

10 July 2013

By email: scer@ret.gov.au

Senior Committee of Officials
Standing Council on Energy & Resources
c/o Department of Resources & Tourism
CANBERRA ACT 2601

Dear Sir/Madam

Limited merits review—consultation draft legislation

Consumer Action Law Centre welcomes the opportunity to provide comment on the exposure draft *Statutes Amendment (National Electricity and Gas Laws—Limited Merits Review) Bill 2013* (the **Bill**). Our comments are aimed at ensuring the legislation enacts the Statement of Policy Intent released by the Standing Council on Energy & Resources (**SCER**) in December 2012, and the Decision Regulatory Impact Statement (**RIS**) released in June 2013. Further, our comments below relate to the amendments to the National Electricity Law (**NEL**), but are also relevant for the mirror provisions of the National Gas Law (**NGL**).

In summary, our comments are:

- the national electricity objective should be amended to include the words ‘in ways that best serve’ before ‘the long term interests of consumers’, as recommended by the Expert Panel;
- proposed section 16 of the NEL relating to the manner AER performs its functions and the definition of materially preferable decision in proposed section 71P should be amended to include the words ‘in ways that best serve the long term interests of consumers’;
- proposed section 28ZJ of the NEL relating to the record of reviewable regulatory decisions should be amended to clarify that the record kept is to be public;
- the words ‘sufficient interest’ should be removed from the definition of ‘reviewable regulatory decision process participant’ in section 71A of the NEL;
- section 71K should be amended so that user or consumer interveners do not have to seek leave to intervene if they participated in AER consultations on regulatory determinations;
- SCER should revisit its approach to restrictions on cost orders against user or consumer interveners, and provide the Tribunal with power to make protective cost orders; and
- SCER should include provisions in the NEL and/or Competition and Consumer Regulations 2010 to direct the Tribunal to perform its functions in an informal, consultative and investigatory way.

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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

Commencement

Section 2 of the Bill states that the Act will come into operation on a day to be fixed by proclamation. We urge SCER to ensure that the Act comes into operation as soon as possible so to be in force for the next round of regulatory determinations.

Manner in which AER performs economic regulatory functions or powers

Proposed section 16(1)(c)(i) of the NEL states that out of the decisions the AER can make, it should make the decision that will or is likely to contribute to the national electricity objective to the greatest degree. The national electricity objective states:

the objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity, with respect to (a) price, quality, safety, reliability and security of supply of electricity; and (b) the reliability, safety and security of the national electricity system.

SCER's Statement of Policy Intent affirms that 'the objective of the limited merits review framework, in common with the objectives of the laws, is to ensure that relevant decisions promote efficient investment, operation and use of energy infrastructure ... in ways that best serve the long term interests of consumers' (emphasis added). The words 'in ways that best serve' are not incorporated in proposed section 16(1) of the NEL. We urge SCER to amend the legislation to include these words.

The use of these words by the Statement of Policy Intent is more than mere semantics. The Expert Panel that reviewed the limited merits review framework explained the use of these words as follows:

The words "in ways that best serve" are intended to reflect the point that there may be many ways in which efficiency can be improved and that preferences among them should be determined by reference to the long term interests of consumers.

The Expert Panel also explicitly recommended that these words be included in a revised national electricity objective:

the Panel notes that even an efficiency assessment typically requires a balancing of allocative, cost and dynamic efficiency considerations, which may be differentially affected by alternative potential decisions. There are trade-offs among these various dimensions that need to be resolved by reference to some balancing or weighting of the different elements, and this balancing/weighting usually depends upon a value system beyond the notion of economic

efficiency itself. It is the Panel's view that this is precisely what the reference to 'for the long-term interests of consumers' in the legislation provides, and the recommendations therefore serve to reinforce the intended meaning.

We strongly support this analysis, as well as the Expert Panel's recommendation. It appears that the SCER is also alive to this concern as it adopted the words 'in ways that best serve' in its Statement of Policy Intent. In our view, the addition of these words could also serve to overcome other weaknesses with the national electricity objective. With its narrow focus on the economic interests of consumers,¹ our concern is the objective institutionalises an inability of our market institutions to consider adjustment, distributional and equity impacts of regulatory decision-making. This is because the objective focuses these institutions on supply-side efficiency and investment matters, rather than broader consumer and public interest outcomes.

We urge the SCER to revisit the Bill and either amend the objective as proposed by the Expert Panel, or amend proposed section 16 of the NEL so that it better aligns with SCER's Statement of Policy Intent.

Record of reviewable regulatory decisions

We strongly support the proposed section 28ZJ requiring the AER to keep a written record of regulatory decision related matters. We submit that this section should be amended to make it clear that such record should be available to the public for review.

