



public interest
ADVOCACY CENTRE

**Submission to the Senate Environment and
Communications Legislation Committee**

**Inquiry into the Competition and Consumer
Amendment (Abolition of Limited Merits Review) Bill
2017**

19 September 2017



1. Introduction

The Public Interest Advocacy Centre (PIAC) welcomes this opportunity to provide a submission to the Senate Environment and Communications Legislation Committee (the **Committee**) for its inquiry into the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017 (the **Inquiry**). We understand that the Committee will inquire and report by 16 October 2017.

We note that there are no specific Terms of Reference for this Inquiry. In a context in which we understand that support for the abolition of Limited Merits Review (**LMR**) is bipartisan, we do not object to, and otherwise make no comment on, the particular mechanism by which this Bill would abolish the system of LMR.

Instead, this submission covers two issues which relate to the arrangements for appeals of decisions by the Australian Energy Regulator (**AER**) that are of concern to consumers. These issues are funding and subsequent legislative amendments to address standing and cost protection for consumer groups. In relation to these issues, PIAC makes the following submissions:

- (i) The regulatory system must provide for consumer involvement in all stages of the process, including administrative review processes, in order to ensure a focus on consumer outcomes, in keeping with the National Electricity Objective and National Gas Objective.
- (ii) Further committed funding is necessary to enable effective consumer participation at all stages of the regulatory process, including any arrangements for appeal, as has been acknowledged by COAG Energy Council in its recent review of arrangements for Limited Merits Review.
- (iii) Further changes are required so that the abolition of LMR does not have the unintended consequence of limiting opportunities for consumer participation in administrative reviews of the AER's decisions.
- (iv) Alongside the passage of this Bill, the Committee should recommend further legislative reforms to give consumer organisations a statutory right of standing in judicial review proceedings, and protection from adverse cost orders.

We understand that key stakeholders, including the AER, are concerned that any delay to the passage of this Bill may have detrimental effects on current and upcoming processes. PIAC shares this concern, and submits that the Bill should be passed without further delay; but requests that the Committee recommend that further legislative reforms be enacted to protect consumer interests after LMR is abolished.

2. Public Interest Advocacy Centre

The Public Interest Advocacy Centre is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training.

PIAC's Energy + Water Consumers' Advocacy Program (**EWCAP**) represents the interests of low-income and other residential consumers of electricity, gas and water in New South Wales. The program develops policy and advocates in the interests of low-income and other residential

consumers in the NSW energy and water markets. PIAC receives policy input to the program from a community-based reference group.

PIAC has been actively involved in the AER's revenue determinations, including in LMR. PIAC was the first consumer organisation to be a participant in LMR proceedings in the Australian Competition Tribunal (**the Tribunal**), as an applicant and intervener in the Tribunal's NSW proceedings. In addition, PIAC acted as a consumer observer and legal advisor for other consumer organisations in LMR proceedings in South Australia and Victoria in 2016 and 2017. PIAC's involvement in these proceedings was made possible by funding and support from Energy Consumers Australia (**ECA**).

3. The regulatory system must provide for consumer involvement in all stages of the process, including review processes, in order to ensure a focus on consumer outcomes, in keeping with the National Electricity Objective and National Gas Objective.

It is PIAC's view that, as an underlying principle, consumers must have the ability to meaningfully participate in processes that affect their interests. This includes the regulation of electricity and gas network businesses, which directly impacts the price paid by consumers for these essential services. The National Electricity Objective (**NEO**) reflects the centrality of consumer interests in the regulatory scheme. It provides:

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.¹

As such, consumers must be able to participate in both the AER's determination process and administrative appeals of the AER's decisions. In PIAC's view, meaningful consumer engagement, including participation in both the determination and appeals processes, is a key way of ensuring that regulatory decisions continue to serve the long term interests of consumers in accordance with the NEO.

The need for consumer participation in the regulatory process has been recognised in successive reforms of the National Electricity Market. When the National Electricity Law (**NEL**) and National Gas Law (**NGL**) were amended in 2008 to provide for LMR of the AER's determinations, one of the goals of the (then) Ministerial Council on Energy was to ensure that all stakeholder interests, including the interests of consumers, were taken into account by the Tribunal.² Likewise, the 2013 package of reforms to the NEL and the NGL introduced a suite of measures to improve the ability of consumer groups to participate in the LMR review process, including by enshrining cost protections for consumer participation, and by introducing a consumer consultation process,

¹ Similarly, The National Gas Objective is to promote efficient investment in, and efficient operation and use of, natural gas services for the long-term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

² Professor George Yarrow, The Hon Michael Egan and Dr John Tamblyn, 'Review of the Limited Merits Review Regime' (Stage One Report, 29 June 2012) 8 and 43.

whereby the Tribunal was obliged, before making a decision, to consult with user and consumer groups in relation to the determination.

