



The Regulator and its Judge(s)

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November 2017

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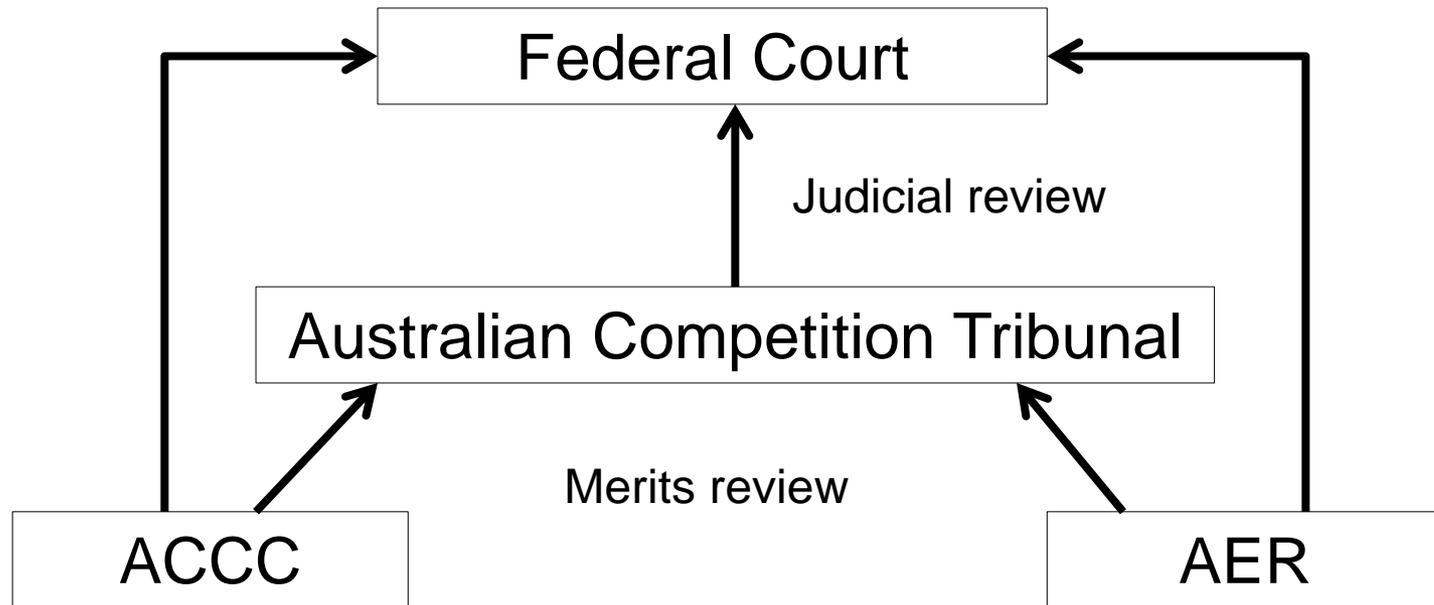
Introduction

- The Australian Energy Regulator (AER) is the Australian economic regulator for electricity and gas networks
- The decisions of the AER were, until recently, subject to both judicial review and merits review
- The Australian Competition & Consumer Commission (ACCC) is the Australian economic regulator for telecommunications, some transport, some water
- Some of the ACCC's regulatory decisions are, or have in the past been, subject to merits review. All are subject to judicial review

Introduction (ctd)

- AER decisions subject to review have been mainly revenue cap determinations
- ACCC regulatory decisions subject to review have included access arbitrations, undertakings and determinations, as well as decisions about which (telecommunications) services are subject to regulation
- National Competition Council (NCC) has also participated in reviews of decisions regarding (non-telecommunications) services subject to regulation

Broad Institutional Design



Merits Review

- Appeals heard by the Australia Competition Tribunal
- Tribunal comprises of one Federal Court judge plus two lay members
- Merits review goes to the merits of the decision – was the outcome the correct one
- Tribunal ‘stands in the shoes’ of original decision-maker, and can re-make the decision
 - Although at least in some cases can choose to remit some or all of the decision back to the agency
- Can be various forms:
 - Hearing de novo – complete re-hearing
 - ‘On the papers’ – limited to reviewing arguments and materials put to original decision-maker
 - Limited merits review – only where a ‘reviewable error’ is established
- Time limited – 3 months from leave being granted, but can be extended (and often is)

Merits Review

- Practical experience has been that very hard for Tribunal to limit its review, or even introduction of new evidence or arguments
- For the AER, reforms in 2013 introduced limited merits review (LMR)
 - focus on reviewable errors to raise the appeal threshold
 - intended to prevent ‘cherry picking’ of AER decisions
- Continued dissatisfaction with merits review regime, and abolished in 2017 (last week)
- For ACCC, main areas of merits review have been in telecommunications
- Again, continued dissatisfaction with merits review in that sector led to partial abolition in early 2000s, and full abolition around 10 years later

