suggested that the language in the ALRC legislation could be picked up in the ESC legislation.

It is recommended that the provisions apply both in relation to the bringing of appeals and intervention in appeals brought by other parties. Such a step would significantly enhance consumer groups' ability to participate in appeals by removing the first instance hurdle of needing to prove a sufficient interest.

Recommendation: *That the ESC Act be amended to include the standing rule as outlined in ALRC Report No.78 and that the provisions apply both in relation to the bringing of appeals and intervention in appeals by other parties.*

This approach is in part reflected in the MCE Decision. The MCE Decision provides that "user and consumer groups" and "users who are materially affected by the original decision" will be able to commence a review.[54] It should be noted that other threshold criteria to be met in lodging an appeal have also been set out. These are further discussed in Section 3.3.3 below.

The MCE Decision provides for more limited rights to intervene – with that right granted to "person with a 'sufficient interest' in the original decision" and "user and consumer groups with the leave of the ACT." [55] The MCE Decision goes on to provide additional guidance to the ACT regarding whether or not to grant leave. This is done in two ways. First by setting out two matters that the ACT is to have regard to in determining whether or not to grant leave:

> Whether
>
> - groups seek to raise matters not raised by an existing party to the review, in which case leave should be granted; or
>
> - the interests of the group or its members are adversely affected, in which case again leave should be granted.[56]

The MCE Decision also proposes that steps be taken to ensure that "user and consumer groups intervention is not needlessly opposed" by explicitly providing in the legislation that "interests of a group are taken to be affected if a determination relates to an object or purpose of the group."[57]

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[53] ALRC Report 78 Ch 2 at 2.25
[54] MCE Decision at 4.
[55] MCE Decision at 5.
[56] See MCE Decision at 5.
[57] Ibid.

Recommendation: *That consumer and user groups' standing to bring appeals and to intervene in appeals brought by other parties is expressly enshrined in the ESC Act.*

It should be noted that in implementing these legislative tests regard will need to be had to existing administrative law legislation to ensure that inconsistencies are minimised and that where inconsistencies exist the energy legislation is unequivocal in its intention to change the general rules applying under administrative law legislation. This will be particularly important at a State level as failure to address fit with applicable Commonwealth legislation may result in the State legislation failing under section 109 of the Constitution as being inconsistent with Commonwealth legislation.

3.3.3 Gaming

The term 'gaming' can encompass a range of behaviour including use of the appeals process as means to delay the implementation of a decision, the withholding of relevant information during initial decision-making and 'cherry picking' for appeal only those alleged errors in the first instance decision that are adverse to the appealing business.

As discussed below, whilst incentives to delay the implementation of a decision and withhold information from the primary decision-maker can to some extent be addressed by legislation it is suggested that a limited merits review model inherently invites cherry picking on the part of the appealing party – that is basing an appeal solely on the elements of a decision that are detrimental to the appealing party.

It is the nature of a lengthy and detailed regulatory determination process that involves the exercise of significant discretion that there will be an element of bargaining amongst the various stakeholders, such that 'gives' in relation to one issue will be offset by 'takes' in relation to another issue.

However setting in place an appeal mechanism that allows only some elements of a determination to be appealed virtually guarantees that only 'takes' will be appealed. Thus, it can be argued that by allowing appeals in relation to 'takes' only, a limited merits review process may in fact deliver greater revenue gains to the regulated businesses than would have occurred had the decisions been reviewed in their entirety. This it must be remembered, takes place in an environment where decision-making is already likely to err in favour of the regulated entities.

ACCC Commissioner Ed Willett expressed concerns regarding the incentives for cherry picking and consequent effect on regulatory certainty in a speech to the Australian Institute of Energy in 2004 in relation to decisions by the ACT:

> *Our concern is that the current approach rewards cherry picking, and encourages appeals where the applicants have nothing to lose and everything to gain by challenging specific aspects of our decisions, while leaving the rest of the decision untouched.*
>
> *For example, the agreed approach to setting the cost of capital has been an assumed 60:40 debt equity ratio. This benchmark has implications for other parameters used, including the benchmark credit rating for determining the risk premium on debt. In the recent MSP Tribunal decision a lower credit rating was viewed as appropriate by the Tribunal however there was no recognition that a corresponding adjustment to the benchmark gearing level was required. If such an adjustment had been undertaken the overall cost of capital and in turn tariffs would have fallen.*
>
> *The result of cherry picking has been the creation of a level of inconsistency in Gas Code interpretation which ultimately leads to a higher level of regulatory uncertainty that can only be detrimental to the future management of the access regime, for service providers and users alike.*[58]

One solution to this difficulty is to require full merits or de novo review such that the whole of the decision is considered. However such an approach has been viewed as having other limitations, in particular cost to the parties (ultimately reflected in the cost of supply) and delay given the amount of material that would need to be considered by the appeal body.

Further, from a public interest perspective all of the barriers to participation by public interest organisations, including costs, time and technical expertise would be exacerbated. Given these groups are likely to have participated in the first instance decision-making process but are most unlikely to participate in a de novo review, there is a risk that such a review will in the absence of such input deliver outcomes that are even more skewed in favour of the regulated entities.

A number of these concerns are reflected in the MCE Discussion Paper, which notes in its discussion of de novo review that:

> *Most proponents of some type of merits review accept that a de novo merits review regime, where the reviewing decision-maker must start from the beginning and fully reproduce the processes to make a truly "fresh" decision, is impractical. This paper assumes that a de novo merit review regime is not likely to be implemented 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 lengthy consultative process.*

[58] See above n.39 at 10.

SCO considers that any review of the specified economic regulatory decisions should be limited in some respects. Policy considerations suggest that review be of only some types of errors. Factors that indicate there should be limited review include:

- *Where a wide, transparent public consultation process has already been undertaken by an expert body;*
- *Where there is no one correct answer for a particular regulatory setting and only a high level of error should reasonably be corrected;*
- *Where there is scope for gaming of regulatory decisions (e.g. withholding of information, delay etc); and*
- *Where costs and delays involved in a wider type of review would be significant.*[59]

This report suggests that the factors outlined in the dot points above, in fact argue for a judicial review model. In contrast the MCE Decision prefers a limited merits review approach and seeks to limit gaming in two ways.

First by providing that where an appeal is brought by a Network Service Provider, the "regulator may, in its absolute discretion, seek a review by the Australian Competition Tribunal of other parts thereof, or of the entire decision and the review would proceed on that basis, not only on the (limited) grounds of review that the network or service provider advances."[60]

There are two things to say about this proposal – first it introduces the possibility of full merits review. Given the time limits imposed on merits review processes elsewhere in the decision there is real concern that the ACT will be unable to effectively review the original decision, arrived at after extensive consultation over an extended period of time. Secondly, even with such a mechanism available, it must be questioned how likely it is for the regulator to open additional areas of its decision- making to review, even where those additional areas illustrate the 'gives' to the regulated businesses that balance the 'takes' appealed.