Definition of reviewable regulatory decision process participant

The proposed definition of 'reviewable regulatory decision process participant' in section 71A includes persons or bodies with a 'sufficient interest' in the reviewable regulatory decision, and who has provided a submission to the AER during its consultation on the regulatory determination. We submit that the requirement of 'sufficient interest' is unnecessary and may serve to exclude participation in merits review, including by consumer groups.

It is unclear what 'sufficient interest' means and it is likely that this would be decided by the limited merits review forum, the Australian Competition Tribunal (**Tribunal**). Noting SCER's decision to not accept the Expert Panel's recommendation to transfer appeals functions from the Tribunal to a new body (discussed further below), we have concerns about the Tribunal interpreting the meaning of 'sufficient interest'. As explained in our various submissions to the Expert Panel and our report, *Barriers to Fair Network Prices*,² the Tribunal is not a familiar or welcoming place for consumer organisations and has historically made decisions that do not accord with the long-term interests of consumers. Given this, we believe that should a person or organisation have provided a submission or comment to the AER during its consultation on a regulatory determination, that person or organisation should be automatically included in the definition of 'reviewable regulatory decision process participant' and should not have to demonstrate 'sufficient interest'.

¹ Brody, G., "Consumer Interest in the National Energy Market: A Changing Climate?", in Cantley-Smith, R., and Bowman, D. (eds), *Green Power: An environmental audit of the national electricity market*, 2009.

² Consumer Action and CUAC, *Barriers to Fair Network Prices: An analysis of consumer participation in merits review of the AER EDPR determinations*, August 2011, <http://consumeraction.org.au/wp-content/uploads/2012/04/Barriers-to-Fair-Network-Prices.pdf>.

Leave for reviewable regulatory decision process participant

The proposed amendment to section 71K of the NEL which requires the Tribunal to grant leave to regulatory decision process participants expressly excludes user or consumer interveners. We assume that the SCER is proposing that user or consumer interveners must only be granted leave in accordance with section 71L of the NEL which provides a discretion to the Tribunal to grant leave in limited circumstances. In our view, this does not accord with the SCER's Statement of Policy Intent, particularly where it states that the limited merits review regime should 'provide a balanced outcome between competing interest and protect the property rights of all stakeholders by ensuring that all stakeholders interests are taken into account, including those of network service providers and consumers'. It is not balanced if some stakeholders have leave to appear before the Tribunal as of right, while user or consumer interveners must apply for leave.

Further, in our report *Barriers to Fair Network Prices*, section 71L was found to be a significant barrier to consumer participation in limited merits review determinations. In particular, the requirements for interveners to "raise a matter that will not be raised by the AER or the applicant" as required by section 71L(3)(a) or would present information, material or submissions which were "likely to be better presented if submitted by the user or consumer intervener rather than another party to the review" as required by section 71L(3)(b) were noted as the reasons legal counsel advised against our organisations proceeding with intervention. The report finds that a consumer group's application for leave to intervene would in all likelihood need to be very specific and/or authoritative in order for the Tribunal to hear its case. The report discusses the risk of network service providers opposing an application for leave, and the need to present economic evidence by a world-leading expert to counter such opposition. Further, the Bill does not appear to deal with the very restrictive time periods imposed on user or consumer interveners, another concern raised in the *Barriers to Fair Network Prices* report.

In its RIS, SCER states that a new limited merits review framework should require the Tribunal to give due regard to user or consumer views, including through consulting with consumers as part of its review process. We note that this is included in the Bill, through the amendment to section 71R of the NEL. We welcome this requirement. However, in order to deliver a more balanced appeal, we believe that consumer organisations that participated in AER consultation on the regulatory determination should have the right to intervene, and not be required to seek leave.

Materially preferable NEO decision

We welcome the proposed amendments to section 71P of the NEL requiring the Tribunal to only make a decision that is materially preferable to the reviewable regulatory determination. However, as outlined above, our view is that the determination of what is materially preferable should not be limited to the national electricity objective as currently drafted. We strongly urge the SCER to define a materially preferable decision as one that best serves the long term interests of consumers.

New information

We support the further limitations on new information or material being submitted to the Tribunal in proposed sub-section 71R(3). An outcome of the new merits review framework must be for all relevant material to be provided to the original decision-maker the AER and for parties not to intentionally withhold information.

Costs in a review

Proposed amendments to sections 71X and 71Y relating to costs in a review are not sufficient to reduce the risk of costs orders against consumer groups. Currently, costs orders can only be made against a consumer group where it has conducted its case without due regard to the costs that would have to be incurred by another party to the review as a result of their conduct, or without due regard to the time required by the Tribunal or another party to hear or prepare their case. The report *Barriers to Fair Network Prices* found that these limitations did not reduce the risk of an adverse cost order in any significant way, particularly due to the requirements (referred to above) for consumer interveners to present a strong technical basis for intervention.

