ADMINISTRATIVE LAW MEETS THE REGULATORY AGENCIES: TOURNAMENT OF THE INCOMPATIBLE?

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Introduction

The focus of this paper is the interface between administrative law and decision-making by regulatory agencies across 2 broad areas. First, there is decision-making by the Australian Competition and Consumer Commission ('ACCC'), where it is concerned with the authorisation of contracts, arrangements or conduct which would otherwise breach Part IV of the Trade Practices Act 1975 (Cth) by reason of their anti-competitive purpose or effect. Second, the last 10 years in Australia has seen the corporatisation, followed by the privatisation, of many of the major utilities in the country, whether they be the supply and transmission of gas, electricity, water or essential transportation services like rail, shipping or airports. Coincident with the opening up of these activities to competition, there has been the passing of regulation which seeks to ensure that where the supplier has market power its behaviour, and in particular its pricing structure, should mirror what would pertain in a competitive market.

There are several broad themes which shall be identified and discussed in relation to decision-making across these two areas. The first theme, which will be given most attention, is that the available grounds and standards for review of such administrative decision-making vary widely, probably too widely, not only across different industries or instruments of regulation, but even within the one instrument. Linked with this, there are significant variations in the types of material, whether evidence or submission, which can be put before the relevant review body.

The second theme to be developed is that the statute or instrument which regulates decision-making by the administrative body regularly requires that body to address and make decisions against a series of incommensurable objectives, principles or standards, often in multiple layers. A body of administrative law is developing in relation to how the problem of incommensurability is to be solved.

A third broad theme is that both the administrative decision-makers and the bodies reviewing their decisions (whether they be Courts or superior Administrative Tribunals) have to grapple with the construction and application of statutes, codes or instruments which embody concepts which are derived from the field of regulatory economics.

The final theme of this paper is some practical suggestions as to how regulatory agencies grappling with these difficult questions, against the background of these varying administrative review processes, might better make their decisions.

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Varying Grounds of Review

(1) Trade Practices Act

Since the *Trade Practices Act 1975* was introduced in 1975, Part IV has proscribed certain contracts, arrangements or conduct which have a specified purpose or effect of lessening competition. However, the Trade Practices Commission, and more recently the ACCC, has had a power under s 88 of the *Trade Practices Act* to grant authorisation to contracts, arrangements or conduct which would otherwise breach the Act so as to exempt the relevant parties from a breach of the Act. Under s 90, the ACCC is not to grant authorisation unless it is satisfied that there is likely to be a benefit to the public which would outweigh the detriment to the public constituted by the lessening of competition in question. If a person is dissatisfied with the decision of the ACCC on an authorisation application, it may apply to the Australian Competition Tribunal ('ACT') for a review of the determination, which will be conducted as a rehearing of the matter: s 101. In these cases, the ACT will stand in the shoes of the ACCC. As a superior administrative body, the ACT will conduct a full merits review of the decision by the ACCC. As examples of cases in this area, the ACT reviewed (and overturned) the decision of the ACCC to authorise an arrangement between banks setting EFTPOS interchange fees at zero[1]; the ACT reviewed (and affirmed, subject to condition) the decision of the ACCC to authorise exclusive dealing arrangements whereby private in-patients in New South Wales public hospitals were restricted to receiving pathology services from public pathology providers[2]; and the ACT reviewed (and set aside) the decision of the ACCC not to authorise certain agreements between Qantas and Air New Zealand which provided for co-ordinated behaviour by the airlines in respect to all Air New Zealand operated flights and all Qantas flights to or from or within New Zealand; further the ACT proceeded to grant its own authorisation to these agreements[3]. When the ACCC makes decisions on authorisation applications under s 88 of the *Trade Practices Act*, it needs to accept that it may well be subject to full merits review by the ACT.

