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Members
Review Panel for Review of Limited Merits Review Regime
C/o Energy and Environment Division
Department of Resources, Energy and Tourism
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By post and email: LMR.Secretariat@ret.gov.au

Dear Panel Members

Review of the limited merits review regime in the National Electricity Law and the National Gas Law

The National Competition Council is constituted under Part IIA of the *Competition and Consumer Act 2010* (Cth) (CCA), and administers the general third party access regime for nationally significant services in Part IIIA of the CCA.

The Council also has a number of responsibilities under the National Gas Law (NGL); it makes pipeline classification decisions and decides applications for light regulation of covered pipelines. The Council also receives applications for coverage of pipelines, revocation of coverage and no-coverage determinations under the NGL. It considers such applications under the NGL and provides a recommendation to the decision-making Minister.

Coverage under the NGL is analogous to declaration under Part IIIA of the CCA. NGL coverage makes a pipeline service subject to the NGL third party access regime, while Part IIIA declaration makes a service subject to the national third party access regime. The criteria for coverage under the NGL are virtually identical to the criteria for declaration under Part IIIA. Indeed, case law interpreting coverage criteria is used to interpret cognate declaration criteria, and vice versa.

The administrative processes under the NGL (including those providing for review of various decisions) are also very similar to those under the national third party access regime. Given this commonality the Council thought it should draw your attention to its views on review arrangements under the national access regime and how these might relate to review arrangements under the NGL or the National Electricity Law (NEL).

In its Annual Report for 2010-11, the Council included a section 'The role of the Australian Competition Tribunal'. A copy of this section is annexed to this letter. In this, the Council expressed the view that the existing institutional arrangements for review of decisions by Ministers under Part IIIA of the CCA should be reconsidered. In the Council's view the current arrangements whereby the Competition Tribunal reconsiders a Minister's decision afresh introduces unnecessary delay and uncertainty into the declaration process. The Council considers that judicial review of Ministerial decisions by the Federal Court would be sufficient to ensure that decisions are made fairly and in accordance with the law and that merits review by the Tribunal is no longer appropriate for decisions under Part IIIA of the CCA. The Council considers that similar reasoning applies to reviews of at least some decisions under the NGL and possibly the NEL.

In reaching this view the Council has considered a range of possible criticisms of the proposition that judicial review of decisions relating to access is sufficient and that merits review is unnecessary. A number of these criticisms are repeated in a recent paper by Professor Allan Fels AO titled *The merits review provisions in the Australian Energy Laws*. We understand that this paper will form part of a submission to the Review Panel on behalf of the Energy Networks Association.

In the Council's view, the Fels paper mischaracterises the appropriate questions to be considered by the Review Panel, and promotes misunderstanding of aspects of the nature of judicial review.

Chapter 5 of the Fels paper discusses 'the role of judicial review'. The paper argues that it is not an 'option' to replace merits review with judicial review, and that judicial review will not provide an effective 'substitute' for merits review in 'correcting' the AER's 'errors' of fact.

In the Council's view, the key issue for the Review Panel is not whether or not judicial review is an adequate 'replacement' or 'alternative' for merits review. Rather, the question is whether the appropriate institutional arrangements for determining matters in the laws at issue require two rounds of fact finding and decision-making which essentially address the same issues.

The complex economic questions raised by Australian energy laws require factual determinations on which reasonable minds can differ. In this regard, the Administrative Review Council helpfully distinguishes between decisions that are 'correct' – in the sense that they are made according to the law; and 'preferable' – in the sense that, from a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.

The Council considers that a single layer of fact finding to determine whether decisions are 'preferable,' with judicial review to ensure such decisions are 'correct,' represents the optimum arrangement (and arguments to the contrary are unpersuasive), for the following reasons.

- Allowing parties who find a decision disagreeable to have it made again, regardless of whether any case for an error of law is apparent, adds no value to the process. It merely allows aggrieved parties to 'have a second bite of the cherry,' and for the Tribunal to substitute its preferences for those of a Minister (on the advice of the Council) or the AER.

- The resulting strong incentive for seeking merits review inevitably adds uncertainty and delay to the resolution of matters, in circumstances where Australian parliaments have expressed a strong preference for decisions under access regimes to be made in a timely fashion.

- The fact that the matters in issue are complicated, important to the economy and of commercial significance and consequence to stakeholders (Fels paper sections 4.3.1, 4.3.2 and 4.3.4) does not justify a second round of fact-finding and decision-making. There is no reason to expect that a Minister or the AER is any less able than the Tribunal to make preferable decisions, or that the Tribunal is any less susceptible to the difficulty of doing so. It may well be that the administrative processes adopted by the Council (in formulating its recommendations to Ministers) and AER are preferable to the adversarial, inter-partes, procedures of the Tribunal when determining which of a range of 'correct' decisions is 'preferable'.

In the Council's view the Fels paper mischaracterises the extent to which courts exercising judicial review can deal with factual matters. It is of course correct that judicial review is different from merits review in that the judicial reviewer does not re-make the relevant factual findings like on merits review. However, the ability of a court on judicial review to address factual findings is broader than the 'narrow circumstances' enumerated in the Fels' paper at paragraph 117.

The grounds upon which a person may seek judicial review under the *Administrative Decisions (Judicial Review) Act 1997* (ADJR Act), for example, are set out in ss 5(1)(a) – (j) of that Act and further elaborated in ss 5(2). In our view factual matters may be raised under a number of these grounds, not just the four listed in the Fels' paper.

