AUSTRALIAN COMPETITION TRIBUNAL

Application by Energex Limited (No 4) [2011] ACompT 4

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| Citation: | Application by Energex Limited (No 4) [2011] ACompT 4 |
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| Review from: | Australian Energy Regulator |
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| Parties: | **ENERGEX LIMITED (ACN 078 849 055)****ERGON ENERGY CORPORATION LIMITED (ACN 078 646 062)****ETSA UTILITIES (ABN 13 332 330 749)** |
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| File numbers: | 3 of 20104 of 2010 |
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| Members: | **JUSTICE FINKELSTEIN (PRESIDENT)****MR R SHOGREN** **MR R DAVEY** |
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| Date of decision: | 11 February 2011 |
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| Legislation: | *Acts Interpretation Act* *1901* (Cth)*,* ss 15AA, 15ABNational Electricity Law, ss 3, 71A, 71B, 71C, 71E, 71F; Sch 2 cls 7, 8, 11, 20National Gas Law, ss 248, 249 |
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| Cases cited: | *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129*Assam Railways & Trading Co Ltd v Inland Revenue Commissioners* [1935] AC 445*Bropho v State of Western Australia* (1990) 171 CLR 1*Cabell v Markham* 148 F 2d 737 (1945)*Catlow v Accident Compensation Commission* (1989) 167 CLR 543*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297*Gray v Pearson* (1857) 6 HL Cas 61; 10 ER 1216*Pepper (Inspector of Taxes) v Hart* [1993] AC 593*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252*Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | File No 2 of 2010 |

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| RE: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF A DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ENERGEX LIMITED PURSUANT TO CLAUSE 6.11.1 OF THE NATIONAL ELECTRICITY RULES |
| BY: | ENERGEX LIMITED (ACN 078 849 055)Applicant |
|  |  |
|  | File No 3 of 2010 |

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| RE: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY (QUEENSLAND) LAW FOR A REVIEW OF A DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ERGON ENERGY CORPORATION LIMITED PURSUANT TO CLAUSE 6.11.1 OF THE NATIONAL ELECTRICITY RULES |
| BY: | ERGON ENERGY CORPORATION LIMITED(ACN 078 646 062)Applicant |
|  |  |
|  | File No 4 of 2010 |

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| RE: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF A DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ETSA UTILITIES PURSUANT TO CLAUSE 6.11.1 OF THE NATIONAL ELECTRICITY RULES |
| BY: | ETSA UTILITIES (ABN 13 332 330 749)Applicant |

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| MEMBERS: | JUSTICE FINKELSTEIN (PRESIDENT)MR R SHOGRENMR R DAVEY |
| DATE: |  |
| PLACE: |  |

**REASONS FOR DECISION**

## Introduction

1. The Tribunal dealt with three applications for leave to apply for a review of determinations of the Australian Energy Regulator (AER) in relation to the provision by each applicant of electricity distribution services. Each applicant owns and operates an electricity distribution network. The provision of services by means of that distribution network is regulated by the NationalElectricity Law(NEL)and the National Electricity Rules (NER), which are made under the NEL. By reason of the NER, the terms upon which distribution services are provided is determined by the AER. The NEL authorises the Tribunal, upon leave being granted, to review a determination of the AER in certain circumstances: NEL, Div 3A, subdiv 2. In the course of the leave hearing certain issues were raised in relation to the meaning and effect of several provisions in Div 3A, subdiv 2. The Tribunal was able to grant leave without resolving those issues but, because of their importance, indicated it would resolve them once the parties had filed written submissions. Those submissions are now to hand and the Tribunal is in a position to rule on the issues.