A separate part of the *Trade Practices Act*, Part IIIA, regulates access to services. Under s 44H, the designated minister may, if there is the necessary recommendation by the National Competition Council, declare a service provided he or she is satisfied of all of six specified matters. The provider may apply to the ACT for a review of such declaration, as may the original applicant where the decision is not to declare: s 44K. That section also empowers the ACT to reconsider the matter and exercise the same powers as the designated Minister. The ACT must act on the evidence led before it. If the parties choose not to lead evidence before the ACT, it cannot be satisfied of the six criteria in s 44H and it must set aside the Minister's determination[4]. As a good example where the ACT conducted a very extensive review, on the evidence before it, of the Minister's decision to declare a service (namely, cargo handling facilities at Sydney international airport) and upheld that decision, see *Re Sydney International Airport*[5].

Where there is a dispute concerning access by a third party to a service which has been declared, the ACCC has power to make determinations arbitrating the dispute: s 44V, and in doing so must take into account the matters specified in s 44X. The ACT has a power to review any decision by the ACCC on the access dispute on the basis of a re-arbitration of the dispute with the ACT having the same powers as the ACCC: s 44ZP. In this case also, the ACT sits as a superior administrative body with full powers of merits review.

(2) Gas Law and Code

Apart from the matters dealt with under the *Trade Practices Act*, the corporatisation and subsequent privatisation of utilities such as the gas, electricity and water industries has seen the conferral of administrative power on bodies to regulate the returns by service providers. In the gas industry, the *Gas Pipelines Access (South Australia) Act 1997* provides a model

for legislation across the Commonwealth. The schedules to that Act have been adopted by legislation in the various other states and are commonly referred to as the *Gas Law* and the *Gas Code*. Pursuant to the *Gas Law*, various gas pipelines across the country are either treated as 'covered' pursuant to the law itself, or covered by virtue of a decision of the relevant regulator. If a pipeline is covered, then the relevant regulator has the power to approve an appropriate access arrangement between the service provider and customers, or ultimately, in the absence of the submission of an acceptable access arrangement by the provider, to determine its own access arrangement. It is here that rather different grounds for administrative review come into play. Under s 38 of the *Gas Law*, if the decision is one on whether a relevant pipeline should be covered under the *Gas Code*, then the ACT has a full merits review role. This may be seen in the decision of *Re Duke Eastern Gas Pipeline Pty Limited*[6] where the ACT set aside a decision by the Minister that the Eastern Gas Pipeline between Bass Strait and Horsley Park, Sydney should be a covered pipeline under the law. This decision was made after a full merits review hearing.

On the other hand, under s 39 of the *Gas Law*, if the relevant regulator (such as the ACCC) makes a decision under the *Gas Code* to approve its own access arrangement instead of that submitted by the service provider, there is an appeal to the ACT, limited to grounds of error of fact or that the exercise of the discretion was incorrect or unreasonable having regard to the circumstances or the occasion for exercising the discretion did not arise. The applicant for review cannot raise matters not raised in submissions before the relevant regulator before the decision was made: s 39(2)(b). The ACT cannot receive fresh evidence on the review: s 39(5). This may be regarded as an intermediate merits review: it is not a full merits review as contemplated by s 38, but on the other hand the applicant is not restricted to traditional judicial review grounds.

As was said in *Re Epic Energy (South Australia) Pty Limited*[7], s 39(2) is not limited in its operation to decisions which are unreasonable in the sense of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*[8]. It is sufficient if the exercise of the relevant regulator's discretion is unreasonable having regard to the totality of the relevant circumstances. It is not an examination at large. One has regard to the relevant materials which were before the regulator and the particular circumstances relied upon by the applicant to establish the decision was unreasonable.

Thus far, I have referred to a full merits review available under s 38 of the *Gas Law* in respect to the decision on coverage and an intermediate merits review available under s 39 in respect to a decision by a regulator to approve its own access arrangement. Another possibility within the spectrum is demonstrated by the decision of the Full Court of the Supreme Court of Western Australia in *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited*[9]. In that case the relevant regulator had made a draft decision as to the initial capital base of a covered pipeline for the purpose of calculating the relevant tariff. There was no express appeal or review mechanism available at that stage. Instead, the disgruntled applicant sought judicial review from the Court of the administrative decision on the ground that it involved an error of law in the construction of the *Gas Code*. The applicant in this case was confined to judicial review grounds.

