ACCC — AER REGULATORY CONFERENCE 2018

After Merits Review – Collaboration or Expanded Judicial Review?

Outline

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A BEGINNING AT THE END

1. *The end is where we start from*, and what has ended is limited merits review of regulatory decisions of the Australian Energy Regulator (AER) by the Australian Competition Tribunal.[1] That was abolished by the *Consumer Amendment (Abolition of Limited Merits Review) Act 2017* (Cth). The rather final words of s 44AIA have been inserted into the *Competition and Consumer Act 2010* (Cth). That section provides that a decision of the AER under a State or Territory energy law or local energy instrument is not to be subject to merits review (however described) by a body established under a law of a State or Territory. Those amendments completed the movement away from full merits review, once found, e.g., under s 38 of the *National Gas Law*, to limited merits review, to review only on the basis of legality.

2. What has begun, but what was always already there, is judicial review of decisions of the AER, to the Federal Court, pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and s 39B of the *Judiciary Act 1903* (Cth). That jurisdiction differs now only in that it is the sole mode of review available.

3. Three issues arise for consideration:

    a. what is the appropriate role for judges as the only reviewer of regulatory decisions (and, in particular, of complex economic regulatory decisions)?

[1] The scaffolding of this talk is T. S. Eliot's *Little Gidding*, the last of his *Four Quartets* and a poem about ends and beginnings and the changes each brings. Phrases drawn from the poem are italicised in the text.

b. how might regulators and regulated businesses change their behaviour in the absence of merits review?

c. what other changes might occur?

B THE ROLE OF THE JUDGE

4. Questions as to the role of the Judge in judicial review proceedings in the Federal Court are circumscribed by two fundamental notions: (a) the role of the Judge under Chapter III of the *Commonwealth Constitution* and (b) the role of the judge in judicial review proceedings.

5. As to the *first*, while "judicial power" defies "purely abstract conceptual analysis",[2] it describes the power of a sovereign authority "to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property".[3] The nature of the judicial function involves the determination of a question of legal right or legal obligation by the application of law as ascertained to facts as found "so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons".[4] The process by which the function is performed involves, subject to appropriate exceptions, an open and public inquiry,[5] in accordance with the rules of procedural fairness.[6]

6. As to the *second*, judicial review "is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from

[2] *R v Trade Practices* Tribunal*; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 (Windeyer J) and 374-375 (Kitto J).
[3] *Huddart, Parker & Co. Pty. Ltd. v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).
[4] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (Kitto J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[5] *Russell v Russell* (1976) 134 CLR 495 at 505 (Barwick CJ), 520 (Gibbs J) and 532 (Stephen J).
[6] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at [27] (French CJ and Gageler J); *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [156] (Hayne, Crennan, Kiefel and Bell JJ).

exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."[7]

7. In 2000, Justice John von Doussa, described the role of the Federal Court in developing the grounds of judicial review that had been codified by statute in the 1970s as being:

> …to develop coherent and explicable legal principles which provide administrators, the public, and their legal advisers, with clear guidelines whilst at the same time retaining sufficient flexibility to allow an appropriate balance between the public and private aspects of the public interest in the infinite variety of circumstances that come before the courts.[8]

8. There is a more specific question. Do any difficulties arise where judicial review takes as its subject matter complex economic decisions of an administrative regulator? Put differently, will the judges now be called upon to perform *a double part*, that involves both legal and technical expertise, and does this risk stepping outside the boundaries of the judicial discipline? That final notion is drawn from a discussion, in 2008, by the Hon Murray Gleeson QC AC, of the role of the judge, where he observed:

> Since deciding what courts ought to do is bound up with an opinion as to what they do well, and what they are unlikely to do well, the strengths and weaknesses of the judicial method are an obvious focus of examination. One area of debate concerns what is sometimes called policy. Judicial oversight of executive policy is a sensitive topic; but the role of the judiciary in formulating or applying policy is a matter that has implications extending beyond judicial review of administrative decisions… As the common law develops, responding to changing needs, or appropriate pressure for rationalisation, the judges (usually of appellate courts) who have the responsibility for such development inevitably consider the wisdom or expediency of existing laws and proposed change. They do so, however, within the boundaries

[7] *Church of Scientology v Woodward* (1982) 154 CLR 25 t 70 (Brennan J).
[8] Justice John von Doussa 'Natural Justice in Federal Administrative Law', Australian Institute of Administrative Law, Darwin, 7 July 2000, 3.