## Background

1. Division 3A, subdiv 2 establishes a regime for what is called “merits review” of certain decisions of the AER: see the definition of “reviewable regulatory decision” in s 71A. The right to apply for a review of a reviewable regulatory decision is not automatic. An applicant must obtain leave of the Tribunal to apply for a review of a reviewable decision: s 71B(1). If leave is granted, the applicant for review must specify the grounds for review being relied upon (s 71B(2)(b)), being one or more of the grounds mentioned in s 71C. Broadly speaking those grounds are that: (1) the AER made a material error of fact; (2) the AER’s discretion miscarried; and (3) the AER’s decision was unreasonable.
2. There are restrictions upon the power of the Tribunal to grant leave. First, s 71E provides that leave must not be granted “unless it appears to the Tribunal that there is a serious issue to be heard and determined as to whether a ground for review … exists”. The second restriction is imposed by s 71F. It applies if the reviewable decision is a revenue or pricing determination and the ground for review relates to the amount of revenue that may be earned by the service provider that is specified in or derived from the decision: s 71F(1). In that event the Tribunal must not grant leave “unless the amount that is specified in or derived from the decision exceeds the lesser of $5 000 000 or 2% of the average annual regulated revenue of the … service provider”: s 71F(2).
3. The operation of the restrictions is uncertain. Section 71E raises the question whether, when an applicant seeks to challenge a decision upon more than one ground, leave can only be granted in respect of those grounds which appear to the Tribunal to raise a serious issue. Or, is it sufficient that the applicant shows that only one ground of review raises a serious issue?
4. As regards the financial threshold imposed by s 71F(2), the question is whether it must be satisfied for each ground of review, if more than one is relied upon. The alternative positions are that when the financial threshold applies: (1) it must be satisfied only in respect of one ground; or (2) it is permissible to aggregate the relevant amounts in respect of the several proposed grounds.
5. The helpful submissions of the parties and the AER show that on some issues the parties make common cause. It will, therefore, not be necessary for the Tribunal to deal with those issues in as much detail as would otherwise be appropriate.

## Statutory interpretation

1. The place to begin is, we think, with some observations about the principles that are to be applied when construing a statute. As we will show, what was once a settled regime may be undergoing change. We rather think, however, that the attempted change will be short lived.
2. The fundamental object of statutory construction is to ascertain the intention of Parliament. Stating the objective this way necessarily involves a rejection of the theory, expressed by a number of commentators, that the “intention of Parliament” is a fiction: see M Radin, “Statutory Interpretation” 43 *Harvard Law Review* 863, 881 (1930); but compare R Dickerson, *Materials on Legal Drafting* (1981) at 51 (“Asserting that there is no such thing as legislative intent because a legislature, as an abstraction, cannot intend anything, is like asserting that there is no such thing as ptomaine poisoning because food ptomaines are not in themselves poisonous”); and F Bennion, *Statutory Interpretation* (5th ed, 2005) at 472-4 (“Legislative intention is not a myth or fiction, but a reality founded in the very nature of legislation … Under our present system Acts are produced, down to the last word and comma, by people. The law maker may be difficult to identify. It is absurd to say that the law maker does not exist, has no true intention or is a fiction … An act of Parliament is usually the product of much debate and compromise, both public and private”).
3. There are, broadly speaking, two methods for identifying the intention of Parliament. First there is the strict approach, whose proponents are sometimes referred to as “textualists”. The other is the purposive approach, whose adherents are often referred to as “intentionalists”. According to the textualists: “[T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther” eg (*Gray v Pearson* (1857) 6 HL Cas 61; 10 ER 1216, 1236 per Lord Wensleydale). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 162 per Higgins J (“The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable”). It must be acknowledged that this strict approach is not, according to later cases, quite as unbending as it seems. In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320, Mason and Wilson JJ said that even on the strict view, “departure from the ordinary grammatical sense cannot be restricted to cases of absurdity and inconsistency”. Cases of “inconvenience of result or improbability of result” may lead the court to depart from the literal meaning “because the alternative interpretation more closely conforms to the legislative intent discernable from other provisions in the statute” (at 320).
4. The purposive approach to the construction of statutes is best expressed in the judgment of Learned Hand J in *Cabell v Markham* 148 F 2d 737, 739 (1945):

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

1. This purposive approach was accepted by the High Court to be the correct common law approach. In *Bropho v State of Western Australia* (1990) 171 CLR 1, 20, in the joint judgment of Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ it was said:

[T]he contemporary approach to statutory construction, with its added emphasis on legislative purpose … and permitted reference to a range of extrinsic materials for the ascertainment of that purpose, has added an element of anachronism to a judicial confinement of the permissible basis for discerning a legislative intent that the Crown be bound to what is “manifest from the very terms of the statute”. (citations omitted)

1. In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408, in the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ, it was said:

[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.