(3) Electricity Law and Code

In the context of the regulation of the National Electricity Market, one can again see different standards of review of administrative action being applied. The regulatory scheme involves again South Australia as the lead state. It passed the *National Electricity (South Australia) Act 1996* which includes the *National Electricity Law* as a schedule to the *Act*. The other participating states then passed legislation adopting the *National Electricity Law* within their own states. The *Law* establishes the National Electricity Code Administrator Limited ('NECA') which administers a code of conduct known as the *National Electricity Code*. The

initial *Electricity Code* is a document approved by the Ministers of the participating jurisdictions. It may be amended from time to time. Clause 2.8.2 of the *Electricity Code* provides that persons who register as participants in the electricity industry are bound to comply with the *Code*. The *Code* is enforceable in accordance with the *Law* but does not constitute a contract between Code participants unless they otherwise agree.

Section 9 of the *National Electricity (South Australia) Act 1996* establishes a body known as the National Electricity Tribunal. Under s 17 of the *Electricity Law*, the functions of the Tribunal include to review decisions by NECA under s 11 (ie decisions that a Code participant is required to pay NECA a civil penalty for breach of the *Code*) or decisions of NECA or the National Electricity Market Management Company Limited (NEMMCO) that are described as reviewable decisions under either the *Electricity Law* or the *Code*. Under s 41 of the *Electricity Law*, the Tribunal may exercise all the powers of the person who made the reviewable decision. It may affirm, vary or set aside the decision under review. For example, under Clause 2.9.2 of the *Electricity Code*, a decision by NEMMCO that an applicant is not qualified to be registered as a Code participant is specified to be a reviewable decision. The disappointed applicant is entitled to a merits review of that decision before the Tribunal.

A second form of review arises under the dispute resolution provisions within s 8.2 of the *Electricity Code*. Where a dispute arises between two or more Code participants about inter alia the application or interpretation of the Code, the parties are obliged to comply with the dispute resolution procedures in Clause 8.2. There is a role for an appointed dispute resolution advisor which includes, if earlier attempts to resolve the dispute fail, the reference of the dispute to a Dispute Resolution Panel ('DRP') for determination. The DRP is to observe the rules of natural justice but is not bound by the rules of evidence: clause 8.2.6C. The DRP has power to make determinations requiring parties to take specified action, refrain from taking specified action or pay a monetary amount to another party: clause 8.2.6D.

Thus, for example, under clause 2.11.1 NEMMCO has a duty to develop, review and publish a structure for participant fees in the market. That structure should, to the extent practicable, be consistent with a number of stated principles. That decision is not stated to be a reviewable decision, so that a disgruntled participant cannot go to the Tribunal. If NEMMCO misinterprets, misapplies or fails to apply a provision of the *Electricity Code* in making its determination of the structure of participant fee, that can give rise to a dispute about the application or interpretation of the *Code* within clause 8.2.1 and thus can be resolved by a DRP. However, in resolving that dispute the DRP has a limited role of determining whether the *Code* has been misinterpreted, misapplied or not applied. It does not have any power to redetermine the fee structure or to order NEMMCO to make any redetermination in conformity with clause 2.11.1 as interpreted by the DRP[10].