Proposed section 71Y(2) does attempt to limit the costs that might be awarded against consumer intervener to 'reasonable administrative costs'. This is welcome, but absent what this term means in practice, it is unlikely to resolve concerns relating to the risk of prohibitive, large cost orders awarded against consumer organisations. Given the expense involved in Tribunal hearings (often involving Senior Counsel, top-tier law firms and international experts), 'reasonable administrative costs' may be significant.

We strongly urge SCER to amend its approach to improving protections for consumer organisations intervening in Tribunal hearings and instead confer the Tribunal with the power to make protective costs orders. A protective costs order is a type of order that protects a party to a proceeding from an adverse costs outcome and may include orders that:

- a party will not be exposed to an order for costs if it loses at trial;
- the amount of costs that a party will be required to pay if it loses at trial will be capped at a specific, certain amount; or
- that there will be no order for costs whatever the outcome of the trial.³

Such an approach would be far more effective in achieving an outcome that consumer interveners do not face the risk of significant adverse cost orders, and is line with SCER's policy goal 'that all participants in reviews are generally required to bear their own costs' (as outlined in the RIS).

Costs not to be passed on

We very strongly support proposed section 71YA of the NEL which states that network business should not be able to pass costs associated with reviews through to consumers. Network businesses can already claim a tax deduction for legal costs, including costs relating to a review

³ For further information about protective cost orders, see: PILCH, Submission to the Commonwealth Attorney-General on protective costs orders, April 2009, available at: <http://pilch.org.au/Assets/Files/PILCH%20-%20submission%20to%20Cth%20AG%20re%20PCOs%20FINAL.pdf>

of regulatory determination. Allowing network businesses to pass these costs on to consumers is perverse and this reform is very welcome.

Role of the Tribunal

We note the SCER policy decision to maintain the Tribunal as the review body. We hold significant concerns about the ability of the Tribunal to undertake the merits review function in the manner deemed necessary by the Expert Panel. Our concern is that the Tribunal conducts itself in a quasi-judicial or court-like fashion—the Expert Panel described its approach as being adversarial and formal in nature. Tribunals with a quasi-judicial approach are not uncommon in Australia but their decision-making can be limited to the submissions and evidence brought before them which, in the case of administrative review of economic decisions, is often required to be wielded by legal counsel and international experts which are generally not available to consumer agencies. Such an approach may be contrasted with more investigatory or inquisitorial approaches to decision-making, which are commonly undertaken by regulators or ombudsmen. In our view, an investigatory approach is likely to be required so that the appeal body is able to assure itself that it has garnered all the information necessary to make a decision based on the proposed single ground of appeal. An investigatory body is also likely to be more accommodating for consumer bodies.

While we acknowledge the proposed amendment to section 71R of the NEL requiring the Tribunal to consult with consumer groups, we do not believe the legislation or regulations sufficiently direct the Tribunal to adopt an informal, investigatory approach. We also acknowledge the effect of regulation 28M of the Competition and Consumer Regulations 2010 (Cth) and the extension of this to energy merits review decisions by virtue of the proposed regulation 7B(2). However, we do not believe that these regulations sufficiently direct the Tribunal to conduct itself informally, consultative and in an investigative rather than adversarial fashion. Such an approach was considered essential by the Expert Panel which stated:

Speaking generally, the Panel considers there to be great merit in adversarial-type review processes in many contexts, particularly when the issues at stake are binary in nature (guilty/not guilty; infringement/non-infringement; allow merger/prohibit merger), or where there are a limited number of options. ‘Advocates’ for those (limited in number) positions can then compete, and reviewers can adjudicate. However, it is the Panel’s view that the nature of the issues that are at stake in a price/revenue control decision are typically not like that; and nor are the related issues of establishing incentive structures for regulated companies. The decision maker is, in the relevant circumstances, ‘standing in for the market’, since market outcomes are considered unacceptable in the relevant, monopolistic conditions. Market processes ‘discover’ values and establish incentive structures, from an infinite range of possibilities, and the regulator does the same, driven by delegated objectives. It is appropriate, therefore, to review decisions on a basis that addresses this reality, and that does not tend to rely on thinking more suited to the assessment of binary decisions.

It was for this reason that the Expert Panel recommended the establishment of a new administrative appeals body. Recognising that this recommendation was not supported by SCER, we think it is essential that further amendments to the NEL or the Competition and Consumer Regulations 2010 are made that directs the Tribunal to conduct itself in an informal, consultative and investigatory way.

Finally, we welcome the proposed amendment to section 71Z providing for a review of the Tribunal's role as the review body by 1 December 2016. We hope that such a review can consider the issues that are described above.

Should you have any questions about this submission, please contact Janine Rayner, Senior Policy Officer, by email at janine@consumeraction.org.au or call 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody
Chief Executive Officer