1. The federal Parliament has made clear that the purposive approach is the required approach to construction. In 1981 the Parliament introduced s 15AA into the *Acts Interpretation Act* *1901* (Cth)(see the *Statute Law Revision Act 1981* (Cth)). Subsection (1) provides:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

1. The different approaches to statutory construction produce with them a difference as regards the appropriateness of the use of, and the extent to which regard may be had to, extrinsic material to construe a statute. In the UK, for example, the rule was that on questions of construction it was impermissible to have regard to extrinsic material (eg reports on which legislation was based) for purposes of discovering the meaning of the words used in the statute: *Assam Railways & Trading Co Ltd v Inland Revenue Commissioners* [1935] AC 445, 457-8. The reason given was that it was the solely in the court to determine what was meant by Parliament’s words.
2. In Australia, by way of contrast, the common law allowed reference to extrinsic material: *CIC Insurance* at 408. The material to which regard could be had included the known state of the law, its supposed defects, the legislative history of the statute, reports of statutory bodies, parliamentary speeches and “indeed any material that may throw light on the meaning that the enacting legislature intended to give to the provision”: *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, [124].
3. Once the court started to jettison the textualist approach in favour of the more modern purposive approach to construction, it came to be accepted that regard could be had to material beyond the text to discover the statute’s purpose. In the UK, going beyond the text is still only permitted in limited circumstances. In *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, the House of Lords said it was permissible to use a ministerial speech in Parliament to construe a statute. But the Law Lords pointed out that there were many legal and practical reasons, including considerations of parliamentary procedure, which may limit the usefulness of referring to that kind of material. Lord Brown-Wilkinson, who delivered the leading speech, said (at 634-5):

In many, I suspect most, cases references to Parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words?

1. *Pepper v Hart* has created a controversy which is still unresolved in the UK. But in Australia the use of extrinsic material has been sanctioned by Parliament. Section 15AB of the Acts Interpretation Actprovides that consideration may be given to extrinsic material if it is capable of assisting in the ascertainment of the meaning of a provision. The section provides that, not only may recourse be had to extrinsic material if the provision in question is ambiguous or obscure or the ordinary meaning conveyed by the text leads to a manifestly absurd or unreasonable result, it may also be used to confirm that the meaning is the ordinary meaning conveyed by the text, taking into account purpose and context. Importantly s 15AB(1) is expressed in the broadest possible terms and permits the use of “any material … capable of assisting in the ascertainment of the meaning of the provision”. A non-exhaustive, but nonetheless extensive, list of permissible sources of extrinsic material is provided in s 15AB(2).
2. Notwithstanding what appears, in Australia at least, to have been a settled position, counsel for the AER has referred the Tribunal to several recent decisions in which the High Court seems to be returning to the strict approach. For example, in *Catlow v Accident Compensation Commission* (1989) 167 CLR 543, 549-50, Brennan and Gaudron JJ said:

Whether or not extrinsic material is considered in interpreting a statutory provision, it is clear that the meaning attributed to the statute must be consistent with the statutory text. If the meaning which would otherwise be attributed to the statutory text is plain, extrinsic material cannot alter it. It is only when the meaning of the text is doubtful (to use a neutral term rather than those to be found in s 15AB(1) of the *Acts Interpretation Act*), that consideration of extrinsic material might be of assistance. It follows that it would be erroneous to look to the extrinsic material before exhausting the application of the ordinary rules of statutory construction.

This passage was followed in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

1. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, in the joint judgment of Hayne, Heydon, Crennan and Kiefel JJ, the High Court said (at [47]):

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (citations omitted)