There are still further cases, where administrative decisions made under the *Code* are not reviewable decisions which can be taken to the Tribunal, and cannot be treated as disputes about the application or interpretation of the *Code* so as to be decided by a DRP. As a recent example in this area, the jurisdictional regulator of New South Wales, the Independent Pricing and Regulatory Tribunal ('IPART'), determined in June 2004 under clause 6.10.5 of the *Code* that the revenue requirement which the various distribution networks would be entitled to recover would be reduced from that which would otherwise obtain in order to ensure there was no price shock to consumers. There is no provision within the *Electricity Law* or the *Code* making this a reviewable decision to the Tribunal. Nor was there a provision in the statute governing the relevant regulator, IPART, giving a right of review. A DRP could not be constituted because the dispute with IPART was not a dispute with a Code participant. Thus, to have this decision reviewed would involve the disappointed party seeking a prerogative writ along the lines of *Re Michael*[11], or possibly an ordinary declaratory suit on the basis that IPART had not complied with the compact embodied in the *Electricity Code*.

To summarise at this point, this review of the relevant governing statutes and other regulatory instruments has identified that the grounds of review from administrative decision-making in competition matters vary markedly. The grounds can be either limited to traditional judicial review grounds, or involve an intermediate but limited merits appeal, or a full merits review. There can also be compulsory alternative dispute resolution which gives a form of review. In an attempt to establish forms of review of administrative action which are fair and appropriate in the interests of the various parties, who will usually, but not always, be the relevant service providers, a complex patchwork quilt has been established. It is not readily apparent that the quality of administrative decision-making by the regulators in question is aided by such disparate standards of review.

Incommensurable standards

I turn then to the second theme of this paper, which is that when administrative bodies like the ACCC are seeking faithfully to perform their function under the relevant statutes or governing instruments, they have often been charged with the task of reconciling a long list (or lists) of what are essentially incommensurable principles or objectives. The challenge arises because the governing instrument, rather than simply conferring a discretion on the regulator in broad terms, often now specifies a long list of considerations which the decision-maker may or must take into account. The considerations usually turn out to be conflicting and contradictory. How an administrative body deals with this challenge in a manner free from reviewable error is a difficult question. It provides fertile grounds for the challenge of administrative decision-making.

Where the challenge arises in a judicial review context, we know that if the regulator ignores any of the relevant factors or wrongly identifies the question it may fall into an error of law which can be corrected: *Minister for Immigration and Multicultural Affairs v Yusuf*[12]. Taking the relevant matters into consideration calls for more than simply adverting to them. The regulator must display an understanding of the relevant matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description that the matters have been taken into consideration: *Weal v Bathurst City Council.*[13] Judicial review would also be available if the manner in which the various considerations are identified and evaluated displayed irrationality, illogicality, or a failure to ground the decision in findings and inferences of fact supported by logical grounds: *Re Minister; Ex parte Applicant S 20/2002.*[14] However, these general principles, while undoubtedly correct, need further application where the problem of incommensurability arises.

Some examples of this problem may be now illustrated, by reference to the *Gas Code* provisions set out in the annexure to this paper. In *Re Michael*[15], the Western Australian Full Court was faced with the challenge, on a judicial review application, of dealing with a draft decision by the relevant regulator which would have allowed the service provider, Epic Energy, an initial capital base on its investment of approximately $1.234 billion for the purpose of calculating a reference tariff. This was only about half of the actual purchase price which Epic Energy had recently paid for the asset in question. If one had regard to most of the concepts defined in the directly relevant provisions of the *Gas Code*[16] and their economic underpinning, the initial capital base would properly have been confined to this amount of A$1.234 billion as it represented the efficient cost (in strict economic terms) of providing the service. There was, however, at least one factor in clause 8.10 – the price paid for any asset recently purchased by the service provider – which might indicate a higher capital base. In order to resolve this conflict between essentially incommensurable objectives within clause 8.10, the Full Court considered that weight, indeed fundamental weight, ought to be given to very general objectives established in s 2.24 of the *Gas Code* which included the legitimate business interests of the service provider. Thus, the technique for reconciling incommensurable standards in the specific provision[17] was to find some more

over-arching set of objectives in the preliminary provisions of the *Gas Code* which applied across the whole *Code*.