Second the MCE Decisions attempts to define the basis of limited merits review and to set up qualifying hurdles to be met by the appealing party. In particular, the MCE propose the following qualifications to the right to appeal:

1. A requirement that the applicant seek leave from the ACT to bring a review; and
2. No leave to be granted unless:

[59] MCE Discussion paper at 31 (para.s 6.2 ad 6.3).
[60] MCE Decision at 21.

a. The application is brought within 10 business days of a final decision; and

b. The ACT is satisfied that, where an economic regulatory decision is involved, the amount at issue exceeds $5 million or 2% of the annual regulated revenue of the applicant whichever is the lesser, alternatively if quantification is not readily possible, that the amount in issue is material in terms of the regulated revenue. In all other cases (i.e. 'non-revenue' errors), the ACT is satisfied that the error is a material one; and

c. The ACT is satisfied there is a serious question to be tried.

3. In addition, leave may be refused if the ACT is satisfied that the applicant:

a. without reasonable excuse failed to comply with any requests for information made by the regulator in the primary regulatory proceedings; or

b. without reasonable excuse failed to comply with any other requests or directions made by the regulator in those proceedings; or

c. without reasonable excuse conducted itself in those proceedings so as to delay the making of the economic regulatory decision sought to be reviewed; or

d. misled or attempted to mislead the regulator in those proceedings. [61]

The limitation in 2a is likely to most actively dissuade applications from parties other than the regulated businesses. The businesses will have been intimately involved in all aspects of the process of decision and will be in possession of significant amounts of information not available to other participants and are thus most likely to be able to meet the timeframe. It is also possible that the imposition of such a short timeframe may in fact encourage the lodgement of speculative appeals to protect the position of the applicant for review.

The limitation in 2b may prevent the lodgement of some appeals that would otherwise have been brought. It is suggested, however, that it will do little to address the problem of cherry picking, provided the 'cherries' exceed the specified monetary threshold.

[61] MCE Decision at 4.

The effectiveness of the MCE limitations will also depend on the basis on which the Tribunal chooses to exercise discretion to refuse leave. For example would the Tribunal deny leave under 3d where an otherwise appealable error by the regulator arises as a result of incorrect or incomprehensible information provided by a regulated business?

If leave to appeal was refused in respect of such an error, two of the successful grounds of appeal in Victoria would have been lost (See Appeal Ground 3 of Powercor and SPI Ausnet 2005-10). If however such an error was found to be appealable it can be argued that the MCE decision provided little defence against gaming the process by withholding information from the regulator and in fact may provide incentives to do so.

In addition the MCE decision failed to consider the need for applicants for review to meet a "good faith" or "clean hands" test in relation to the review. This means that there is no requirement that regulated businesses set off mistakes that provide a windfall gain against the cost of alleged errors. Nor are regulated businesses precluded from seeking to profit from their own failure to provide clear and accurate information to a regulator.

It is also noted that where a non-revenue error is challenged, there is effectively no further limitation on review as the question of materiality of the error is an explicit element of the basis for a factual review.

Whilst the proposed MCE restrictions are an improvement on the current state jurisdictional arrangements, an examination of recent appeals in South Australia and Victoria would suggest that there is room for further restrictions on access to review.

A requirement that the amount at issue in respect of a regulatory decision be greater than the specified threshold does have some real scope to reduce the number of appeals, at least in theory. It is not clear, however, how the amount at issue rule will be applied. The amounts in question in various energy regulatory appeals to date have been reported in a range of ways making comparison difficult. However taking particular examples can never the less be illustrative. The following table illustrates[62] the amounts in question in three applications for review of ACCC decisions, two of which have been concluded.

Decision	**Amount claimed by service provider**	**Amount determined by regulator**	**Amount determined by review body**
MAPS	$59m	$50m	$54m
GASNET	$95m	$77m	$79m
MSP	$86m	$68m	?

[62] EW Speech 2004 at 10.

As can be seen, in the case of the MAPS decisions there was a difference of $9m between the amount claimed by the regulated entity and that awarded by the regulator and a difference of $4m between that awarded by the regulator and that awarded by the Tribunal. If the difference between the amount claimed by the regulated business and that awarded by the regulator is used then leave to appeal the regulator's decision (all other things being equal) will be granted. However, the amount of 'correction' by the appeal body, namely, $4m, falls below the threshold set out in the MCE Decision.

Whilst there are clear temporal difficulties in determining the question of leave to appeal with reference to the ultimate outcome of the appeal, it seems equally perverse to determine the question of leave based on the amount of discrepancy between the regulated entity and the regulator. Such an approach seems most likely to incentivise loading of the amount claimed by regulated businesses in order to preserve the right to appeal in the event they are not satisfied with the regulator's determination.

Thus whilst the idea of imposing a monetary threshold is superficially attractive it is questionable whether it will have the effect in practice of reducing appeals.

As alluded to the report has concluded that gaming of the process is effectively invited by the combination of an first instance decision making process with broad discretion and an avenue of limited merits review of that decision.

In contrast, judicial review, changes the incentives to game the process significantly. In particular, it significantly limits the ability to review the factual basis of the decision.

The impact of a shift to a judicial review model on potential for gaming is recognised by the MCE. For example, in the RIS, it is noted that:

> it may reduce the influence of service providers on the review scheme and thus result in less incentive in 'gaming' from service providers and a just review system for end users. This option may allow the regulator to favour consumer interests more in the initial decision. [63]

3.3.4 Nature of decision under review

There are two elements of determinations by the ESC (or other economic energy regulator) that make effective merits review of those decisions particularly challenging. One is the complexity of the decision itself and the other is the fact that the decision reflects a broad and lengthy series of consultations with stakeholders.

[63] MCE RIS at 16.

The nature of the regulatory framework that applies to energy necessitates consideration of large volumes of highly complex technical, economic and engineering data. This requires a high level of relevant expertise that is in reality possessed by few. Further, the decision-making involves a high degree of discretion, necessitated in part by the fact that much of the methodology applied to achieve regulation designed to emulate competitive pressures is theoretical.