> of their own discipline. This point is often overlooked by some who are enthusiasts for judicial policy-making, and by others who distrust it.[9]

9. If and when reviews are brought, the judges of the Federal Court are likely to confront arguments of economic and technical sophistication, without the benefit of those arguments having already been filtered through the panel expertise of the Tribunal. The Full Federal Court, of course, has already found itself in complex terrain in considering appeals from the Tribunal — the economics of individual wagers in *ACCC v ACT* (2017) 350 ALR 453, at [84] (Besanko, Perram and Robertson JJ) and a thicket of issues, including bushfire capex, forecast labour escalators, gamma and debt, in *SA Power Networks v Australian Competition Tribunal (No 2)* [2018] FCAFC 3.

10. It is important to recall that the kinds of judicial expertise, while excluding policy, include the resolution of disputes involving interdisciplinary reasoning. Legal sources often explicitly direct legal reasoning towards exogenous, non-legal considerations.[10] These reasons are drawn from various domains of social value, including scientific, mathematical, economic, philosophical, psychological or moral propositions. That is both a reality and a virtue of legal reasoning, and informs the structure of that reasoning. Mark Van Hoeke has observed:

> Generally speaking, we can state that each legal argument contains three components: deductive reasoning, inductive reasoning and value thinking. With the *deductive* part of reasoning one reaches a legal solution by a logical deduction, starting from legal premises. With the *inductive* part of reasoning one starts from concrete facts and from desired results to reach general rulers, a hierarchy of principles, etc. Finally, *value thinking* is also inevitable in legal reasoning. Even the

[9] The Hon Murray Gleeson AC QC, "The role of a judge in a representative democracy" 4 January 2008
[10] See, most obviously, s 4E *of the Competition and Consumer Act 2010* (Cth), which invokes the economic concepts of "substitutable for or otherwise competitive with" in defining the legal concept of a market.

> choice of premises (in deductive reasoning) and the choice of the facts and values considered to be relevant (in inductive reasoning) are themselves value-laden.[11]

11. The Federal Court frequently resolves complex economic, financial and other technical issues in competition law and taxation applications. Consider the impressively extensive disposition by Robertson J of the matters raised in the Chevron transfer pricing case (*Chevron Australia Holdings Ltd v Commissioner of Taxation (No 4)* (2015) 102 ATR 13); a decision later upheld by the Full Federal Court. The judges have never inhabited *a condition of complete simplicity*. Nor will they in any regulatory judicial review proceedings. But they will have the interdisciplinary legal expertise to resolve them.

12. And it will remain the case that Courts can receive evidence as to the meaning of terms of art, including economic terms of art.[12] That evidence may already have been provided to the AER during the regulatory process, but could be supplemented if necessary. Those economic terms must be construed within, and subject to, the legislation in question. In that context, courts will confront consideration of a series of, often incommensurable, principles or objectives, sitting under the umbrella of the national gas and electricity objectives, and will be required to reconcile the possible contradictions among them having regard to the subject-matter, scope and purpose of the legislation.[13] The complexity of that task should not be understated, but it is a familiar enough one for the Federal Court.[14]

13. What will remain impermissible and beyond the judicial role is intervention on the basis of policy, beyond the policy disclosed by the legislation itself. As the Court of Appeal of England observed in *R (G) v Immigration Appeal Tribunal* [2005] 1 WLR 1445 at [20]: "The

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[11] Mark Van Hoeke, *Law as Communication* (Oxford and Portland, Oregon: Hart Publishing, 2002) p. 125.
[12] *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397; *Australian Lighting and Hardware Pty Ltd v (Falkner) Brightlight Nominees Pty Ltd* [1994] 1 VR 553; *Marine Power Australia Pty Ltd v Comptroller-General of Customs* (1989) 89 ALR 561 at 572; *General Accident Fire & Life Assurance Corporation Ltd v Commissioner of Pay-roll Tax* (NSW) [1982] 2 NSWLR.
[13] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).
[14] See *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at [144] (Parker CJ): "How best to determine the efficient level of costs or the outcome of a competitive market are matters of economic theory and practice which, on the evidence, are in the course of constant revision, development and refinement."

satisfactory operation of the separation of powers requires that the Parliament should leave the judges free to perform their role of maintaining the rule of law but also that, in performing that role, the judges should, so far as consistent with the rule of law, have regard to legislative policy." Gaudron J spoke to similar effect in *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157, [56].[15]

C CHANGES IN BEHAVIOUR OF REGULATORS AND REGULATED BUSINESSES

(1) Submission of regulatory and revised proposals

14. The *content* of the regulatory process for businesses making, and the AER considering, regulatory proposals is unchanged. The *context* of that process is unavoidably altered by the means of redress available in respect of adverse decisions.

15. As a result, the only immediately likely change to the interaction between regulator and regulated entity is one directed to the content of the proposals, and the economic, accounting and other expert materials supporting them, given the nature of review ultimately available. It is likely that, in framing proposals and supporting materials, distribution businesses will have squarely in mind the rubric of the grounds of review ultimately available. But it is important to remember that they always did: applications for merits review were routinely accompanied by applications for judicial review.

