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3 October 2016

COAG Energy Council Secretariat  
GPO Box 9839  
Canberra ACT 2601

Dear Sir/Madam

### **Review of the Limited Merits Review Regime**

Consumer Action Law Centre (Consumer Action) and Consumer Utilities Advocacy Centre (CUAC) welcome the opportunity to respond to the Council of Australian Governments Energy Council (Energy Council) review of the Limited Merits Review (LMR) regime.

#### **About our organisations**

Consumer Action is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

CUAC is a specialist consumer organisation established in 2002 to represent Victorian energy and water consumers in policy and regulatory processes. As Australia's only consumer organisation focused specifically on the energy and water sectors, CUAC has developed an in-depth knowledge of the interests, experiences and needs of energy and water consumers, in particular those from low income, disadvantaged and rural communities. CUAC's policy positions are informed by evidence based research.

#### **Background**

In the 2012 review of the LMR regime, Consumer Action and CUAC presented evidence that the regime had failed to deliver on its objectives. Our report, *Barriers to fair network prices*, provided feedback based on the involvement by Consumer Action and CUAC in the AER's formal

consultation process for its Victorian network decisions for 2011–2015, and the attempt to intervene in the related LMR process.<sup>1</sup>

Major failings of the regime highlighted in the report included that it:

- did not provide equal access to review for all affected parties, including network service providers, users and consumer associations
- allowed for network businesses to ‘cherry-pick’ issues for review, rather than looking at the appropriateness of the decision overall
- is overly lengthy and complex and results in additional costs and uncertainty for consumers.

The report also examined the effectiveness of a merits review versus a judicial review process, including the notion of accountability, regulatory certainty, correct initial decisions, stakeholder views, minimising gaming, minimising delays and costs. On the basis of this analysis, we recommended that the LMR regime be removed, leaving judicial review as the sole mechanism for appeal of AER decisions.

More recently, CUAC was a signatory and contributor to the Victorian Energy Consumer and User Alliance (VECUA) submissions to the 2016–20 Victorian distribution reset. On the basis of this involvement, it sought advice on whether it could get standing to appeal the decisions, or intervene in the appeals of the distribution businesses. This experience reinforced CUAC’s view that numerous and varied barriers remain for a consumer organisation to effectively participate in LMR.

### **Current position**

Consumer Action and CUAC are of the view that the 2013 LMR reforms have failed to adequately overcome the problems seen in the initial regime, and that removal of the LMR regime remains the only viable option under the current framework. Judicial review provides a sufficient mechanism for stakeholders to seek redress of significant regulatory error.

More broadly, we consider there is merit in ongoing discussion on the effectiveness of the network revenue decision-making framework, and the appropriate role for consumer representatives in that process. Unless the objectives of consumer participation is made clear, we cannot sensibly assess whether the current framework is well suited to achieving these outcomes.

### **Assessment of the current framework**

The following are some of the key failings of the current merits review arrangements.

*The hurdle for access to LMR has not been raised*

The 2013 reforms attempted to raise the threshold for network businesses to obtain leave to review an AER decision. It did this by requiring the applicant to establish a prima facie case that a materially preferable decision exists with regard to the energy market objective of outcomes that are in the long term interests of consumers.

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<sup>1</sup> May Mauseth Johnston, *Barriers to fair network prices: An analysis of consumer participation in the merits review of AER EDPR determinations*, report prepared for the Consumer Action Law Centre and Consumer Utilities Advocacy Centre, August 2011, available online at: <http://consumeraction.org.au/wp-content/uploads/2012/04/Barriers-to-Fair-Network-Prices.pdf>

That all businesses who have sought review under the revised framework have been granted leave raises significant doubts about the effectiveness of the higher hurdle to review. Recent applications for leave to review have still been framed, and accepted, on the basis of specific ‘errors’ in AER’s decisions. There is little evidence that the Tribunal has considered how the matters raised for review link with other element of the AER decisions and, therefore, whether an overall materially preferable decision is likely to be achieved through a review.

#### *Tribunal not focused on the long-term interests of consumers*

Tribunal reviews remain focused on the correction of specific ‘errors’ raised by the network businesses, rather than the broader question of whether a materially preferable decision could be made.