Interestingly, in the later decision of the ACT in *Re East Australian Pipeline Limited (EAPL),*[18] the ACT read down the decision in *Re Michael* as being one confined to its own facts and explicable by the need to give the *Code* a strained construction because the principles of judicial review of administrative action otherwise allowed only highly limited Court intervention. The approach taken in the *EAPL* decision, far from seeking some panacea to the reconciliation of incommensurable objectives through guiding objectives at the outset of the *Code*, is more a traditional black letter law construction of the provisions of the *Code* directly in issue to ascertain what guidance they may give. It is tolerably clear that the ACT had a fundamental difficulty with the approach taken by the Full Court of the Supreme Court of Western Australia in *Re Michael*.

In *EAPL*, the question, which arose on an intermediate merits review, was whether the ACCC had properly established an initial capital base for the pipeline between Moomba to Sydney for the purpose of the access arrangement. This raised a question under clause 8.10 of the *Gas Code*. The ACT took the view that clauses 8.10(a) – (d) required the ACCC to have regard to certain defined and well recognised asset valuation methodologies in determining an initial capital base. Although the ACCC was then permitted, and indeed required, to have regard to the other factors specified in clause 8.10(e) – (j) in coming up with its initial capital base, the ACT held that the ACCC was not permitted, as a matter of law, in that process to simply discard well recognised asset valuation methodologies and devise its own idiosyncratic or ad hoc methodology. This decision from the ACT, if it stands, and an application to the Federal Court for judicial review of it has been filed, provides an important lesson to the ACCC and other regulators in this area. They will be required to conform to a relatively black letter law interpretation of the governing statute, and to have regard to long established principles of common law, such as in the area of valuation of assets, rather than devising ad hoc solutions which justify particular pricing outcomes otherwise thought desirable for consumers.

Another case which illustrates the difficulties which arise in this area is *GasNet Australia (Operations) Pty Limited*[19]. In that case, again an intermediate merits review, the ACT was called upon to review under s 39 of the *Gas Law* an access arrangement approved by the ACCC in respect to the gas pipeline in Victoria. The decision of the ACCC was largely overturned. One of the important points made by the ACT was that the application of the reference tariff principles in the *Gas Code* involves issues of judgment and degree upon which reasonable minds could differ. Where those principles produce a tension, the relevant regulator has an overriding discretion to resolve the tensions in a way which best reflects the statutory objectives. However, where there are no conflicts or tensions in the application of those principles, and where the access arrangement proposed by the service provider falls within the range of choice reasonably open and consistent with those principles, it is beyond the power of the relevant regulator not to approve the proposed access arrangement because the regulator prefers a different access arrangement[20]. This decision highlights a critical question for a regulator like the ACCC: does the particular provision of the statute or instrument in question require and entitle it to make a choice between available alternatives; or, on the other hand, is the only question for it whether the choice made by the service provider was one within the available range?

The specific manner in which the issue arose in *GasNet* was that the service provider chose, as it was entitled, the cost of service approach under clause 8.4 of the *Code* as the methodology to establish the revenue to be generated from sales of all services over the period of the access arrangement. The cost of service approach required it to establish a rate of return on the value of the capital assets which formed the covered pipeline. In turn, clause 8.30 provided that the rate of return used was to be commensurate with prevailing

conditions in the market for funds and the risk involved. Under clause 8.31, the return could be determined on the basis of a well accepted financial model such as the capital asset pricing model ('CAPM'). Once the provider had chosen the CAPM model and proffered a particular rate of return, in this case based on Commonwealth bonds with a 10 year maturity (the longest life bonds available), the only question for the ACCC was whether this was a conventional application of the CAPM model. Assuming it was, it was not open to the ACCC to say that it preferred some other rate of return (namely the use of 5 year bonds) because it considered that this would allow a better balance between the general objectives set out in clause 8.1 of the *Code*.

As in the *EAPL* decision, an error which the ACT found in the decision of the ACCC was that the ACCC did not answer the question posed by the specific provisions of the *Code* in question, but rather illegitimately sought refuge in more general objectives earlier in the *Code*. In doing so the ACCC asserted that it was given a more general discretion than was in fact the case.