1. It is difficult to know precisely what the High Court intended by *Alcan*. First, the cases to which the High Court referred do not completely support the proposition for which they are cited. Second, the statement that the task of interpretation “must begin” with the text of the legislation is inconsistent with what the High Court said in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69], namely that “[t]he process of construction must always begin by examining the context of the provision that is being construed”. Third, beginning with the text and confining an investigation into purpose only to where a statute is ambiguous will easily lead to error. To say that the meaning of a provision is plain is a conclusion that can only be reached at the end of interpretation. That is, it is not a threshold test. It is a judgment that can appropriately be made only in light of all the available evidence of legislative meaning and intent. That may well require the assistance of extrinsic material, if that material bears on the issue. Finally there are ss 15AA and 15AB.
2. Nonetheless, because of the decision in *Alcan*, counsel for the AER submitted that “it would be erroneous to consider extrinsic material before exhausting the ordinary rules of statutory construction”. We do not accept the correctness of this submission. In our view, until the approach mandated by *Bropho*, *CIC Insurance* and *Project Blue Sky* is overruled we should continue to apply those cases: see Chief Justice Spigelman, “The intolerable wrestle: Developments in statutory interpretation” (2010) 84 *ALJ* 822, 831. That is, we will continue to apply the purposive approach when determining the meaning of a provision, having regard to what Parliament intended by the statute. We will not give the statute a meaning simply based on the words used. Moreover, if the words used appear on their face to have a plain meaning, that meaning must still give way to a contrary intention if one is discovered by a wider inquiry.
3. In any event, whatever the common law position may be, in the construction of the NEL, the Tribunal is required to apply a purposive approach. Section 3 of the NEL provides that Sch 2 applies to the interpretation of the NEL. Clause 7 of Sch 2 states that:

(1) In the interpretation of a provision of this Law, the interpretation that will best achieve the purpose or object of this Law is to be preferred to any other interpretation.

(2) Subclause (1) applies whether or not the purpose is expressly stated in this Law.

1. By cl 8(2), for the purposes of construction, regard may be had to extrinsic material, even if only to confirm the interpretation conveyed by the ordinary meaning of a provision. The extrinsic material to which regard may be had is any material that may assist in the construction process. The non-exhaustive list in cl 8(1) includes: reports of parliamentary committees, explanatory notes or memoranda, parliamentary speeches and documents that are declared by regulation to be relevant.

## The legislative history of ss 71E and 71F

1. Turning to the legislative history of ss 71E and 71F of the NEL, we are indebted to the parties for helpfully setting out that history in some detail. What follows is substantially derived from the submissions.
2. In June 2001, the Council of Australian Governments (COAG) established the Ministerial Council on Energy (MCE) to provide national oversight and coordination of energy policy development.
3. On 30 June 2004, the Commonwealth, state and mainland territory governments entered into the Australian Energy Market Agreement (AEMA). Through the AEMA, the parties agreed: (1) that the MCE would be the national policy and governance body for the Australian energy market including for electricity and gas (cl 4.1); (2) that the MCE would have responsibility for, among other matters, the national energy policy framework, including the legislative and regulatory framework within which the market operates (cl 4.3); and (3) to develop and implement a national legislative framework for the energy market which would involve, among other things, each state and territory submitting to its parliament implementing legislation with the effect of conferring functions and powers with respect to electricity and natural gas regulation on the AER (cl 6.3).
4. By amendments made to the AEMA on 2 June 2006 the parties further agreed that South Australia would submit to its Parliament implementing legislation that would create the national gas law and make other consequential amendments to the then existing electricity legislation and the gas legislation as may be necessary on the request of the MCE.
5. Also on 2 June 2006, the MCE released its “Decision on Review of Decision-Making in the Gas and Electricity Regulatory Frameworks”. The Decision announced the implementation of a limited merits review model for economic regulatory decisions in the gas and electricity access regimes. In particular, the Decision stated (at 17-18):

To control the number and scope of reviews, it is proposed that a leave requirement be added as follows:

1. A requirement that the applicant seek leave from the ACT to bring a review; and

2. No leave to be granted unless:

a. The application is brought within 10 business days of a final decision; and

b. The ACT is satisfied that, where an economic regulatory decision is involved, **the amount at issue exceeds $5 million or 2%** of the annual regulated revenue of the applicant whichever is the lesser, alternatively if quantification is not readily possible, that the amount in issue is material in terms of the regulated revenue. In all other cases (ie. ‘non-revenue’ errors), the ACT is satisfied that the error is a material one; and

c. The ACT is satisfied there is a serious question to be tried.

The restrictions on the grant of leave are designed to ensure that:

* applications are brought in a timely fashion;
* only final (not draft) decisions are reviewed (thus ensuring that there are not multiple reviews in the ACT in the course of economic regulatory decision-making);
* only significant claims are reviewed; and
* trivial or vexatious claims are prevented.