Indeed, the Supreme Court in reviewing whether or not the ORG had acted within power in making its 2001-2005 distribution price review noted that the formula mandated by the relevant legislation and tariff order was "imprecise, uncertain and of recent origin. On no view could it be described as a mathematical or scientific formula."[64]

The Court went on to note that:

> *Where a word or phrase is described as a term of art, usually it is not difficult for the court by reference to a book, such as a dictionary of technical terms or a textbook, to determine what the word or phrase means. The industry, profession or field of learning evolve their own language to define a word or phrase. They acquire a well accepted meaning. The lexicon of the terms of art is found usually in a dictionary or a textbook. There is usually no debate as to meaning. However, that is not the case here. Witnesses were called on both sides as to the meaning of the formulae contained in cl.5.10(a), but on any view of the evidence, there is a degree of uncertainty as to what each formula means.*[65]

Dr John Tamblyn, the then Essential Services Commissioner noted from practical experience that there are 4 key elements that contribute to this complexity:

1. *Economic principles do not provide an unambiguous answer to what deemed asset values should be a key factor in cost-based regulation;*

2. *There is a large asymmetry in the information available to the regulated entity compared to the regulator [let alone consumers] about what needs to be spent to provide the relevant services;*

3. *The level decided for regulated prices is dependent upon forecasts of variables that are subject to a large degree of estimation imprecision, but which have a disproportionate impact on final prices approved for the regulated business;*

4. *Analysing and making decisions on all of the issues involved in a regulated price review is a long and complex task, which involves*

[64] TXU Decision at para 115.
[65] TXU Decision at para 143.

drawing on expertise from a number of disciplines (eg engineering, economics and finance, law etc) and assessing a substantial amount of material advanced during the review process, in particular:

- *The final decision on prices reflects a series of decisions on matters of principle or methodology, as well as findings of fact;*

- *Some of the decisions about methodology that are made in one price review are designed to assist with setting prices at the subsequent price review and therefore part of the approach that is adopted may reflect decisions made 5 years previously;*

- *Many of the issues are interrelated, requiring care and judgement in seeking to ensure consistency across the assessment.*[66]

Whilst some may argue these elements support the availability of merits review, this report asserts that it makes effective merits review more difficult. It is unlikely that an Appeal Panel possesses the same degree of expertise as the regulator making the original decision, still less the same level of experience in applying the relevant concepts in a practical context.

It should also be noted that the regulator's view is informed not only by the expertise of the statutory office holders but also a significant expert staff. A three-person panel cannot match this breadth of input.

The importance of the relevant expertise was recognised by the MCE in its Discussion Paper, which notes:

> *Economic regulatory decisions involve complex and by no means settled economic concepts, and expertise is thus a critical factor in providing for review of these decisions. Particularly where the nature of the review involves a consideration of the merits of the decision, the review body must have the skills, expertise and information available to ensure that the review outcome is a better one than the original decision- maker. An effective review regime pre-supposes that the reviewing body is sufficiently resourced and expert to add value to the decision-making of the AER and other relevant decision-makers.*[67]

As outlined in this report, commentary relating to energy merits review to date suggests that this pre-supposition cannot necessarily be met in practice.

It is also relevant that the level of expertise required participating in a merits review process is rarely, if ever, possessed by consumer representative

[66] JT Speech at 6-7.
[67] MCE Discussion Paper at para 6.33.

organisations. Thus even if their right to participate is recognised (as is proposed in the MCE decision) the likelihood of being able to do so effectively must be doubted. One solution would be for the groups to retain experts of their own, however, even were funds available to do this (which they are not and are unlikely to be in the foreseeable future), it is questionable whether it is desirable to fuel a 'battle of the experts' at the ultimate cost of the end use consumer.

In fact, it is more likely that pubic interest groups would seek review of inadequacies in the process of decision-making or fundamental framework rather than specific concepts or calculations.

The other factor that mitigates against merits review is the length and depth of the consultation process engaged in by the regulator. This is a broad based process in which a range of stakeholders can participate, including members of the public. By way of example, Dr Tamblyn noted that over the course of the 2001-2005 distribution price review the then Office of the Regulator General released 5 consultation papers, "a paper summarising preliminary conclusions on certain high level matters of principle, a paper summarising the distributors' formal proposals for other interested parties…a more detailed paper discussing each of these papers, and volumes of material – both evidence and argument- were received and placed on the Commission's website."[68] In contrast the Appeal Panel, even with the amendments to the appeal process reflected in the ESC Act, is significantly constrained in terms of the time available to it to consider an appeal, and does not recognise the same breadth of stakeholders.

It is not suggested that it is desirable that the Appeal Panel in any way replicate the process of consultation. Rather it is considered that the practical inability to replicate the process is a further argument against merits review.

The position is similar at the national level. The MCE noted in relation to electricity revenue cap determinations by the AER that:

> *Currently, decisions of the AER – such as electricity revenue cap determinations – involve such extensive inquiry and consultative processes that it takes between 6 and 12 months to complete, and this process re-occurs every 5 years. The process for making a revenue cap determination is as follows:*
>
> 1. *The revenue cap application and a request for submissions are published;*
> 2. *A draft decision is published;*
> 3. *A public forum is held following the draft decision;*
> 4. *Further opportunity for submissions is provided following the draft decision and public forum; and*
> 5. *A final decision is published.*

[68] JT Speech at 7.

> *This process is designed to provide all interested persons with ample opportunity to consider the relevant issues and put their views to the AER, both in written and verbal form. Practice has shown that there is a wide range of parties that make submissions on a revenue cap determination. These include the transmission network service provider (TNSP); other industry participants, such as generators and retailers and other TNSPs; and users and consumers. Practice has also shown that it is an iterative process, characterised by an on-going exchange of information and views between the regulator, the TNSP and other interested parties. Not surprisingly, this process is a lengthy one. The process published in the Statement of Regulatory Principles provides for it to take 13 months but previous decisions of a similar nature have taken longer.*[69]

Taking the above into account. it can be argued that, in the absence of legal error, the ESC is best placed to balance the range of stakeholder views expressed during consultation. This viewpoint finds some support in the Administrative Review Council's Guideline *What Decisions Should be Subject to Merits Review?*, which state that where a decision involves an extensive inquiry process, merits review may not be justified.

It is noted that other aspects of these same guideline are cited by the MCE in support of the decision to adopt a limited merits review model. If anything, this illustrates that either a limited merits review model or a judicial review model can be supported from a broad administrative law perspective.

3.3.5 Costs

Under the present Appeal Panel model costs are not awarded against the losing party. Participating parties bear their own legal costs. These legal costs are substantial, however they represent different barriers to different parties.

From the perspective of the regulated businesses, the amounts of money involved in a five year pricing determination are so large that an appeal on elements of a determination that have gone against them, where there is no risk that they will pay the costs of the other party if unsuccessful, could be said to be a very worthwhile investment. The tax-deductible nature of such costs further underlines the incentive.

The cost involved in bringing an appeal or intervening in the appeal by another party already act as a significant constraint to consumer and user group participation. Adding a liability for the costs of other parties where unsuccessful would effectively guarantee that consumer representative groups (let alone individual consumers) would never participate in a review process.

[69] MCE Discussion Paper at para 5.25-5.26.

Costs is also an issue in relation to a judicial or administrative review model. in the ordinary course, the costs indemnity rule applies – namely that costs follow the event i.e. the losing party pays the costs of the successful party.