It should be mentioned that similar problems of incommensurability and layered objectives arise under the *Electricity Code*. For example, under clause 6.10.5(d), when the regulator sets a regulatory cap for a particular network owner, it must take into account the owner's revenue requirements for the control period having regard to 11 specified matters. They include such incommensurable factors as expected demand growth, price stability, a fair and reasonable risk adjusted cash flow rate of return on efficient investment and ongoing commercial viability of the distribution industry. If this list of competing objectives does not of itself give the regulator a headache there is then the more general series of objectives in clause 6.10.3. That provides that the regime for regulation of revenues of owners is to be administered by the regulator in accordance with five principles, the fifth of which has within it multiple sub-principles. This list of objectives includes providing owners with incentives and opportunities to increase efficiency, providing fair and reasonable risk adjusted cash flow rates of return to owners on efficient investment, providing reasonable certainty and consistency over time of the outcome of regulatory processes, balancing the interests of users and owners and consistency with previous regulatory decisions.

At a higher level still there are key principles and core objectives of network pricing set out in clause 6.1.1 which include promoting competition, facilitating a transparent and stable and non-discriminatory commercial environment, seeking to replicate the outcomes of a competitive market, efficiency, price stability and equity.

Finally, at the highest level of generality, there are *Code* objectives in clause 1.4 which include that the regime should be a light handed regulation of the market to achieve market objectives, which include competition and choice for customers.

Meaning and proof of economic concepts

This discussion leads to a third broad theme, and one identified by Professor Robin Creyke in 'Current and Future Challenges in Judicial Review Jurisdiction: a Comment'[21], namely the correct way to ascertain the meaning of economic terms in the construction of relevant statutes and instruments in the competition regulation area and the use of expert evidence in this task. The decision in *Re Michael*[22] confirms that it is permissible for a Court on a judicial review application, and presumably for the administrative decision-making body itself, to take into account expert evidence from economists as to the meaning which particular terms used in the instrument may bear within the profession[23]. Nevertheless, it remains a matter of law whether any particular meaning established by economists is the meaning intended in the instrument in question. In *Re Michael*, the court was ultimately unpersuaded that critical terms used in the *Gas Code* like 'efficient costs' in clause 8.1(a) had an established meaning even within the profession of economists at the date the *Code* came into force. This allowed

the court to adopt an ultimate meaning of the relevant terms which was more flexible than a meaning which might have been held by economists[24].

Another aspect of this issue arose in *Re East Australia Pipeline Limited*[25]. In determining the initial capital base for the covered pipeline between Moomba and Sydney, one of the relevant questions in clause 8.10(b) of the *Code* was the meaning to be given to the expression 'depreciated optimised replacement cost' (DORC). This expression was recorded in parenthesis in the *Code*, suggesting that it had an accepted meaning within the profession. The evidence in this case demonstrated that the concept of DORC was, in fact, of relatively recent origin; within its relatively short history, it originally had been applied by using straight line depreciation, but there was recent discussion by certain economists and some regulatory bodies to suggest that the form of depreciation which better complied with the underlying principle of DORC was one based on net present value. Interestingly, the ACT held[26] that the theoretical underpinnings of DORC had progressed over the years to the point where it should now be recognised that an NPV approach would give the most reliable result. Straight line depreciation was rejected. This is an example where expert evidence as to developing concepts within the profession of regulatory economics, even post dating the instrument, is held to inform the relevant instrument.

The way forward

Finally, this paper turns briefly to some practical suggestions for decision-making by regulators, such as the ACCC, in these areas bedevilled by administrative law review. The first suggestion is one really for the legislators: asking bodies like the ACCC to perform the function of investigator, prosecutor and administrative decision-maker subject to review ranging from pure judicial review, intermediate merits review through to full merits review is really asking too much. No one body can perform such heterogeneous functions successfully. Philosophically and practically, the mindset needed to perform such functions differs. If the ACCC is to be left with such multifarious functions, the task of organising different units within the ACCC to perform such different functions is a heavy one.