The intention is to prevent the bringing of merits review claims where any regulatory errors made are relatively small, or where the error does not affect in a meaningful way the totality of the original regulatory decision. For ‘revenue’ errors, the figure put forward of $5 million or 2% of the applicant’s annual regulated revenue (whichever is the lesser) is put forward on the basis that to date all reviews have involved at least $2 million.

As to “serious question to be tried”, this formulation is designed not only to exclude frivolous and vexatious claims but also to ensure that, even if the threshold amount test is met, only matters that raise serious issues go to the ACT. The criteria is [sic] aimed at preventing frivolous, vexatious or unmeritorious actions from proceeding. (emphasis added)

1. On 31 July 2006, the MCE released a document titled *“*Statement of Scope – A National Legislative Framework for Gas and Electricity*”*. In that document the MCE noted that the Statement of Scope had been prepared to assist stakeholders by outlining details of future national legislative arrangements for gas and electricity markets and clarifying the scope of the proposed legislative packages to progress the MCE energy market reform agenda. The MCE advised that the national legislative arrangements would be contained in two legislative packages to be released for public consultation in 2006 and 2007 and that the packages would give effect to the requirements of the AEMA as amended in June 2006.
2. As part of the Statement of Scope, the MCE noted (at 24-5) that:

An applicant for merits review will need to seek leave from the ACT to bring an action for review and, amongst other things, will need to meet a materiality threshold. The ACT must be satisfied that there is a serious question to be tried. In addition, for revenue-related errors, the amount at issue must exceed $5m or 2% of average annual regulated revenue, or if quantification is not readily possible, **the amount in issue must be material in terms of an entity’s regulated revenue**. In all other cases (ie non-revenue errors) the ACT will have to be satisfied that the error is a material one. (emphasis added)

1. On 7 November 2006, the MCE released an exposure draft of the NGL. Part 6.5 of the exposure draft dealt with merits review of reviewable regulatory decisions made by the AER. Section 275 of the exposure draft, within Pt 6.5, was in the following terms:
2. **Tribunal must not grant leave in certain cases**

Subject to section 277, the Tribunal must not grant leave to apply under section 273(1) unless it appears to the Tribunal that there is a serious issue to be determined and –

(a) if the reviewable regulatory decision is about the revenue of a service provider and the issue to be determined relates to an amount specified in or derived from the decision that amount—

1. exceeds the lesser of $5 000 000 or 2% of the average annual regulated revenue of the service provider; or
2. if that amount cannot be derived from the decision, is a material amount of the average annual regulated revenue of the service provider;

(b) in all other cases, there is an error that, if established, would be material to the operation and effect of the decision.

1. The MCE published an explanation of the gas legislative framework entitled “2006 Legislative Package: Gas Legislative Framework” at the same time as releasing the exposure draft of the NGL. In the section dealing with Pt 6.5 of the NGL exposure draft (at 29), there is an explanation which is in identical form to that given in the Statement of Scope.
2. On 5 January 2007, the MCE released an exposure draft of amendments to the NEL. Clause 36 of the exposure draft proposed the insertion of new Divs 3A and 3B into Pt 6 of the NEL. Proposed Div 3A dealt with merits review of reviewable regulatory decisions made by the AER. Proposed s 71D, within proposed Div 3A, was in substantially the same terms as proposed s 275 in the NGL:

**71D Tribunal must not grant leave in certain cases**

Subject to section 71F, the Tribunal must not grant leave to apply under section 71B(1) unless it appears to the Tribunal that there is a serious issue to be determined and—

(a) if the reviewable regulatory decision is about the revenue of a regulated network service provider and **the issue to be determined** relates to **an amount specified in or derived from the decision**, that amount—

(i) exceeds the lesser of $5 000 000 or 2% of the average annual regulated revenue of the regulated network service provider; or

(ii) if that amount cannot be derived from the decision, is a material amount of the average annual regulated revenue of the regulated network service provider;

(b) in all other cases, there is an error that, if established, would be material to the operation and effect of the decision. (emphasis added)