A potential liability to meet the costs of other parties would likely deter any such applications and would bankrupt any organisation bold enough to take the risk.

All stakeholders consulted supported this proposition. By way of example, one consumer advocate commented in response to an invitation to identify risks in appealing that:

> *I guess most of us would say adverse costs. But, again, there's the effort required to get an appeal on foot. The businesses can afford this as an investment...in my experience even the largest end-users are reluctant to take this on.*

In the absence of such participation, public interest is left to be raised by the regulator. This is a difficult task for an independent regulator. Further, even with provision for other parties, in particular the regulator to raise new grounds in an appeal, it must be questioned whether the regulator is likely to wish to open further aspects of its decision to review even to illustrate some of the 'gives' that may balance the 'takes' likely the subject of appeal by the regulated businesses.

Resources are also a difficulty in relation to judicial review applications by consumer organisations. However it must be noted that in a more traditional review environment it ought to be easier for public interest organisations to secure pro bono representation.

In addition, the issues canvassed in a judicial review application are more traditional ground for public interest organisations both in terms of issues relating to the process in respect of which the organisations are likely to be concerned and their experience in bringing appeals of this kind.

This rule could, and this report suggests, should, be overcome by legislative means. It is strongly arguable that some form of exemption from costs save in the case of frivolous or vexatious claims in the case of consumer organisations is necessary to enable them to participate as applicants.

It is recognised that such a proposition is likely to raise concerns that consumer groups will somehow thereby bring a flood of review applications. However, the reality of the financial situation of all small consumer representative groups is that it would be a huge commitment to meet their own costs of a judicial review application. Indeed, it is likely that consumer groups would need to seek pro bono assistance to participate in a review. In order to access pro bono resources the consumer groups would be required to satisfy a public interest test that would weed out frivolous, vexatious or weak applications for review.

In recognition, however, that the range of consumer representative organisations is broad, one solution would be to provide the costs exemption to those organisations listed in a regulation and that continue to meet certain specified criteria. It may also be desirable to enable the relevant Minster to schedule an organisation provided it can also meet the relevant criteria, to cover the situation where a new organisation emerges after the promulgation of the regulation.

Recommendation: *That the ESC Act be amended to provide exemption from costs orders to consumer and public interest organisations specified in the regulations or gazetted by the Ministers (save in the case of frivolous or vexatious applications).*

The position is slightly different in relation to judicial review cases where a consumer representative organisation may wish to intervene in the application made by another party. A significant body of law has developed to exempt intervening parties from costs orders where that intervention in the public interest. It is nevertheless desirable that the need to argue costs be removed. Therefore the ESC Act should be amended to make it clear that the costs exemption also applies to applications to intervene in appeals brought by other parties.

Recommendation: *That the ESC Act should be amended to make it clear that the costs exemption applies to applications to intervene in appeals brought by other parties as well as appeals.*

3.3.6 Breadth of appeal grounds

Whilst the model under the ESC Act and that proposed by the MCE are referred to as 'limited' merits review, experience shows that the scope of review afforded by grounds that examine the reasonableness of a decision or potential errors of fact is in reality very broad. As illustrated by Table A above, appeals under the ESC Act and its predecessor, the ORG Act have sought the examination of a very broad range of decisions.

The breadth of review is further expanded by the likelihood of divergence of opinion in relation to evolving economic and regulatory principles.

As noted, the grounds for review under the ESC Act (and proposed MCE model) refer to 'material' errors of fact. This inevitably opens the door to a range of arguments about whether or not a particular error or fact is material. Whilst the same can be said for judicial review to a degree, the relevant thresholds are significantly higher.

Concern has also been expressed that the Appeal Panel has concerned itself with questions that do not meet the standard of materiality.[70]

[70] See for example JT speech at 14.

4. Tests in other jurisdictions

4.1 Other Australian jurisdictions

4.1.1. New South Wales

Appeal arrangements applicable in New South Wales are less clear than any other jurisdiction examined. The *Independent Pricing and Regulatory Tribunal Act 1992* makes no mention of appeal.

Based on consultation with New South Wales based advocates and the administrative law framework existing in New South Wales, the Project team has concluded that appeal is confined to judicial review.

It does appear that there have been any appeals from IPART decisions to date.

4.1.2 South Australia

The South Australian model permits an initial review by the Essential Services Commission[71] and then a form of merits review – by the Administrative and Disciplinary Division of the District Court.[72]

Reviews of a price determination by the ESC may be sought by the Minister or by a regulated entity. There are no limitations on the grounds on which the review may be sought.[73]

A person who sought review under Section 31 "or any other party to the review who made submissions on the review who made submissions on the review, who is dissatisfied with the price determination or the decision as confirmed, varied or substituted" may make appeal to the District Court.[74]

The Court may not consider new information.

4.1.3 Tasmania

The Tasmanian model permits initial review by the Regulator and then appeal to the Minister.[75] Whilst the legislation makes provision for appeal to be directed to another body, regulations assigning appeals to another body have not been passed.

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[71] Section 31 *Essential Services Commission Act 2002* (SA)
[72] Section 32 *Essential Services Commission Act 2002* (SA)
[73] Section 31(2)(b) *Essential Services Commission Act 2002* (SA)
[74] Section 32(1) *Essential Services Commission Act 2002* (SA)
[75] Section 101 *Electricity Supply Industry Act 1995* (Tas)

Reviewable decisions are defined in the Act to be "any direction, decision or determination under the Act, the Regulations or the Tasmanian Electricity Code other than a direction, decision or determination that is declared by the Act, Regulations or the Code not to be reviewable."[76]

It does not appear there have been any appeals under these provisions.

4.1.4 Western Australia

The Western Australian model utilises a merits review model, though it is more limited in terms of which decisions may be subject of an appeal.

Pursuant to the *Energy Coordination Act 1994*, section 11ZH, a person "adversely affected" by a decision of the Economic Regulatory Authority may apply for a review of the decision within 14 days of receiving notice in writing of the decision of the Authority.

The appeal lies to the West Australian Gas Review Board (to be renamed the Energy Review Board) established under the *Gas Pipelines Access (Western Australia) Act 1998.* The hearing is a fresh hearing.[77]

The types of decisions that may be reviewed include decisions by:

- the Authority concerning the grant, amendment or transfer of an electricity supply licence;
- the Authority as to terms and conditions to include in an electricity supply licence;
- the Authority to refuse to approve proposed standard form contracts for electricity supply licensees;
- the Authority to approve or not approve an access arrangement submitted under the *Electricity Networks Access Code 2004*;
- the Authority as to ring fencing obligations of a network service provider; and
- the Minister for Energy that an electricity network be "covered" under the *Electricity Networks Access Code 2004*.

There have been at least four appeals under these provisions to date. These are comprehensively outlined on the ERA website: www.era.wa.gov.au.