As a related point, if the ACCC is to be left with strong administrative functions, but subject to careful oversight by either the ACT or the courts based on widely varying standards of review, its administrative decision-making process needs to conform to an exacting and transparent standard. Its reasoning may be subject to review either by traditional courts on judicial review grounds, or by the ACT (which includes a Federal Court Judge together with a qualified economist and business person) on varying standards. The nature and quality of its administrative decision-making needs to resemble that of the judgment of a superior court. Where facts need to be found, the reasoning process needs to be exposed as would be done by a superior court Judge. Where concepts of regulatory economics are involved, the competing expert evidence, and the ultimate decision-making needs, to be of a highly sophisticated and impartial level. Where discretions arise, it is important to identify whether the discretion resides in the ACCC or in the service provider. Where incommensurable standards are to be balanced, and there are layer upon layer of statutory objectives, the reasoning process needs to be carefully exposed. Crude notions that a result which achieves a lower tariff for customers is always to be preferred need to be avoided as they will be readily exposed as the product of error.

Second, a particular problem in this area arises from the question identified by Robin Creyke as to the stage at which administrative challenge is available. If a draft decision is to be the subject of detailed judicial review, as in *Re Michael*[27], that would seem to call forth an even higher and more cautious standard of conduct by the regulator before the draft decision is made. The price paid for this is that the decision-maker's views need to be more set in stone at this time, even though it is only supposed to be a draft. The same problem emerged in a different guise in *Re East Australia Pipeline Limited*[28]. The draft decision there identified a

relatively low initial capital base which the ACCC then sought to hold onto in the final decision, notwithstanding circumstances had changed, by using a different form of reasoning and one which had little support in the instrument or in established valuation practice[29]. The ACT clearly had grave concerns as to whether the ACCC was reasoning in its final decision to a pre-determined result, namely the result determined in the draft decision[30]. A lesson for administrative decision-makers in this area is that there needs to be a genuine openness to submissions received in response to the draft decision and a very real possibility that the ultimate result may differ significantly. Otherwise the review body, whatever standard it be applying, may well find error.

Finally, we are seeing a transitional period in which regulators like the ACCC have been given immense power to make administrative decisions which have huge commercial consequences. Ten years ago, the relevant state governments, through their monopoly powers, and without any great transparency, simply made whatever decisions they thought fit. Now those decisions are made by a corporatised or privatised body but subject to the power of a regulator like the ACCC. There is a period required in which regulators will learn what is required of them. In that period they may fall foul, even often, of review by superior administrative bodies or courts. The process is a learning one. Ultimately the aim should be that the strike rate for successful appeals or reviews is low. The ACCC should not be criticised because at present it has lost a number of large cases. Nor should the ACT, or the courts, be criticised for regularly finding error in the ACCC's decisions. This process will work itself out over time.

Annexure

Relevant provisions of the Gas Code concerning the setting of the initial capital base

Directly relevant provisions:

Clauses 8.10 and 8.11

8.10 When a Reference Tariff is first proposed for a Reference Service provided by a Covered Pipeline that was in existence at the commencement of the Code, the following factors should be considered in establishing the initial Capital Base for that Pipeline:

(a) the value that would result from taking the actual capital cost of the Covered Pipeline and subtracting the accumulated depreciation for those assets charged to Users (or thought to have been charged to Users) prior to the commencement of the Code;

(b) the value that would result from applying the **"depreciated optimised replacement cost"** methodology in valuing the Covered Pipeline;

(c) the value that would result from applying other well recognised asset valuation methodologies in valuing the Covered Pipeline;

(d) the advantages and disadvantages of each valuation methodology applied under paragraphs (a), (b) and (c);

(e) international best practice of Pipelines in comparable situations and the impact on the international competitiveness of energy consuming industries;

(f) the basis on which Tariffs have been (or appear to have been) set in the past, the economic depreciation of the Covered Pipeline, and the historical returns to the Service Provider from the Covered Pipeline;

(g) the reasonable expectations of persons under the regulatory regime that applied to the Pipeline prior to the commencement of the Code;

(h) the impact on the economically efficient utilisation of gas resources;

(i) the comparability with the cost structure of new Pipelines that may compete with the Pipeline in question (for example, a Pipeline that may by-pass some or all of the Pipeline in question);
(j) the price paid for any asset recently purchased by the Service Provider and the circumstances of that purchase; and
(k) any other factors the Relevant Regulator considers relevant.