1. The MCE published an explanation of the proposed NEL amendments entitled “Electricity amendments & further amendments to the electricity and gas rule-change process” at the same time as releasing the exposure draft of the NEL. In the section dealing with proposed Div 3A (at 14), the explanation for the requirement of leave proposed is identical to that which appeared in the Statement of Scope.
2. On 1 March 2007, the MCE announced the release of a response to submissions it had received on the NGL exposure draft. The MCE noted (at 15) that a submission had been made by network providers that: “The ‘serious issue to be determined’ leave threshold for merits review is inappropriate and creates a double hearing of the issues”. The response of the MCE (at 15) was: “Partly Accepted. The ‘serious issue to be determined’ threshold will be reconsidered to see if the policy intent can be more clearly captured”.
3. On 13 April 2007, the MCE released its response to submissions it had received on the NEL amendments exposure draft. Relevantly, the MCE set out the following issues that had been identified and its response to those issues:

| **Issue** | **Raised By** | **SCO Response** |
| --- | --- | --- |
| The overlapping thresholds for review makes merits review difficult to access. | Networks | Partly acceptedThe changes made to the NGL will be replicated in the NEL; in particular, see NGL response table items 111, 114, 115, 117 & 126 |
| The materiality threshold is inappropriate and it is unclear whether cumulative errors can meet the threshold. | Networks | Not acceptedThe threshold is appropriate to ensure that merits reviews are not brought over trivial matters. **The threshold is intended to operate in a cumulative manner.** (emphasis added) |
| The ‘serious issued to be determined’ threshold is too high. | Networks | AcceptedThe drafting will be clarified to focus more on the error being material to the operation or effect of the decision. |

1. On 19 July 2007, the MCE released the second exposure draft of the NGL. The MCE noted that the responses to the matters raised in the first round of public consultation on the NGL were the basis for the amendments. In the second exposure draft, review of reviewable regulatory decisions made by the AER was dealt with in Pt 7.5. Proposed ss 227 and 228, within proposed Pt 7.5, were in the following form:

**227 Tribunal must not grant leave if error is not material**

Subject to this Division, the Tribunal must not grant leave to apply under section 224(1) unless the Tribunal is satisfied that there is an error in the reviewableregulatory decision that, if established, would be **material to the operation or effect of the decision**. (emphasis added)

**228 Leave must be refused if application is about an error relating to revenue amounts below specified threshold**

(1)This section applies if –

(a) leave to apply under section 224(1) is about an error in a reviewable regulatory decision that is a full access arrangement decision; and

(b) the error relates to the amount of revenue that may be earned by a service provider that is specified in or derived from that decision.

(2) Despite section 227, the Tribunal must not grant leave to apply under section 224(1) even if that error is material to the operation or effect of the full access arrangement decision unless the amount that is specified in or derived from the decision exceeds the lesser of $5 000 000 or 2% of the average annual regulated revenue of the service provider.

1. At the same time as releasing the second exposure draft, the MCE published explanatory materials. In relation to proposed s 227, the explanatory materials provided:

The test the Tribunal must apply in determining whether to grant leave to apply for review has been revised (from ‘serious issue to be determined’): the Tribunal may only grant leave if it is satisfied that there is an error in the reviewable regulatory decision that, if established, would be material to the operation or effect of the decision. However, the monetary thresholds remain in section 228.

1. On 9 August 2007, the MCE released the second exposure draft of the NEL amendments. The MCE noted that the responses to the matters raised in the first round of public consultation on the NEL were the basis for the amendments. In the second exposure draft, the proposal to insert divs 3A and 3B was contained in cl 43. Proposed ss 71E and 71F were in the following form:

**71E Tribunal must not grant leave if error is not material**

Subject to this Division, the Tribunal must not grant leave to apply under section 71B(1) unless the Tribunal is satisfied that there is an error in the reviewable regulatory decision that, if established, would be **material to the operation or effect of the decision**. (emphasis added)

**71F Leave must be refused if application is about an error relating to revenue amounts below specified threshold**

1. This section applies if –

(a) leave to apply under section 78B(1) is about an error in a reviewable regulatory decision that is a network revenue or pricing determination; and

 (b) the error relates to the amount of revenue that may be earned by a regulated network service provider that is specified in or derived from that decision.