[76] Section 3 *Electricity Supply Industry Act 1995* (Tas)
[77] Section 57 *Gas Pipelines Access (Western Australia) Act 1998*

4.1.5 The National Market

Currently, the national market utilises a combination of merits and judicial review models depending on the body making the decision and the nature of the decision.

Thus for example, limited merits review is available to the Australian Competition Tribunal in respect of gas access decisions by the ACCC. Decisions of NECA and NEMMCO are open to judicial review.

The position proposed in relation to decisions by the Australian Energy Regulator as outlined in the MCE Decision is discussed throughout this report.

4.2 International jurisdictions

4.2.1 United Kingdom

A limited merits review of decisions of the Gas and Electricity Markets Authority is available to the Competition Commission.[78] Merits review is only available in respect of decisions relating to "the modification of certain industry codes which form part of the contractual framework of the gas and electricity industries."[79] In addition the Competition Commission must give permission for the bringing of an appeal.[80]

This review may be sought by either "a person whose interests are materially affected" by the decision or "A body or association whose functions are or include representing persons in respect of interest of their that are so affected."[81]

Judicial review is available in respect of other GEMA decisions.

4.2.2 United States

Decisions in relation to distribution licensing and price regulation is made at State level by Public Utilities Commissions. Thus it is possible, at least in theory, that there could be more than fifty variants in approach in the Untied States.

The research and consultation undertaken, suggests, however, that at least a significant majority of states utilise a judicial review model. It should be noted however that the judicial review model applicable to energy in the United

[78] GEMA is the governing body of the Office of Gas and Electricity Markets (OFGEM).
[79] Ofgem Fact Sheet 36 *The Energy Bill* 28 November 2003.
[80] Section 173(4) *Energy Act 2004* (UK).
[81] Section 173(3) *Energy Act 2004* (UK).

States appears to allow a slightly broader basis of review than the Australian model.

For example, in California, an 'aggrieved party before the Commission' may petition either the Supreme Court or Court of Appeal for a writ of review in respect of the "lawfulness of the original order or decision."[82] The permitted grounds of review are set out by Statute as follows:

- whether the commission failed to proceed in the manner required by law;
- whether the decision is supported by the findings;
- whether the findings are supported by substantial evidence in light of the whole record; and
- whether the decision was procured by fraud or was an abuse of discretion.[83]

The second and third grounds appear on their face to be broader than permissible grounds of judicial review in Australia. The grounds in California are nevertheless anchored by the reference to review of the lawfulness of the decision (as compared to its factual correctness).

4.3 Analysis and Conclusions

First, it can be seen that a significant number of jurisdictions examined utilise a judicial review model. Further, where a merits review model is utilised it is in many cases significantly limited in terms of the types of decision of which merits review may be sought.

Secondly there is a range of approaches in relation to participation by broader stakeholders in review processes. In the US, in view of the judicial review model utilised, regard is had to the standing rules that have been developed by courts in relation to judicial review in general.

In relation to intervention by interest groups, US laws have developed such that an interest group must demonstrate that it is impacted by a decision other than the manner in which a member of the public is impacted.

The UK regime specifically provides for participation of interest groups, allowing participation by "a body or association whose functions are or include representing persons in respect of interest of theirs that are so affected."[84]

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[82] Section 1756 *Public Utilities Code* (California).
[83] See Chapter 855 SB1322 of 1996 (California).
[84] Section 173(3) *Energy Act 2004* (UK).

5. Assessing the alternatives

5.1 Basis of Assessment

In assessing which model is to be preferred from a public interest perspective, this report examines the options against the criteria outlined in the MCE Decision together with specific consideration of the model's ability to service the public interest – both in terms of participation and in addressing the concerns identified with the present system (outlined in Section 3 of this report).

The MCE criteria are that:

> *The appropriate review mechanisms should aim for the optimal decisions possible within a framework where the benefits of the review outweigh the costs to stakeholders.*
>
> *Some criteria relevant to developing an appropriate review scheme are:*
>
> - *Maximising accountability;*
> - *Maximising regulatory certainty;*
> - *Maximising the conditions for the decision-maker to make a correct initial decision;*
> - *Achieving the best decisions possible;*
> - *Ensuring that all stakeholders' interests are taken into account, including those of service and network providers, and consumers;*
> - *Minimising the risk of "gaming"; and*
> - *Minimising time delays and cost.*[85]

5.2 Accountability

Accountability in the broad sense – that is ensuring that regulatory decisions are open to appropriate scrutiny – is delivered to varying degrees by either a merits or judicial review model. The question therefore becomes which model will in fact permit optimum levels of scrutiny – enabling appropriate examination of decisions and providing further incentives for correct first instance decision making.

[85] MCE Decision at 3.

Given an independent regulator is not accountable to the public in the same way as governments the review process arguably plays an even more important role in relation to accountabi8lity than would ordinarily be the case.

It is preferable that whatever review model is chosen, the full scope of the decision is open to review. Such an outcome can be better delivered by either de novo or judicial review than merits review, which allows appellants to 'pick and choose' element of the decision.

5.3 Regulatory certainty

The importance of regulatory certainty is often raised in the context of encouraging and maximising investment in regulated businesses. Further it is important for all stakeholders that regulatory decisions can be brought to a point of finality as quickly as possible, whilst also ensuring the other aims outlined in this section are fulfilled.

In this context it is noted that it is not clear the extent to which merits review bodies have the capacity to consider questions of laws. For example in *TXU v. Office of the Regulator General & Or.s*, Justice Gillard considered the Appeal Panel did not have jurisdiction to entertain an appeal ground that raised a question of law.[86]

This position was elucidated by the High Court in *Craig v. South Australia* as follows:

> *At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. That point was made by Lord Diplock in In Re Racal Communications Ltd: 'Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so'.*[87]

Even where the legislature has authorised a tribunal to consider questions of law, it may still be reluctant to do so. Thus, for example, the Australian Competition Tribunal has expressed reluctance to concern itself with questions of law:

> *The ACT found that procedural fairness was not examinable in a s.39 review due to the limited grounds of review set out in that section and the restricted material which the ACT was entitled to consider (i.e. only the specified material which was before the decision-maker at the time*

[86] TXU Decision at para 42.
[87] Craig's case at 179.

> *the decision was made). The ACT further stated that the s.39 review is in respect of a specialist area by a specialist review body, and is not concerned with broad administrative law principles which focus not only on merits but on the process of the decision-maker under review, and judicial review for reasons of procedural fairness is expressly preserved in other parts of the GPAL: Application by Epic Energy South Australia Pty Ltd (Epic No 1) [2002] ACompT 4.* [88]

Further, in at least one instance, the Tribunal has erred where it sought to apply the law. In considering the appeal by the ACCC from the ACT's decision in relation to the Moomba to Sydney pipeline, the Federal Court found that, contrary to the position taken by the ACT, the ACCC did not make an error of law in its determination of the regulated value of the Moomba to Sydney pipeline. The Federal Court is yet to release its reasons however it is to be expected that they will provide an interesting perspective on the debate regarding the role of expert tribunals in relation to questions of law.

