

26 October 2012

By email: scer@ret.gov.au

SCER Secretariat
GPO Box 1564
Canberra ACT 2601

Dear Sir/Madam

Review of the Limited Merits Review Regime—Stage Two Report

We welcome opportunity to provide comment to the Secretariat of the Standing Council on Energy and Resources (**SCER**) on the Review of the Limited Merits Review Regime Stage Two Report (the **Final Report**).

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Initial comments

We understand that SCER is seeking comments to help develop a regulatory impact statement (**RIS**) to guide further policy reform with respect to merits review of energy regulatory decisions. While we strongly support government undertaking rigorous RIS analyses before enacting new laws and regulations, given the extent of analysis and consultation undertaken by the Expert Panel, we question whether a high level RIS is useful or necessary at this time. We note that the recent Independent Review of the Australian Government's Regulatory Impact Analysis Process recommended:

A RIS should not be required for a regulatory proposal in cases where a fulsome consultation and analysis has already been undertaken through another mechanism, such as the release of a 'green' and 'white' paper or an official review (where the terms of reference prescribe an equivalent analysis to that which would be undertaken in a RIS).¹

This independent review stated that this recommendation aims to reduce duplication and inefficiency. We support this recommendation, and would note that, subject to one issue identified below, significant consultation and analysis was undertaken in the development of the

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Final Report. In addition, our experience is that RIS processes can be time intensive, and there may be a risk that the existing merits review regime will continue to apply to future energy regulatory determinations while the policy is being finalised. Given the significant proven consumer detriment of the existing regime, we would encourage SCER to consider fast tracking policy decisions, rather than undertaking a lengthy RIS process.

Comments on primary recommendations

We are broadly supportive of the Final Report's recommendation that there should be a single ground for appeal, that is, that there is reason to believe that there is a materially preferable decision as defined in the Final Report. During the review, we advocated for the abolition of merits review (but for energy businesses to retain the right for judicial review) or that review should only be on the allowed where the entire decision is reviewed (a *de novo* review). While the Final Report states that its suggestion will not result in a *de novo* review because, for example, the review body would be required to adopt the primary decision as its starting point, we are supportive of its recommendation as we agree it will significantly change the risk/reward calculation for energy networks considering an appeal. In short, it appears that the approach suggested will significantly reduce the number of appeals.¹

We strongly support the Final Report's recommendation that a preferable decision will be one that ensures that regulatory determinations promote efficiency in investment, operation and use of networks *in ways that best serve* the long term interests of consumers. The intention here accords with our submissions to the Expert Panel that there can be many views regarding ways in which efficiency can be improved or a better decision be made, but that the key determining factor should be the decision that best serves the long term interests of consumers. We strongly support the proposal from the Expert Panel that the National Electricity Objective and the National Gas Objective be amended to include the words "in ways that best serve" before the long term interests of consumers.

We also support other aspects of the Final Report's recommendations, particularly that the review body should adopt an inclusive and investigatory approach, rather than an adversarial approach which may deny access to consumer groups. We also agree that there should be standing provided to a broad range of interests, particularly consumer groups, to initiate a review.

While we support the establishment of a separate appeals body to undertake any review, we are not supportive of the recommendation that this body be placed within the Australian Energy Market Commission (**AEMC**). As we argued in submissions to the Expert Panel, there may be a conflict between this role and its role as the rule-maker, even if there is some separation of decision-making within AEMC. If sharing of resources is necessary in the establishment of a new appeals body, we would encourage consideration of entities which are likely to have expertise but not to be too 'close' to the subject matter at hand.

Comments on recommendations relating to broader regulatory regime

¹ Note for the avoidance of doubt that this support is entirely contingent on the presence of both elements ie the single ground of a "materially better decision" and a definition of materially preferable decision as proposed by the Final Report. We consider for example that moving to a single ground of appeal without changing the objective and thereby the definition of preferable decision would fail to redress the imbalances in the current system.