8.11 The initial Capital Base for Covered Pipelines that were in existence at the commencement of the Code normally should not fall outside the range of values determined under paragraphs (a) and (b) of section 8.10.

More general provisions:

Clause 8.1
A Reference Tariff and Reference Tariff Policy should be designed with a view to achieving the following objectives:

(a) providing the Service Provider with the opportunity to earn a stream of revenue that recovers the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering that Service;
(b) replicating the outcome of a competitive market;
(c) ensuring the safe and reliable operation of the Pipeline;
(d) not distorting investment decisions in Pipeline transportation systems or in upstream and downstream industries;
(e) efficiency in the level and structure of the Reference Tariff; and
(f) providing an incentive to the Service Provider to reduce costs and to develop the market for Reference and other Services.

To the extent that any of these objectives conflict in their application to a particular Reference Tariff determination, the Relevant Regulator may determine the manner in which they can best be reconciled or which of them should prevail.

Clause 2.24
The Relevant Regulator may approve a proposed Access Arrangement only if it is satisfied the proposed Access Arrangement contains the elements and satisfies the principles set out in sections 3.1 to 3.20. The Relevant Regulator must not refuse to approve a proposed Access Arrangement solely for the reason that the proposed Access Arrangement does not address a matter that sections 3.1 to 3.20 do not require an Access Arrangement to address. In assessing a proposed Access Arrangement, the Relevant Regulator must take the following into account:

(a) the Service Provider's legitimate business interests and investment in the
(b) firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline;
(c) the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline;
(d) the economically efficient operation of the Covered Pipeline;
(e) the public interest, including the public interest in having competition in markets (whether or not in Australia);
(f) the interests of Users and Prospective Users;
(g) any other matters that the Relevant Regulator considers are relevant.

Endnotes

1 *Re EFTPOS Interchange Fees Agreement* [2004] A Comp T 7 (25 May 2004).
2 *Re Australian Association of Pathology Practices Incorporated* [2004] A Comp T 4 (8 April 2004).
3 *Re Qantas Airways Limited* [2004] A Comp T 9 (12 October 2004).
4 *Re Asia Pacific Transport Pty Ltd* [2003] A Comp T 1.
5 [2000] A Comp T 1.
6 [2001] A Comp T 2.
7 [2003] A Comp T 5 at [9] – [16].
8 [1948] 1 KB 223 at 223 – 234.
9 (2002) 25 WAR 511.
10 See decision by DRP comprising Sir Anthony Mason, Hon John Clarke QC and Professor Allars given on 23 May 2002 in the *National Electricity Code Participants fee dispute.*
11 Above note 9.
12 (2001) 206 CLR 323 at [82].
13 (2000) 111 LGERA 181 at [13] and [80].
14 (2003) 198 ALR 59 at [5] and [34].
15 Above note 9.
16 ie clauses 8.10 and 8.11.
17 Clause 8.10.
18 [2004] A Comp T 8 (8 July 2004), at [20].
19 [2003] A Comp T 6 (23 December 2003).
20 Ibid at [29].
21 (2003) 37 *AIAL Forum* 42.
22 Above note 9.
23 Ibid at [107].
24 Ibid at [137]-[142].
25 [2004] A Comp T 8.
26 Ibid at [38].
27 Above note 9.
28 Above note 25.
29 Ibid at [28].
30 Ibid at [32] and [33].