1. Despite section 71E, the Tribunal must not grant leave to apply under section 71B(1) even if that error is material to the operation or effect of the network revenue and pricing determination unless the amount that is specified in or derived from the decision exceeds the lesser of $5 000 000 or 2% of the average annual regulated revenue of the regulated network service provider.
2. We note that the change in the threshold in the second exposure drafts of the NGL and NEL (from “serious issue to be determined” to an error that would be **“**material to the operation or effect of the decision”) was not adopted in the Bills. Instead, the language in s 71E of the NEL and s 248 of the NGL is “serious issue to be heard and determined”.
3. On 27 September 2007, the National Electricity (South Australia) (National Electricity – Miscellaneous Amendments) Amendment Bill 2007 (SA) was tabled in the House of Assembly of the South Australian Parliament. On the second reading of the Bill, the Minister for Energy said (Hansard, at 967):

An applicant for merits review will need to seek leave from the Tribunal to bring an action for review and, amongst other things, will need to meet a materiality threshold. The Tribunal must be satisfied that there is a serious issue to be heard. In addition, for revenue-related errors, **the amount at issue as a result of all of the alleged grounds of review** must exceed the lesser of $5 million or 2 percent of average annual regulated revenue. (emphasis added)

1. On 3 October 2007, the MCE released its response to submissions on the second exposure drafts of the NEL and NGL. It noted that the Bill introducing the NEL amendments reflected the policy outlined in the MCE response to the second exposure draft. The response in relation to proposed ss 71E and 71F of the NEL (and the cognate provisions in ss 227 and 228 of the NGL) was as follows:

| **NGL Section** | **NEL Section** | **Issue** | **Raised by** | **Response** |
| --- | --- | --- | --- | --- |
| 227 and 228 | 71E and 71F | The use of the word “error” in the merits review part may inadvertently exclude grounds for review in the operation of the Law. | ENA | AcceptedThe drafting of the relevant provisions has been amended so that they refer to the “ground of review relied on by the applicant” rather that the “error”. |
| 227 | 71E | The formulation of “an error … that, if established, would be material to the operation or effect of the decision” is unworkable. | ENA | AcceptedThe granting of leave now relies on whether it appears to the Tribunal that “there is a serious issue to be heard as to whether a ground of review … exists”. This will be clearer for the Tribunal to apply and allow arguments based upon the case law surrounding interlocutory injunctions. |
| 228(2) | 71F(2) | It is not clear that multiple quantifiable errors should be considered cumulatively. | ENA | NotedMultiple quantifiable errors are intended to be applied cumulatively, as indicated by the wording “the amount that is specified in or derived from the decision”. **The decision as a whole, including cumulative errors, is to be considered against the threshold.**  The second reading speech has also made this clear. (emphasis added) |

1. On 9 April 2008, the National Gas (South Australia) Bill 2008 (SA) was tabled in the House of Assembly of the South Australian Parliament. The second reading speech by the Minister for Energy included the following (Hansard at 2893):

An applicant for merits review will need to seek leave from the Tribunal to bring an action for review and, amongst other things, will need to meet a materiality threshold. The Tribunal must be satisfied that there is a serious issue to be heard. In addition, **for revenue-related errors, the amount at issue as a result of all of the alleged grounds of review must exceed $5 million or 2 percent of average annual regulated revenue**. An application for leave setting out the grounds of review must be made within 15 business days of a reviewable decision being published. (emphasis added)

1. An “Explanation of Clauses” was tabled along with the Second Reading Speech. In respect of cl 249, the explanation was as follows:

Leave for review of **some** decisions must be refused if the amount in dispute is smaller than the lesser of five million dollars or two percent of average annual regulated revenue. (emphasis added)