The 2013 legislative changes to the NEL and the NGL were broadly supported by consumer groups, some of whom participated actively in litigation before the Tribunal in 2015 and 2016. Notably:

- In NSW, PIAC participated as an applicant and intervener before the Competition Tribunal in reviews relating to Networks NSW, and over 20 consumer groups participated in the Tribunal's consumer consultation process.
- In South Australia, the South Australian Council of Social Service applied for leave as an applicant on the Competition Tribunal review relating to SA Power Networks, and 14 consumer organisations participated in the Tribunal's consumer consultation process.
- In Victoria, 9 consumer organisations participated in the Tribunal's consumer consultation process in relation to the five Victorian electricity Network businesses.

It is clear that the period 2008-2013 saw reforms that enhanced the ability of consumers to participate in administrative reviews of the AER's determinations, and that consumer groups actively embraced and took up that challenge.

4. Further committed funding is necessary to enable effective consumer participation at all stages of the regulatory process.

Consumer advocates share the view that the AER's determination process, rather than reviews of its decisions, should remain the primary forum for decision making in the regulatory space. Our view is that a substantial increase in funding for consumer participation is necessary in order to ensure that consumers can meaningfully contribute to all stages of the AER's regulatory process.

The nature of the AER's decision making is extremely complex. Historically, small consumer organisations have lacked the internal technical expertise and capacity to critique in detail the methods and approaches adopted by the Network businesses and AER in their regulatory proposals and draft decisions. Analysing these proposals, and understanding their likely impacts on consumers, may require (among other things) lawyers with expertise in both the National Electricity and Gas Laws and Rules, economists with expertise in the regulation of electricity and gas markets, and engineers with expertise in energy-related infrastructure. Obtaining this advice externally (as it is rarely available in-house) over the course of a determination period is time-consuming and costly for consumer organisations.

Likewise, in respect of administrative review processes, the asymmetry of resources between networks and consumer groups was demonstrated clearly in the NSW LMR proceedings, where Networks NSW paid legal costs in the vicinity of \$90 million (representing approximately 8% of the networks' combined \$1.1 billion net profit in 2014-15),³ compared with approximately \$500,000 spent by PIAC and ECA to fund their involvement.⁴

³ Sophie Li, "Public Interest Advocacy in the Australian Competition Tribunal" (2017) 87 *Australian Institute of Administrative Law Forum* 93, 101.

⁴ It should be noted that this figure includes the costs of PIAC's intervention in judicial review proceedings before the Federal Court. The figure consists of approximately \$300,000 in direct costs, including fees for legal counsel, and \$200,000 in internal costs. To our knowledge, the costs of Networks NSW involvement in the judicial review proceedings are not included in the estimate of \$90 million.

Without a specific increase in consumer funding for participation in the AER's determination processes, it is likely that both the AER's determinations and any subsequent administrative reviews will continue to produce results that are heavily weighted towards network businesses, to the detriment of consumers.

PIAC notes that the COAG Energy Council has committed to further consultation with consumer groups about options to improve their resourcing and capacity to more effectively participate in the AER's determination process. PIAC understands that the Energy Council will circulate a discussion paper in relation to this issue in the coming months. In this context PIAC submits that the Committee should recommend that further funding be made available to consumer groups to ensure the viability of their participation in both regulatory decision making and administrative reviews after LMR is abolished.

5. Further changes are required so that the abolition of LMR does not have the unintended consequence of limiting opportunities for consumer participation in administrative reviews of the AER's decisions.

Once LMR is abolished, the avenue for administrative appeal of the AER's decision will be through applications for judicial review. Given the importance of the revenue determinations to Network businesses, consumers expect that they will continue to regularly challenge the AER's determinations through this forum. However, issues of both standing and costs will pose significant impediments to the participation of consumer advocacy groups in such reviews.