The MCE acknowledge that merits review cannot necessarily deliver finality:

> resort to tribunals generally will not finally resolve the issues because of the likelihood of appeals to courts on questions of law.[89]

5.4 Correct initial decisions/best decision possible

Supporters of merits review generally tend to indicate that merits review offers greater scope than judicial review to correct regulatory error. In the context of energy decision making, the potential costs to business of an error (given it subsists over a five year period) is highlighted to further underline the importance of correcting error.[90]

First, it is reiterated that the available evidence suggests that regulatory outcomes err in favour of the regulated entities.

Secondly, the word 'error' needs to be carefully considered in this context. Error tends to suggest that there is a clearly right and wrong answer or approach. As discussed above, however, in the case of complex economic decision-making, things are rarely that clear cut.

This is acknowledged by the MCE who state:

> *Economic regulatory decisions involve complex and by no means settled economic concepts, and expertise is thus a critical factor in providing for review of these decisions. Particularly where the nature of the review involves a consideration of the merits of the decision, the review body must have the skills, expertise and information available to*

[88] See for example MCE Discussion Paper at 38.
[89] See MCE Discussion Paper at para 6.49.
[90] See for example MCE Decision at 3.

> *ensure that the review outcome is a better one than the original decision- maker. An effective review regime pre-supposes that the reviewing body is sufficiently resourced and expert to add value to the decision-making of the AER and other relevant decision-makers.*[91]

THE MCE Discussion Paper goes on to note:

> *It is fair to say that a tribunal cannot usually match the expertise (or the resources) of the regulator making the original decision.*[92]

Thus the ability of a merits review process to establish the 'correct' facts must be questioned. In these circumstances it can be argued that judicial review, that will accept a decision provided there is cogent evidence to support it, is preferable, given the depths of inquiry undertaken by the original decision maker and his or her arguably greater expertise.

It is also suggested that the availability of merits review is likely to focus the decision-maker on the detail of the decision to be made thereby further supporting correct and consistent decision-making at first instance.[93] However, given the fact that to date appeals have been brought by regulated businesses in the overwhelming majority of cases, it can equally be argued that the availability of limited merits review (with all its potential for cherry picking as earlier discussed) may in fact cause the regulator to make decisions more favourable to the regulated businesses than he or she may otherwise make. As argued elsewhere, due to the resources and technical expertise required to bring an appeal or intervene, it is unlikely even with standing that consumer groups will participate effectively in merits review therefore these incentives are likely to remain unchanged.

Furthermore, a legislative framework that incorporates judicial review and detailed guidelines regarding the decision- making process will enable review of the basis of decision-making – in particular interpretation and application of the guidelines. It is suggested that permitting the review of the legal basis of decision-making but not inquiry into the facts as found properly balances the need for deference to the expertise of the original decision maker and the need for regulatory certainty against putting in place incentives for correct decision making and the availability of review where the decision maker has erred.

The incentive is further enhanced given that under a judicial review model the court will not substitute its own decision but remit the matter to the original decision maker. This point is recognised by the MCE who state in their Discussion Paper:

> *[Judicial review] will also enhance the AER's accountability.*

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[91] See MCE Discussion paper at para 6.33.
[92] See MCE Discussion Paper at para 6.49.
[93] See for example MCE Decision at 12.

First, the AER will be subject to the discipline of the specific requirements set out in the energy legislation. As noted, those requirements will set out key principles in relation to how the AER must exercise its economic regulatory functions, make explicit the basis for its decision-making and define the decision-making process.

Second, the principal difference between Model A [Limited merits review] and Model B [Judicial review] is that the Federal Court will not substitute its decision for that of the AER but rather will remit the matter to the AER (and, in doing so, the Court may be prepared in appropriate cases to give quite specific directions to the AER.) Review, whether judicial or merits, is an incentive to the decision-maker to make a correct initial decision. The incentive will be high if the decision-maker knows that the decision will be returned to it for remaking. In particular, any inclination on the part of the decision-maker to act in the expectation of having its decisions substituted by a review body will be avoided.[94]

Clear provision in legislation as to the basis of decision-making can also address concerns surrounding the centralisation of decision-making in the AER in future. It should be noted that the AER will also have the benefit of previous decisions by state based regulators to guide its thinking.

A final argument put forward in support of merits review is that it will help encourage investment by "promoting confidence that correct regulatory decisions will be made."[95] However the review model chosen is only one of a number of factors influencing investment decisions. Further, as discussed above, making clearer provision in legislation regarding the basis of decision-making is another way to achieve this goal.

5.5 Including stakeholder views

From a public interest perspective there are two key elements to achieving this outcome:

- Standing for organisations capable of representing the public interest; and
- Enabling participation by such groups by addressing other practical hurdles, in particular costs exposure.

Recommendations regarding standing are made in Section 3.3.2 above. Recommendations regarding the treatment of costs are made in Section 3.3.5.

[94] MCE Discussion Paper at 2.51 – 2.53
[95] See MCE Decision at 12.

5.6 Minimising gaming

As discussed in Section 3.3.3, a merits review process, particularly limited merits review, invites gaming by regulated businesses in a number of respects. Indeed such behavior is to an extent economically rational behavior by the businesses.

Of particular concern is the capacity to delay implementation of decisions, withhold information from the original decision-maker and to limit the scope of the appeal to only those aspects of the decision that do not favour the regulated business.

Concerns regarding delay and withholding information can be addressed to some extent by the legislative framework – in particular by providing that the original decision stands pending the outcome of any review and that the reviewing body should not consider new information where it has been withheld (without reasonable excuse) from the original decision maker.

Addressing concerns regarding cherry picking is more difficult. For the reasons outlined in Section 3.3.3, this report concludes that a limited merits review model cannot effectively address this issue.

In contrast, judicial review offers more limited grounds upon which review may be sought. Further, the nature of the grounds available, focusing as they do on legal correctness and process, are such that it will limit the ability of the regulated businesses to pick and choose elements of the decision.

5.7 Minimising delays and costs

Looking at the nature of representation retained by regulated businesses and other parties in merits review application to date it is likely that legal costs incurred in judicial review and merits review processes would be similar (though where merits review proceedings are followed by judicial review proceedings costs increase significantly).

Whatever cost model is chosen, ultimately the costs of the regulator and regulated businesses will be born by consumers of energy. Where the cost position will diverge however is in the costs that flow from appeal outcomes, in terms of changes to the revenue of the businesses.