16. Within this initial interaction, however, it can be expected that little else will change. In my experience as Counsel acting for applicants in merits review proceedings, energy businesses genuinely seek to persuade the AER at the submission stage of the correctness of their position. They advance materials they believe can and will be accepted. They appreciate that they have a continuing and crucial relationship with the regulator. They are willing to drop certain matters between the draft and final decision stages. They are, rationally enough, keen to avoid the cost, uncertainty, diversion of

[15] See, generally, K Stern SC, "The Rationale for the Grant of Relief by Way of Judicial Review and Potential Areas for Future Development" in N Williams (ed) *Key Issues in Judicial Review* (Federation Press, 2014) at pp. 194-215

business resources and inevitable delay, that accompany litigation. Indeed, the need to avoid these distractions is perhaps especially acute in respect of energy businesses; which operate in politically sensitive and profoundly dynamic markets, with little room for *old factions* or *old policies*.

17. Nor, at this stage of the process, should the AER be inclined to adopt a more robust approach in the decisions it takes than was previously the case. It has a delineated statutory and regulatory role, the content of which has not changed, and the exercise of which should not change, due merely to exogenous changes to the statutory review mechanisms. Further, as in any judicial review adjudication, the Court will take into account that the Parliament's selected decision-maker is a Commonwealth agency, and not the Minister, with the result that narrower policy considerations can be taken into account.[16]

18. Separately, there are aspects of the exercise of economic regulatory decision-making that confine the creativity of regulators. In an article published some decades ago, Judge Patricia Wald, of the United States Court of Appeals for the District of Columbia Circuit, said this about judicial review of economic analyses:

> Most economic analyses are designed to make predictions about the future; thus, there is no direct way to test their validity. But once a regulatory scheme has been in place for a few years, one can often evaluate it and determine whether the earlier predictions were borne out. If the agency then wants to rely on the same economic predictions in a similar situation, a court may be able to insist that the agency first inquire, for the record, into the success or failure of the predictions in the past. [17]

[16] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42 (Brennan J).
[17] PM Wald, "Judicial Review of Economic Analysis" (1983) 1(1) *Yale Journal of Regulation* 43, at 56. See also, S Breyer, "Economic Reasoning and Judicial Review" *The Economic Journal*, Vol. 119, No. 535, Features (Feb., 2009), pp. F123-F135

19. The presentation of argument imposes a discipline of coherence. Further, it can be anticipated that the Court will be astute to the possibility that either the regulator or the regulated entity is engaging in regulatory gaming.

20. However, the AER can be expected, in making its decisions, to have one eye cast towards the rubric of the grounds of challenge under judicial review. It will be careful to take into account all relevant matters. It will avoid taking irrelevant matters into account. It will eschew decisions so unreasonable that no reasonable decision maker would make them. But again, one must assume, it has always been guided by these principles. It is not the case that *last year's words belong to last year's language, and next year's words await another voice*. This year's language will be much like last year's language.

21. One possible change arises from the combination of judicial review being the only available mode of review and the availability of judicial review of *draft* decisions under s 6(1) of the ADJR Act. That Act innovates on the common law in its intertemporal operation: attaching to decisions that have yet to be made, are in the process of being made and that have been finally made. A draft decision may be challenged where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply for judicial review thereof.[18] This, of course, is what occurred in *Re Michael* (2002) 25 WAR 511.

22. The prospects of such review being brought are perhaps not high. The grant of relief in judicial review is always, ultimately, discretionary and a Court may be more inclined against the exercise of that discretion in respect of preliminary conduct as opposed to a final decision. However, the possibility of such review is apt to produce both more cautious, and carefully reasoned, initial decisions and to encourage greater consistency between

[18] Section 3(5) of the ADJR Act suggests that acts done preparatory to the making of a "decision" are not to be regarded as constituting "decisions" for, if they were, there would be little, if any, point in providing for judicial review of "conduct" as well as of a "decision": *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, at [30].

the draft and a final decision.[19] That may, to some extent, inhibit or defeat the important discursive potential of publishing a draft decision before a final decision. While regulated entities have always had the ability to challenge preliminary conduct by way of judicial review, the incentive to do so was radically affected by the availability of limited merits review: in part for the discretionary reasons already mentioned and in larger part because a more capacious form of review awaited after the final decision.

(2) Seeking review

23. At the stage of review of the AER's decision-making, what has been lost is limited merits review. *De novo* review has not, for some time, been available. The matters that could be raised by parties were circumscribed, under the National Electricity Law, by s 71O, and those to be considered by the Tribunal by s 71R. So too the grounds for review were limited: s 71C. Overarching the review was the guiding concept of the national electricity objective (s 7), and, latterly, delimiting the decisions that could be made was the notion of a materially preferable NEO decision, within the meaning of s 71P(2a)(c). The energy businesses and their representatives have, of course, used their *peculiar genius* to advance as expansive a review as the energy laws could tolerate. And, while limited, being administrative in character, the review allowed the Tribunal to interrogate factual matters, including matters of policy, and the merits of the underlying decision.