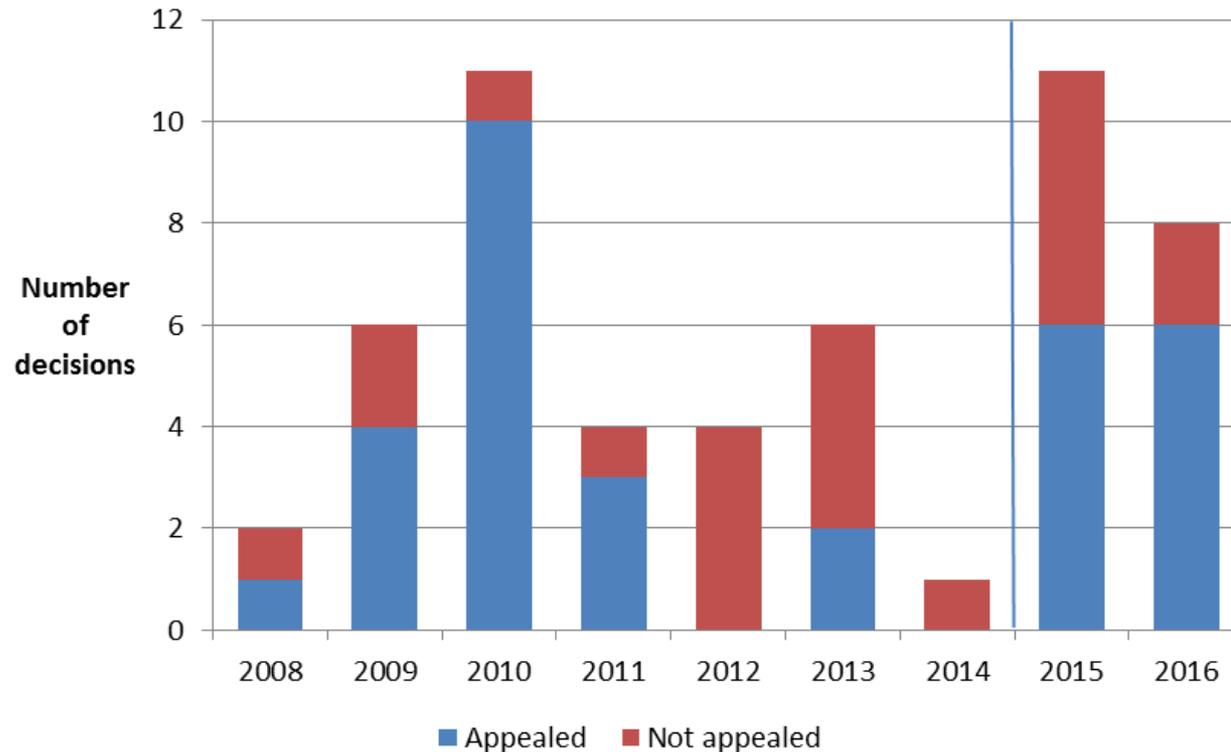
Judicial Review

- Appeals initially heard by the Federal Court of Australia with further appeals (on limited grounds) to the High Court
- Goes to whether the decision maker made it's decision correctly
- Decision maker can be either the AER/ACCC or the merits review body, the Australian Competition Tribunal
- Grounds:
 - Jurisdictional error
 - Error of law – misunderstanding or misapplying the statute
 - Improper exercise of power including irrelevant considerations
 - Unreasonableness
 - Natural justice/procedural fairness/bias
- No time limits

Issues subject to review

- Major points of contention in recent AER merits review matters have been:
 - rate of return
 - operating expenditure allowances
- Major points of contention in ACCC (and NCC) merits review matters have been:
 - Valuation of asset base
 - Services to be regulated
- While judicial reviews proceedings have been brought, not all have proceeded to conclusion, and impact overall has probably been less noticable

AER decisions and appeals



- Before framework changes: 20 of 34 (59 per cent) decisions appealed
- After framework changes: 12 of 19 (63 per cent) decisions appealed
- For electricity DNSP: 19 of 24 (80 per cent) decisions appealed

Case study ... AER decisions for NSW/ACT

- **2015** Original decisions made by AER for regulatory period 2014-2019
- **2015** Businesses appeal to the Tribunal on a large number of grounds
- **2016** Tribunal finds in favour of businesses - sets aside AER decisions and remits opex and some aspects of cost of debt decisions
- **2016** AER appeals Tribunal decision to Federal Court for judicial review
- **Mid 2017** Federal Court affirms Tribunal decision on some aspects and affirms AER decisions on others – remits decision back to AER
- **Mid 2017** AER starts remittal process
- **Mid 2017** Process for 2019-2024 regulatory period commences concurrently with remittal
- **Mid to late 2018** Target for final remitted decisions - only one year left of the initial regulatory period

Meanwhile...

- During this period there were a further 16 revenue determinations being undertaken concurrently with appeals to the Tribunal and Federal Court
- There is now a number of decisions made by the Tribunal on very similar matters with different outcomes
- The most recent ACT decisions for Victoria affirmed all AER decisions
- These can still be appealed to the Federal Court for judicial review
- Confused?

Some Observations on Merits Review

- Complexity & time
- Regulator as amicus curiae
- Regulatory design

Merits Review Process – Complexity/Time

- Regulatory decisions
 - Complex
 - Involve exercise of judgement
 - Extensive inquiry process
- Primary decision maker brings significant legal, economic and technical expertise to its decisions
- Merits review places Tribunal in the position of a second or ultimate decision maker for these complex decisions without the benefit of:
 - Time
 - Process
 - Resources

Merits Review Assessment

- Overall process has been lengthy and costly and results have not entirely dealt with uncertainty
- Issues have been complex and overlapping given concurrent AER determinations and differing Tribunal decisions on similar matters
- Most recent cases have upheld some aspects of the original AER decisions and dismissed others
- Aspects of decisions where Court found AER had made an error have been remitted back to AER for remaking
- Awaiting a further key decision from the Court on approach to debt
- Expect to see more JR appeals with abolition of merits review