## The proper construction of ss 71E and 71F

1. With this enacting history in mind, we can return to the issues raised relating to the construction of ss 71E and 71F. The argument that s 71E requires the applicant for review to raise one serious ground and that other non-serious grounds are simply carried along with the serious ground runs as follows: Section 71B(1) provides for a person with requisite standing to seek leave to apply for a review of “a reviewable regulatory decision”, not a component of a decision. That application must be made under one or more of the grounds specified in s 71C(1). Section 71E requires the applicant to show a serious issue as to whether “a ground” for review exists. The ordinary meaning of “a ground” is “one ground”. Any other meaning would require a strained construction. Moreover, it is put that the requirement that the Tribunal be satisfied that each ground of review is a serious ground would likely involve a lengthy process of consideration and determination – ie a mini trial. If a frivolous ground is raised along with a serious ground the Tribunal has ample power to deal with it in an expeditious manner. For example the Tribunal could limit the time for argument, refuse to hear oral submissions and so on.
2. In our view, however, it is clear that the purpose of s 71E is to ensure that only serious issues are considered by the Tribunal. The procedure before the Tribunal is not a hearing *de novo* (in the sense that the parties are free to rerun their case in full) because an applicant must show error on the part of the AER, even if error is broadly defined in s 71C(1). But because in many cases there will be a substantial repetition of the issues raised before the AER, it is appropriate that Tribunal hearings be confined to serious issues. Moreover, it would be a curious result in a case where it is necessary to obtain leave to apply for a review for the Tribunal to grant leave to run frivolous points. No useful policy objective would be advanced by that approach. Further, we think, in line with the AER’s submissions, that the approach for which the applicants contend would jeopardise the Tribunal’s ability to determine applications within three months, as is the target time limit set by s 71Q. We also agree with the AER that the scheme in Div 3A is likely to work more smoothly and expeditiously if unmeritorious grounds are filtered out before the Tribunal embarks upon a substantive hearing.
3. The Tribunal had raised with the parties whether the answer to the construction question might be different if the Tribunal had power to revoke leave, as an alternative to dealing with an unmeritorious case. On reflection we think the ability to revoke leave is just a distraction. If Parliament had intended a party to run non-serious grounds alongside serious ones the Tribunal would be circumventing that intention by revoking leave.
4. This makes it unnecessary to consider the submission made by some of the parties, and the AER, that the Tribunal does not in any event, have power to revoke leave once leave has been granted. We should, nonetheless, point out that none of the submissions turned their attention to cl 20(a) of Sch 2. That subclause provides: “If this Law authorises or requires the making of an instrument, decision or determination – the power includes power to amend or repeal the instrument, decision or determination”. This rather suggests the Tribunal does have the power to revoke a decision to grant leave on appropriate grounds.
5. Finally, on this aspect, we think the extrinsic material to which we have referred strongly supports the construction that the Tribunal favours.
6. As regards the construction of s 71F(2), it is clear that there are problems with the drafting. First of all we think that the expression “the amount specified in or derived from the decision” should not be read literally as meaning the total revenue to be derived by the service provider. Rather the relevant amount is the amount at issue in light of the grounds upon which the AER’s decision is challenged. This is supported by the extrinsic material and particularly the second reading speeches to the NEL amendments and the introduction of the NGL.
7. Secondly, if we were to apply a textualist approach, then the preferable view is that the revenue threshold should be satisfied in respect of each ground of review. Section 71F(2) speaks of not granting leave even if there is a serious issue “as to whether a ground for review … exists unless the amount specified in or derived from that decision exceeds” the financial threshold. A straightforward reading links the ground with the relevant decision thus requiring the conclusion that each ground must meet the threshold. And, arguably, it may be contrary to the intention of Parliament to rely on cl 11(4)(a) of Sch 2 to have “a ground” read as “grounds” to aggregate the threshold requirement.
8. But, as the parties say, the enacting history shows quite clearly that the ordinary meaning of s 71F(2) is not the intended meaning. The observations made by the MCE in relation to the exposure drafts of the NEL amendments, as well as the second reading speech of the Minister, show that the effect of all the alleged errors must be taken into account when working out whether the threshold is satisfied.
9. It may be accepted that the amount to be derived from a decision is not always capable of precise calculation. Most often the amount will be an estimate based on forecasts. That only means the Tribunal must have sufficient evidence that the financial threshold is met. This will not require an applicant to produce material that would satisfy a standard of proof applicable in curial proceedings. It will be sufficient that the Tribunal is able to reach a reasonable state of satisfaction on the question. If, on a leave hearing, the Tribunal finds that the threshold is satisfied but, during the course of the hearing proper, it turns out the Tribunal was wrong, then the applicant runs the risk that leave will be revoked.
10. Further, it appears to be common ground, and in any event we think it is beyond dispute, that the relevant grounds (ie those in respect of which there may be aggregation) are those grounds which meet the serious issue threshold.

## Conclusion

1. Nothing in these reasons requires the Tribunal to give further directions in addition to those made on 15 July 2010.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein (President), Mr R Shogren and Mr R Davey. |

Associate:

Dated: 11 February 2011