In relation to standing, the *Administrative Decisions (Judicial Review) Act (ADJR Act)* requires a potential applicant for judicial review to establish that they are a 'person aggrieved' by a decision and that the decision in question affects their legal rights and/or obligations. These tests have historically been difficult for applicants, such as consumers, who seek judicial review in the public interest. The network businesses, whose financial interests will be directly affected by the AER's determinations, can more easily satisfy these tests. In PIAC's view it is unlikely under the current legislative framework that consumer groups would be able to successfully apply for judicial review of the AER's determinations.

Similarly, consumers would face barriers to participation as intervenors in applications brought by the network businesses. In order to be granted leave to intervene, consumer groups must demonstrate a sufficient 'interest' in the proceedings, and also that their contribution would be 'useful and different' from the other parties and not 'unreasonably interfere' with the ability of the parties to conduct the proceeding as they wished. Absent legislative amendments to these tests, it is not clear that a consumer organisation would be granted leave to intervene in such an application.⁵

⁵ We note that PIAC was granted leave to intervene in the recent judicial review of the Tribunal's decision in respect of the NSW determinations: *Australian Energy Regulator v Australian Competition Tribunal (No 2)* [2017] FCAFC 79. However, PIAC's intervention was predicated on its role as an applicant in the LMR proceedings before the Tribunal which were the subject of the judicial review. Thus, the grant of leave in these proceedings should not be considered an indication of the ability of consumer groups to successfully apply for leave to intervene in judicial review proceedings following the abolition of LMR.

In relation to costs, the risk of an adverse costs order will be a practical deterrent to consumer groups applying for judicial review or participating in proceedings as interveners. The significant risks posed by adverse cost orders were the reason cost protections for consumers were added to the NEL and the NGL for LMR proceedings as part of the 2013 reforms. In contrast, only very limited cost protections (like cost caps) are available for judicial review proceedings in the Federal Court and only at the discretion of the Court.

In addition to the risk of an adverse costs order, consumer groups seeking to participate in any judicial review process will have to bear their own legal costs. As outlined above, the complexity of the regulatory decision-making process and the formality of judicial review proceedings mean that legal representation is a necessity if consumers are to be effective participants in judicial review. Inadequate funding arrangements currently limit the ability of consumer groups to access this representation, which is typically costly.

The combination of these issues regarding standing, the risk of adverse costs and inadequate of funding for consumers will make it considerably less viable for consumers to be involved in judicial review of the AER's decision than in the current system of LMR. Without further reforms to facilitate consumer participation in judicial review, there will continue to be a significant power imbalance in the regulatory system, away from consumers and in favour of network businesses.

6. Alongside the passage of this Bill, the Committee should recommend further legislative reforms to give consumer organisations a statutory right of standing in judicial review proceedings, and protection from adverse cost orders.

In order to ensure continued rights of consumer participation in administrative review processes, the National Electricity Law and National Gas Law, as well as the ADJR Act, should explicitly guarantee standing for consumer groups in judicial review processes relating to the AER's decisions. Further consideration must also be given as to how the consumer protection against cost orders under the LMR review scheme can be preserved for judicial review hearings.

We note that this position has the broad support of consumer advocacy organisations and the AER. In its 2016 submission to the COAG Energy Council's Review of LMR, the AER envisaged legislative reforms of exactly this kind to protect consumer interests, were LMR to be abolished.⁶ We further understand that the AER remains supportive of this position, provided that it does not delay the passage of the Bill currently before the Committee.

We recommend that, in its report, the Committee agree that such legislative protections are necessary for consumers after LMR is abolished, and recommend that these changes be adopted without further undue delay.

7. Conclusion

PIAC thanks the Committee for the opportunity to provide a submission to this Inquiry. PIAC would welcome the opportunity to speak with the Committee about this submission and our

⁶ Australian Energy Regulator, Submission to COAG Energy Council Senior Committee of Officials, *Review of the Limited Merits Review Regime*, 4 October 2016, pages v, 22 and 25.

consumer advocacy work in further detail. Please contact Craig Memery at cmemery@piac.asn.au or on (02) 8898 6522, or Julia Mansour at jmansour@piac.asn.au or on (02) 8898 6504.

Supporting organisation contacts:

Douglas McCloskey, NSW Council of Social Service
Jo De Silva, South Australian Council of Social Service
Zac Gillam, Consumer Action Law Centre
Ben Martin Hobbs, Consumer Policy Research Centre