In addition, Prof Fels' paper mischaracterises the *Wednesbury* unreasonableness ground (ADJR Act s 5(2)(g)) as 'narrow'. On the grounds of *Wednesbury* unreasonableness, courts exercising judicial review may reopen factual findings where there has been an obvious mistake or a factual finding goes beyond what a reasonable decision-maker, acting reasonably, could hold.

The key point for the Review Panel as regards the courts' ability to consider factual matters on judicial review is that in almost all cases where there has been a clear objective error of fact, the proof of which does not require further detailed analysis, courts exercising judicial review will almost always be able to correct that error under one of the established categories of judicial review. Similarly, where a decision falls outside a range of conclusions that might be drawn by a reasonable decision maker, a court is likely to be empowered to provide redress.

Where a purported error is of a type that requires further analysis of the factual matrix and/or the hearing of stakeholders to become apparent, it is more likely that the 'error' in question is a decision that one or more parties consider not to be the 'preferable' assessment of the facts. It is correct that such matters may not be reconsidered under judicial review. However, in the Council's view, that is a proper consequence of appropriate arrangements in which there is only one round of factual inquiry and decision-making and appropriate regard is given to the responsibilities and expertise of the primary decision-maker.

The Fels paper also argues that courts engaging in judicial review may only offer 'blunt' remedies, and asserts that 'where a legal error is established, a court cannot remake the decision but must quash the decision (or, in some circumstances, part of the decision) and remit the matter back to the primary decision-maker for reassessment' (Fels paper, paragraph 128).

In our view this is also an overly narrow characterisation of the powers of a court exercising judicial review. The remedial powers of a Federal Court under the ADJR Act are broad and flexible. For example, under s 16 of this Act, in addition to quashing the decision and/or remitting it for reconsideration under the law, a court may make an order directing the making of the decision (s 16(3)(a)), as well as:

(c) an order declaring the rights of the parties in respect of any matter to which the decision relates;

(d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

A court would only be likely to remit a judicially reviewed decision for reconsideration where judicial review found that further factual findings were necessary that would require the decision-maker to make new factual findings that required its expertise and/or further public consultation to ensure procedural fairness. This would be similar to the types of decisions that the Tribunal remits back to the AER under present arrangements.

I trust you will find these comments of assistance. If you would like to discuss any aspect of this letter further please call me. My direct number is (03) 9981 1602.

Yours sincerely

John Feil
Executive Director

Annexure 1: NCC 2010-11 Annual Report: Extract from President's review

The role of the Australian Competition Tribunal

1.1 Administrative decisions should be properly made and appropriate review mechanisms should ensure decision-makers, and those advising them, adopt fair and reasonable processes and make their decisions in accordance with the law. However, the role of the Tribunal in reviewing declaration decisions goes significantly further.

1.2 Under the CCA, the Tribunal stands in the shoes of the Minister and remakes his or her decision. A party seeking review by the Tribunal need not demonstrate any error on the part of the Minister in making his or her decision or on the part of the Council in making its recommendation. Further, while amendments were recently made to Part IIIA to limit new evidence being put to the Tribunal, it remains to be seen how effective these amendments will be in practice. Even if they are effective in reducing the amount of new material brought before the Tribunal (particularly information and arguments that were not, but could or should have been, provided to the Council and the Minister), in a *de novo* rehearing the Minister's decision may be overturned simply because the Tribunal came to a different view of the same facts considered by the Minister. This rehearing process has some adverse consequences. First, it encourages reviews. Parties seeking review have little to lose from having a second 'roll of the dice' in the hope that they will get a different result. Second, it encourages gaming and forum shopping and adds to uncertainty.

1.3 Having the Tribunal undertake the same enquiry as the Council and Minister, in a quasi-court setting, unnecessarily delays the determination of a declaration application. More fundamentally, bearing in mind that the assessment of an application for declaration against the criteria is inherently a matter of judgment and discretion, *de novo* rehearing by the Tribunal undermines the basis, as envisioned by the Hilmer Committee, for having declaration decisions made by an elected member of the Government acting on independent advice.

1.4 The Tribunal does not add value to the declaration process when it simply substitutes its own view of the facts to prevail over that of a Minister acting on comprehensive advice. Similarly the Tribunal adds little value when it reaches a different view of the proper legal construction of statutory provisions as it is not a judicial body. Questions of legal construction are properly matters for determination by a Court, rather than administrative decision-makers such as the Minister or the Tribunal.

1.5 It appears to the Council that, compared to conventional judicial review, the review role of the Tribunal is of little benefit while it significantly exacerbates cost, uncertainty and delay. The Council considers that judicial review by the Federal Court is a preferable form of oversight. It would ensure declaration decisions are made fairly and in accordance with the law without substituting for the judgement of a well advised and politically accountable ministerial decision-maker.

Judicial review also allows for the merits of a declaration decision to be reviewed where the decision-making Minister took into account matters that should not have been considered, or failed to take into account matters that should have been addressed and where the decision falls outside what might be concluded by a reasonable decision-maker. In the Council's opinion judicial review provides a more than adequate means of redress when a Minister's decision or the Council's advice is faulty in law, procedurally unfair or manifestly unreasonable.