

Chapter 3

Limited Merits Reviews

Schedule 1 – Limited Merits Reviews

3.1 The Australian Competition Tribunal is a review body. A merit review by the Tribunal is a re-hearing or a re-consideration of a declaration by the Minister (based on the original application to the NCC) or arbitration by the ACCC. The Tribunal may perform all the functions and exercise all the powers of the original decision maker for the purposes of review. It can affirm, set aside or vary the original decision. Although currently the Tribunal is only required to review the original decision it has the purview to seek entirely new information that may not have been presented previously.

3.2 The bill will require the Tribunal to base its merit review on the material before the original decision-maker (although it will be able to seek clarifying information from the access seeker, the ACCC or NCC).

3.3 The material sent to the Tribunal includes the recommendation of the regulator and submissions, but does not include any information disregarded by that regulator. This request for information must still be adhered to in the case of a failure to make a decision within the expected period by the original regulator.

3.4 As the decision-making process progresses information disregarded at each stage continues to be left out of further material provided to the next stage regulator. In this way, the amount of irrelevant information decreases until the final decision can be made based on the clearest and most relevant data.

Support for the amendment

3.5 The Department of Resources, Energy and Tourism supported the amendment:

RET supports the different measures which will add to the efficiency of process under the National Access Regime, including time limits on decision making bodies and Ministers, and the limited merits review process.¹

3.6 A representative for the ACCC referred to limited merits reviews at the hearing:

1 Department of Resources, Energy and Tourism, *Submission 7*, p. 1.

One of the issues again about the limited merits review is that it is a balance... It really is a balance that in a lot of respects policy makers apart from us have to make. We have had experience with it... and the experience has been fine. Of course, there is more than one side to those. I would hate to disagree with Justice Finkelstein and some of his comments on it, but from an operational point of view we have not had any really great concerns.²

3.7 The National Competition Council also support the move to limited merit reviews:

We think the proposal to focus the tribunal's consideration on material that was available to the council and the minister is a reasonable step. This mirrors provisions that are already in place in the National Gas Law and, in the limited time it has operated, it appears to be working reasonably well.³

3.8 The NCC also noted the issue of 'double jeopardy' in that applicants can go through the declaration process, achieve a Ministerial declaration, only to have to start the entire process from the beginning if it is brought before the Tribunal:

What I have a problem with is us considering one set of evidence and one case and the Tribunal considering an entirely different or modified set of arguments and case. Although it is a de novo rehearing, it is a review of the decision of the minister. It is not a primary first shot.⁴

3.9 There were also concerns raised that this can often lead to a 'gaming' of the system – where evidence is deliberately withheld from the NCC process or to give misleading information in the original stage, to strategically delay the process until the tribunal stage when they are gradually required to give that information and to have its veracity tested. The view has been put that, as a result of the proposed restrictions at the Tribunal stage, it would then be in companies' interests to put as much information as they can up front to the NCC, and more accurate information.

3.10 Fortescue, among others, argued that restricting what the tribunal could consider would usefully encourage the provision of more information and more accurate information to the NCC at the beginning of the process because it would be in their interests to have it up front or miss out on using it at all:

I think strategically if any incumbent knows that if they do not put that information in front of the council when it goes to the tribunal they cannot [use it] ... it will encourage them to provide them.⁵

2 Mr Mark Pearson, *Proof Committee Hansard*, 5 February 2010, p. 45.

3 Mr Feil, National Competition Council, *Proof Committee Hansard*, 5 February 2010, p. 18.

4 Mr Feil, National Competition Council, *Proof Committee Hansard*, 5 February 2010, p. 23.

5 Mr Julian Tapp, FMG, *Proof Committee Hansard*, 5 February 2010, p. 91. A similar point was made by Mr Stamford, Department of Resources, Energy and Tourism, *Proof Committee Hansard*, 5 February 2010, p. 62 and by Mr Archer, Department of the Treasury, *Proof Committee Hansard*, 5 February 2010, p. 78.

3.11 At the hearing Treasury was asked to expand on the aspect of limited merits reviews and replied that while time limits are proposed, they can be extended and therefore the proposed limited merits reviews would work to reinforce the final decision-making objective.