Given the higher threshold of error required to succeed in a judicial review application it is likely that adjustment to revenue outcomes will be less frequent. It should be noted that any regulatory decisions that could be shown to have a significant negative impact on the viability of the regulated business are likely to be reviewable, particularly in view of the legislative requirement to have regard to the viability of the energy market.

Time limits are perhaps an area where a merits review process may be considered a better alternative than judicial review, however such a

presumption bears further analysis. Obviously an application to the relevant court for judicial review will be heard in the ordinary course of the court's business with the potential for delay (relative to merits review timeframes). It is noted however that the appeal by TXU from the ORG's 2001-2005 distribution price review, brought on 31 December 2000 was heard the Supreme Court of Victoria in 15 days over the period 3 March to 4 April 2001. Judgment was delivered on 17 May 2001.

The ESC Act imposes a timeframe of 30 business days with the option to extend for 15 business days.[96] The MCE Decision proposes a timeframe of 65 business days for the ACT to make a determination with the option to extend the time by periods of 20 business days.[97]

Options to extend timeframes have been utilised extensively in practice. By way of example, the MCE Discussion Paper notes that:

> *The Queensland Gas Pipeline appeal – which was confined to a single question of law– under the limited merits review of the gas access regime took approximately 6 months. The GasNet appeal (which covers a wider range of issues) took some 7 months to reach the hearing stage. The Moomba to Adelaide Pipeline System appeal took over a year to reach the same stage. As these substantial delays are in addition to the already extensive time taken for the original decision, there is the potential to create significant uncertainty about the basis for a regulation of a gas pipeline.*
>
> *If appeals were more limited to judicial review there would be a greater level of certainty around these decisions. All parties would be able to appeal to a 'one stop shop' for all their issues concerning the decisions which could be raised.*[98]

Thus the timeframes for merits review and judicial review in practice may be comparable.

6. Conclusion – which model should be preferred?

The analysis above illustrates that a judicial review model particularly where the scope of review is broadened by virtue of clear guidance in the relevant legislation is as effective or better than merits review in achieving the general objectives of a review framework.

Further a judicial review model is more effective in addressing the specific concerns that have arisen as a result of merits review processes in Victoria and the energy market more generally.

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[96] Section 56(4)(b) *Essential Services Act*.
[97] MCE Decision at 30.
[98] MCE Discussion Paper at 5.27-5.28.

In particular, this report concludes that a judicial review model supported by clear legislative parameters as outlined below ultimately better supports the objectives of:

- Good decision making
- Consumer participation
- Minimum necessary impact on cost of service
- Minimising the opportunity for gaming

Any review model chosen in relation to economic regulatory decision making should have real as well as theoretical capacity to maximise access to public interest organisations and to minimise the possibility of gaming by regulated entities to the ultimate cost of end use consumers.

Judicial review meets this threshold as it provides the greatest likelihood of participation by public interest organisations. It offers more limited grounds upon which review may be sought and the nature of the grounds available, focusing as they do on legal correctness and process, are such that it will limit the ability of the regulated businesses to game the process by picking and choosing elements of the decision. In addition, the issues canvassed in a judicial review application are more traditional ground for public interest organisations both in terms of issues relating to the process in respect of which the organisations are likely to be concerned and their experience in bringing appeals of this kind.

One issue that must be specifically addressed in the ESC Act regardless of the review model chosen is that of the standing of consumer and public interest organisations.

Thus, a judicial review model, together with amendments to the ESC Act to ensure standing to organisations representing the public interests and to provide guidance to the regulator in relation to decision making parameters and methodologies as is consistent with the framers' desired scope of review, should be preferred.

Recommendation: *That the ESC Act adopts a judicial review model for the review of economic regulatory decisions, together with amendments to the Act to ensure standing to organisations representing the public interests and to provide guidance to the regulator in relation to decision making parameters and methodologies as is consistent with the framers' desired scope of review.*

Appendix A Project brief and methodology

A1 Project brief

The Consumer Utilities Advocacy Centre (CUAC) is an independent consumer advocacy organisation, established to ensure the interests of Victorian consumers, especially low-income, disadvantaged, rural and regional and Indigenous consumers, are effectively represented in the policy and regulatory debate on electricity, gas and water.

By Tender documentation dated 17 February 2006, CUAC sought expressions of interest from:

> a small number of researchers, with expertise in administrative law and regulatory processes, to participate in a closed tendering process for research into the opportunity for, and structure of, regulatory appeal processes for the electricity distribution business. The primary task of the project is to analyse and assess whether, or how, appeal arrangements can ensure consumer standing in the process and enhance consumer outcomes through minimising the risk of 'gaming' by regulated monopolies.
> (the Project)

The Tender documentation goes on to further define the scope of the Project:

> to analyse the current arrangements in place in Victoria, research the extent to which it provides incentives for companies to game the system, and outline possible improvements based on lessons from other jurisdictions and/or markets.
>
> We envisage the project will comprise the following three broad components, with the emphasis on the second in the final report.
>
> **1)** Production of a critique of the current arrangements, using the appeals made to the Distribution Price Review Determination as a starting point. In developing that critique, the researcher must consult key Victorian stakeholders to elicit their views on and experience with the electricity distribution appeal processes.
>
> **2)** Using this critique, analyse the possible legal and procedural amendments that would enhance the outcomes for consumers, both in terms of standing in the appeal process and the final cost of the monopoly service. Drawing on the experience in other jurisdictions/markets this analysis should highlight options for improvements to the current arrangements. The research should cover the following key aspects of the appeal arrangements:

- The grounds for appeal and the opportunities for business to 'game' the system
    - Including the definition of 'factual error' and information to be considered by the appeal's body
- Incentives and disincentives for business to appeal
    - Such as costs attached to enter an appeal or costs reflecting the degree of success attained in the appeal
- The opportunity for consumer standing in the appeal process
    - such as formal rights to appeal/have their interests heard, capacity to participate and cost of/funds to participate (including funding bodies)
- An assessment of the benefits of a merit review versus a judicial review by a court
    - both in terms of minimising risk of 'gaming' and promoting consumer standing

3) Recommendation of amendments and/or solutions to the benefit of consumers having regard to:

- The future regulatory arrangements for distribution businesses within the National Energy Market, as regulation of electricity distribution will pass to the Australian Energy Regulator on 1 January 2007
- Opportunities to amend or strengthen the processes contained within the *Essential Services Commission Act,* which will be reviewed in 2006.
- Regulatory costs to consumers

The Tender documentation also specifically excludes certain matters from the scope of the Project:

- the development of a detailed appeal process arrangement (how ever, CUAC envisage that broad solutions will be examined and proposed)
- examination of the range of possible regulatory models and their impact on the effectiveness of appeal arrangements. Rather, the researcher(s) should assume that the building block approach, with all its implications for the appeal process and risk of 'gaming' behaviour, is the preferred model.

A2 Project methodology

The Project has been conducted in three stages – a research phase, a development phase and a writing phase.