Consumer advocacy

We note the Final Report does not support the establishment of a "taxpayer-funded consumer advocate", primarily because there are many different consumer views. We strongly disagree with this recommendation and point to the views of a range of other experts which have identified the need for more resources and greater coordination to be applied to national consumer energy advocacy.ⁱⁱ Importantly, consumer advocacy need not be taxpayer-funded, and it may be fairer and more efficient for an industry levy to support improved consumer advocacy, as with the Consumer Advocacy Panel. Further, a national consumer advocacy body can coordinate consumer views or, where there are diverse and competing views among consumers, play a role in expressing a range of consumer views, rather than only expressing the views of stakeholders where there is unanimity. Consumer Action is strongly supportive (and indeed is co-sponsoring) the proposal to establish a new national energy consumer advocacy body that is currently being considered by governments.

Regulator independence

We strongly oppose the proposal to separate the Australian Energy Regulator (**AER**) from the Australian Competition & Consumer Commission (**ACCC**). It is not clear to us on what basis this recommendation is made by the Expert Panel, other than concerns raised by regulated businesses and other unnamed stakeholders. It is important to note that the Expert Panel did not seek consumer views about this proposal during the review process.

In our view, there are significant benefits from existing arrangements. Not only are there operational efficiencies in the AER and the ACCC sharing resources, it is also our view that regulators that focus narrowly on one industry are at significant risk of becoming 'captured' by industry interests. A broader view across different industries is likely to keep the regulator independent and focused on the interests it exists to serve—that of the long-term interests of consumers. The Expert Panel notes that regulators should be independent from unstable political preferences; we would argue that our independent and respected national consumer and competition organisation is very much independent from such preferences. We are also concerned that a debate about regulatory structure is likely to distract from or delay other reforms that we consider to be critical to the success of the regime going forward. We note the Expert Panel's comments that "failure should not be rewarded" but we question whether "failure" is a fair assessment given the significant and acknowledged framework shortcomings the regulator has had to navigate.

In our view a far preferable approach would be to:

- make the necessary reforms to the framework,
- give the regulator a reasonable opportunity (and if need be additional resources) to work within the new framework; and
- schedule a review of the effectiveness of the reforms which could include a review of the effectiveness of the AER if that is still considered necessary and appropriate.

Equity in decision-making

We strongly support the Expert Panel's comments that regulators and network businesses should not ignore distributional impacts of decisions and 'pretend that they are only required to

think about efficiency'. As we have argued throughout this process, efficient outcomes can be in the long-term interests of consumers, but they are not always so.

An example in point is the ongoing push for time of use electricity prices so that prices reflect the cost of supply at different times of day. Changes to electricity pricing will inevitably create "winners" and "losers", so policy makers and regulators need to be alive to the implications of these sorts of decisions across the community. Indeed, we would encourage SCER to consider ways to achieve the outcome being sought (reduction of peak demand) that does not result in harsh or oppressive pricing for consumers. One approach might be for retailers to be charged time of use network prices, but to charge some consumers a flat electricity rate but bundle this with a range of demand management devices or energy efficiency interventions to encourage change in demand. We would also encourage SCER to consider this line of analysis when responding to the AEMC's *Power of Choice* review.

Environmental initiatives

We are supportive of the Final Report's argument for greater scrutiny of environmental projects and schemes, so that they can achieve environmental objectives at lower costs to consumers, both now and in the longer run. Consumers have a strong interest in ensuring energy consumption is environmentally sustainable and that there is a reduction in the carbon intensity of energy production. There is also an ongoing need for environmental initiatives within energy markets to be coherent, open, sustained and accountable to promote legitimacy and public support. In addition, consumers have a strong interest in ensuring that environmental programs are cost effective. Stringent and robust monitoring programs should be introduced after environmental policies are implemented, to identify the effect on distribution and cost.

Please contact us on 03 9670 5088 if you would like to discuss these matters further.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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ⁱ David Borthwick AO PSM and Robert Milliner, *Independent Review of the Australian Government's Regulatory Impact Analysis Process*, 20 April 2012, recommendation 4, page 73.

ⁱⁱ Australian Energy Regulator, *Submission to Senate Standing Committee on Electricity Prices*, September 2012, page 13; Australian Energy Market Commission, *Directions Paper—National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, March 2012, page 155; Australian Energy Market Commission, *Submission to the Senate Select Inquiry into the Electricity Prices*, September 2012; and Rod Sims, *Speech—The ACCC at work: consumers, competition & regulatory issues*, John Curtin Institute of Public Policy, 13 September 2012.