24. The Court's jurisdiction in judicial review is not based on the merits of the decision, but rather on its legality.[20]

25. The statutory grounds of judicial review are of long-standing; comprising the enumerated categories of ss 5 and 6 of the ADJR Act and the alternative mechanism of s 39B of the Judiciary Act. Section 39B(1) allows people affected by decision-making by an "officer of

[19] See also, JT Gleeson SC, "Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatibles" *AIAL Forum 46*, p. 28 at 35; R Creyke, "Current and Future Challenges in Judicial Review Jurisdiction: A Comment" *AIAL Forum 37*, pp. 42-57.
[20] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–37 (Brennan J).

the Commonwealth" to have decisions reviewed through mandamus, prohibition or an injunction. (Certiorari and declaration are available as ancillary forms of relief.) Section 39B(1A) expansively permits review "in any matter... arising under any laws made by the Parliament".

26. In the case of statutory appeals, an applicant must identify an error of law or a question of law in the decision sought to be reviewed, and specify whether that error is jurisdictional in character or merely an error of law on the face of the record. When utilizing s 39B, an application must identify jurisdictional error; i.e., error of law in the decision-making process that produces an outcome that the decision has not been made according to law. When utilizing the ADJR Act, non-jurisdictional error may also be engaged. The remedies available under s 16 of that Act are also more flexible than those available under the *Judiciary Act*. The price of this greater plasticity is, of course, the imposition of time limits under s 11 of the ADJR Act.

D OTHER CHANGES

(1) Expansion of the scope of judicial review

27. One possible consequence of the sole judicial review jurisdiction is an actual of implied expansion of the grounds of judicial review. It has long been clear that, while the statutory concepts underlying the categories of grounds are delimited, the conceptions that each might host are not. That in itself is not surprising. It is of the essence of common law reasoning that principles are identified, applied and, on occasion, developed.[21] It can be expected that regulated entities will seek gently to enlarge the circumference of judicial review.

28. What is likely to change, but perhaps only a little, is the manner in which, and rubrics by reference to which, proposals and supporting materials are framed. The grounds of error

[21] O Dixon, "Concerning Judicial Method" in *Jesting Pilate*, (Australia, Law Book Company, 1965) p. 152

of law (s 5(1)(f)) and improper exercise of the power (s 5(1)(e)) — in particular the subsidiary notion of unreasonableness — are likely to attract particular focus. However, these were to some extent involved or implicit in the arguments run under s 71C of the NEL. Applicants *have come this way, taking this route, before*.

(2) Frequency of reviews

29. There may, overall, be fewer applications for review. That has been the course and outcome of statutory change in telecommunications following the withdrawal of forms of merit review in favour of judicial review. Very few challenges are now brought in respect of telecommunications decisions by the ACCC. The recent application by Vodafone in respect of the ACCC's draft decision within an inquiry about the possible declaration of a domestic mobile roaming service under Part 25 of the *Telecommunications Act 1997* (Cth), was an outlier, and one that demonstrated how challenging such challenges can be.[22]

30. There may, however, not be such a decline. The frequency of appeals to the Federal Court from decisions of the Tribunal suggests that the matters under consideration have always been amenable to being cast within the language of judicial review, and will continue to be so. And the stakes are high. The sums of money involved in energy reviews are routinely vast, and worth the effort of review. (*Costing not less than everything.)*

(3) Professional cross-pollination

31. Within our profession, the legislative changes are likely to refocus the practice of many professionals, including many in this room.

32. Taken alongside the introduction of criminal jurisdiction for cartels under Part IV of the *Competition and Consumer Act*, practitioners who were once narrowly commercial and

[22] *Vodafone Hutchison Australia Pty Ltd v ACCC* [2017] FCA 1549

competition lawyers will be required to be practitioners of criminal and public law, leavened by competition law experience.

33. This change in itself is likely to precipitate development within the jurisprudence of each area, as scores of capable minds are freshly directed at new bodies of law.

D CONCLUSION

34. Towards the end of *Little Gidding*, T. S. Eliot imagined an *end of all our exploring*, where we would *arrive where we started and know the place for the first time*. That is, perhaps, a little too much to ask of judicial review of economic regulatory decisions. Eliot also echoed Julian of Norwich and suggested that *all manner of things will be well*. That is perhaps more realistic. In the new world of sole judicial review jurisdiction there will be neither a fresh collaboration nor an expanded judicial review. There will instead be *an easy commerce of the old and the new*. A limited collaboration will continue and there may be more judicial review, but with grounds and issues for review which are broadly familiar.