In combination we would like to think the measures will work well together, but we have some concerns about the time limit on its own, because we have had target and other time limits in the past.⁶

3.12 Treasury argued that the most efficient and effective way of assisting with decision making, streamlining the administrative process and encouraging the provision of the most accurate and relevant material at the earliest stage of the process will be achieved by limiting the scope of the merit review.

Opposition to the amendment

3.13 Justice Ray Finkelstein, President of the Tribunal, is opposed to the proposed introduction of limited merits review by the Tribunal. He suggested a less restrictive amendment:

It would be preferable to (i) provide a more flexible and practical mechanism for the Tribunal to seek information in addition to that which was before original decision-maker and (ii) allow the Tribunal greater discretion to conduct proceedings in a more streamlined fashion.⁷

3.14 Justice Finkelstein, in his submission, outlined the problems he envisages with the introduction of limited merits reviews. He stated that the process 'suffers from several deficiencies'⁸, including the inability to approach a review with flexibility, a need for the Tribunal to access additional material facts, and the restriction on testing conflicting evidence.

3.15 As discussed earlier, in Chapter 2, some interested parties express concern that the ultimate decision will not be the correct one. This was echoed by Justice Finkelstein:

While limited merits review does save time, if the limitations are too strict there is a real risk that it will result in erroneous decision-making.⁹

3.16 Justice Finkelstein expanded on this view at the public hearing:

I cannot but acknowledge that it does take time to resolve declaration applications. Sometimes the time seems inordinate. It no doubt seems inordinate to the business world, as much as it does to the executive arm of

6 Mr Brad Archer, *Proof Committee Hansard*, 5 February 2010, p. 85.

7 Justice Ray Finkelstein, *Submission 3*, p. 1. Justice Finkelstein made his submission in a private capacity.

8 Justice Finkelstein, *Submission 3*, p. 4.

9 Justice Finkelstein, *Submission 3*, p. 5.

government, but it is necessary to understand precisely what is involved and the factors that contribute to the delay, because some of them are unavoidable. That is to say, like it or not it is a complex process.¹⁰

3.17 His perspective on the review process is that:

The review is a reconsideration of the matter, not an appeal confined to identifying errors of fact or law: section 44. At the review the parties are entitled to place before the Tribunal information that was before the minister, as well as new information.¹¹

3.18 A problem with restricting the Tribunal to only using material before the original decision-maker is that:

Circumstances relevant to the making of a decision often change, and sometimes change dramatically. Unless adequate provision is made in the legislation, the Tribunal must...assume the existence of facts that no longer exist and ignore facts that have come into existence since the decision under review was made.¹²

3.19 Limited merits reviews are also opposed by Rio Tinto, who share Justice Finkelstein's concern. At the hearing Rio Tinto gave evidence in support of the role of the Tribunal as a means to test the veracity of information:

The proposed limit on the tribunal, both in terms of time and material that it may consider, runs the very real risk of undermining the process and yielding a misconceived outcome. The result will be even less confidence in the process than currently exists, and investment in key facilities that could be subjected to part IIIA will therefore be further discouraged.¹³

3.20 The National Competition Council did not share the view that circumstances relevant to the making of the decision were likely to change significantly between their determination and the review by the Tribunal:

To be honest, this is large infrastructure. These are not markets that change overnight, and you are not dealing with such narrow points that there will be a lot of updating evidence, but if there is some by all means. If we had done this 10 years before we started looking at this, the market would have looked considerably different to 10 years later. I would rather that we were not having the council consider a matter and then the Tribunal consider the same matter 10 years later. That is a terrible thought. If there is a genuine modification to the circumstances, it seems to me that there is no reason

10 Justice Finkelstein, *Proof Committee Hansard*, 5 February 2010, p. 30.

11 Justice Finkelstein, *Submission 3*, p. 2.

12 Justice Finkelstein, *Submission 3*, p. 4.

13 Mr O'Neill, *Proof Committee Hansard*, 5 February 2010, p. 64.

why the Tribunal, in the current formulation, could not seek an updating report from the council.¹⁴

3.21 The role and powers of the Tribunal will be discussed in Chapter 5.

14 Mr Feil, National Competition Council, *Proof Committee Hansard*, 5 February 2010, p. 23.