Research phase

There were four key aspects to the research phase –

1. A review of relevant materials relating to the current Victorian process including relevant legislation, materials relating to the appeals from the 2001-2005 and 2006-2010 distribution price reviews and relevant commentary (including media reports).
2. A review of relevant case law – particularly relating to standing and de novo and merits review.
3. An examination of the review processes in place in other jurisdictions including NSW, SA, WA, the national market, UK, US and NZ.
4. Consultation with stakeholders including regulators, end user groups and consumer advocacy groups.

Development phase

This stage of the project involved consideration of the views and materials gathered in the research phase with a view to developing a critique of the current regulatory review model, with particular attention to:

- The grounds for appeal
- Procedural arrangements, including the basis on which a review of the regulator's decision is conducted –i.e. in whole or in part, de novo or on the merits, and the standing of other interested parties, particularly consumers to be heard as part of the process.
- Who may lodge an appeal?
- Outcomes for all parties, particularly consumers.

Each of the above factors was then considered in formulating an alternative model. The following additional factors were also considered:

- The cost/benefit equation for distribution businesses considering an appeal.
- Costs of the process.
- Impact on cost of service.
- The impact of the movement of distribution regulation to the Australian Energy Regulator in 2007.
- Whether energy markets are sufficiently unique to require a review model outside the general court system.

Writing phase

This stage of the project involved the drafting and finalisation of this report, which examines the current model, and present alternatives, including the rationale underlying the alternative proposed.

Appendix B About the authors

Catriona Lowe

Catriona is a lawyer by training with many years experience in relation to utilities advocacy, legal analysis and report research and writing. She has a detailed understanding of the Victorian utilities regulatory regime and has participated in regulatory consultation and drafting processes in relation to a range of instruments including the Electricity and Gas Retail Codes and the Distribution Code. She has also participated in distribution price review processes.

More recently, as Director – Consumer Liaison at the ACCC she has had the opportunity to review international regulatory regimes in a range of markets. She has also maintained and extended her network of contacts with regulators and consumer representatives.

A more detailed curriculum vitae is attached. As demonstrated by her CV, Catriona is committed to furthering the interests of consumers and in ensuring their views and interests are reflected in legal and policy processes.

Denis Nelthorpe

Denis Nelthorpe is a lawyer by training with 25 years experience as an advocate and policy advisor in consumer law. Denis has held leadership positions in a number of government funded and private consumer organizations including the Consumer Credit Legal Service, Consumer Law Centre Victoria, State Insurance Office Consumer Appeals Centre and the Consumer's Federation of Australia.

More recently he has participated in the regulatory processes of the state and national energy markets through positions such as the Board of the Energy and Water Industry Ombudsman and the National Advocacy Panel. He has acted as consultant on energy regulation to a range of organisations including Essential Services Commission Victoria, Energy and Water Industry Ombudsman Victoria, Victorian Department of Infrastructure, and community organisations including CUAC, CLCV and FCRC.

Denis has also had casework and policy experience dealing with legal issues such as amicus applications, standing, class action and representative proceedings and appeal rights for community organisations. A detailed CV for Denis is attached.

Appendix C Consultation Questions

Project to examine the Victorian regulatory appeals process

Consultation document

Part 1

Introduction

CUAC has supported a project to examine the process by which determinations of the Essential Services Commission are reviewed. Denis Nelthorpe and Catriona Lowe are undertaking the project.

The project will include:

5. A review of relevant materials relating to the current Victorian process including relevant legislation, materials relating to the appeals from the 2000 and 2005 distribution price reviews and relevant commentary (including media reports).
6. A review of relevant case law – particularly relating to standing and de novo and merits review.
7. An examination of the review processes in place in other jurisdictions including NSW, SA, WA, the national market, UK, EU and US and in other markets.
8. Consultation with stakeholders including regulators, end user groups and consumer advocacy groups.

A report will be produced that examines the current review model, and presents alternatives, including the rationale underlying the alternative/s proposed.

Existing appeal mechanism

The *Essential Services Commission Act 2001* sets out a right of appeal from determinations. The relevant section is extracted below.

Essential Services Commission Act - section 55

(1) A person who is aggrieved by-

…

(c) a determination of the Commission-

may appeal against the… determination in accordance with this section.

(2) The only ground for an appeal-

…

(c) under sub-section (1)(c) is that-

(i) there has been bias; or

(ii) the determination is based wholly or partly on an error of fact in a material respect.

The legislation provides that an Appeal Panel is to be established to hear the appeal. In turn, decisions of the Appeal Panel can be the subject of judicial review in the Supreme Court Victoria. This has occurred on one occasion. To date there have been two appeals under the predecessor to section 55 (Section 37 of the *Office of the Regulator General Act 1994*) and an appeal under the current provision. These appeals have identified or established a number of issues relating to the appeal mechanism. In particular:

- Where they have applied, consumer representative organisations have been denied standing to appear at the appeals as interested parties;
- The Appeal Panel can consider only those issues identified by the party/s bringing the appeal, not the determination as a whole (with the result that only those aspects of a determination that are unfavourable to the appellant are the subject of an appeal);
- Where an appeal is brought on the grounds of error of fact, the Appeal Panel is required to review a determination in a short period of time, and as noted above does not hear from all stakeholder groups. In contrast a determination is based upon detailed consideration of data provided by the distribution businesses and significant consultation with stakeholders over an extended period of time;
- It has been suggested that the current arrangements provide low-cost, risk free opportunities for distribution businesses to raise revenue at the cost of end-users (Victorian Minister for Energy Industries, *Australian Financial Review*, 9 January 2006);

Part 2

Issues for Discussion

Consumer participation

In what circumstances can you envisage consumer organisations may wish to appeal a regulatory determination?

What risks do you perceive in bringing an appeal?

Are there elements that would assist consumer organisations to bring an appeal?

Were you aware that appeals to date have not recognised the right of consumer representative organisations to appear as interested parties or parties affected by appeals undertaken by other parties? Any comments?

Grounds of appeal

Noting the points raised in Part 1, do you have any comments regarding the current grounds of appeal?

Gaming

Do you consider that the current appeal mechanism has/could encourage gaming by distribution businesses? Any examples?

Do you have any comments regarding the impact of the costs relating to an appeal on the incentives to game the process?[99]

Other issues

Do you have any comments regarding the impact of costs relating to an appeal on community organisations considering bringing an appeal?

Are there other issues regarding the current appeals process about which you have comments or concerns?

Additional question for NSW advocates

Please outline your experience of the process of appeal from IPART decisions with particular reference to the issues outlined in Part 1 and above.

[99] Note parties bear their own legal costs in relation to the Appeal Panel process. The usual rules apply regarding legal costs relating to judicial review in the Supreme Court – in general, the unsuccessful party pays the costs of the successful party.