The Tribunal, in its 2016 decision related to the New South Wales electricity distribution networks, recognised that an assessment of a materially preferable decision must consider how a complex range of related matters impact on the overall decision in meeting the long term interests of consumers. But in recognising this, the Tribunal also conceded that it is not as well equipped to consider these complex linkages as the AER. Its apparent solution to this problem is that where it finds a ground of review or ‘error’ has been made out, it will remit the decision back to the AER to correct the ‘error’ and consider any flow-on impacts. This approach defeats the purpose of the 2013 amendments to the LMR that should only see a decision varied or remitted where the question of whether there is a materially preferable decision has been answered affirmatively. It also raises serious questions around regulatory certainty, with regular remittal of matters likely to further delay finalisation of outcomes, and the suitability of the Tribunal to undertake the required assessment under the existing framework.

Recent Tribunal reviews have seen greater participation by consumer groups presenting evidence on the long term interests of consumers, including through a community consultation process. However, the Tribunal’s decisions have failed to set out how this evidence has, if at all, been considered in establishing that a materially preferable decision could be made.

#### *Significant barriers to user and consumer participation remain*

While the new framework has made participation for consumer groups easier, through both the ability to seek leave to review or intervene, and through the community consultation process, significant barriers to meaningful participation by these groups remain.

The decision of the Tribunal to dismiss the South Australian Council of Social Services’ application for leave to review the AER’s November 2015 decision for SA Power Networks highlights ongoing difficulties for consumer groups in participating in the LMR process. In particular, it suggests that consumer groups must approach the whole AER consultation process in a more legalistic manner with a view to potential grounds for appeal. This presents an unnecessary barrier to participation, and is in conflict with moves to de-formalise the consultation stages more generally to enable greater consumer involvement.

More recently, CUAC was a signatory and contributor to the VECUA submissions to the 2016–20 Victorian distribution reset. The submissions were prepared by an economic consultant commissioned by the Energy Users Association of Australia. CUAC sought ‘prospects advice’ as to whether there were sufficient grounds in the VECUA submission for it to obtain standing in the Victorian LMR process. Prospects advice necessarily required CUAC to seek grant funding to engage legal counsel and a number of economic consultants—including the author of the VEUCA

submission—because CUAC does not have the expertise or resources to conduct this work in-house. Due to CUAC's reliance on grant funding and the limited window to submit an application for leave in accordance with the requirements under section 71D of the National Electricity Law, CUAC was unable to seek prospects advice in time to meet this deadline.

CUAC then sought advice as to whether it had standing as an intervenor in one or more of the distribution businesses' own appeals, and whether there were sufficient grounds in the VECUA submission for CUAC to intervene. Ultimately, counsel advised that though CUAC did have standing, the grounds for appeal were unlikely to be successful. Our experience demonstrated the numerous and varied barriers for a consumer organisation to participate in LMR. Consumer organisations remain unable to engage in the process without significant financial assistance from an external body to obtain the economic and legal expertise required for effective participation. CUAC's experiences through this process are set out in more detail in a confidential case study provided with this submission.

The complex nature of the determinations, and significant information asymmetries between network and consumer groups, mean that consumer groups will always struggle to participate as an effective contradictor to network businesses. Changes to the framework have failed to move the Tribunal away from a highly legalistic, adversarial approach. This approach, and the focus on technical economic issues, means that significant financial resources are required to facilitate effective participation in the review process (to allow for legal representation, senior counsel and expert technical advice).

While a more investigatory approach may be achieved through a new review body, the nature of the decisions in question means that a technical economic focus on points of detail is likely to remain under any merits review framework implemented. As a result, we see little value in further tweaking of the current arrangements to enhance the ability of consumer organisations being able to intervene in merits reviews as significant barriers to effective consumer intervention are likely to remain.

#### *Lengthy and costly process*

The current system remains complex and results in a lengthy and costly process. Energy Consumers Australia, for example, has spent close to \$1 million supporting consumer participation in the current round of LMR processes. As stated above, it is unclear what impact, if any, this participation had on the Tribunal's decision in those matters.

The Tribunal process in those cases extended significantly beyond the target of three months from the time that leave is granted. That the decisions are subject to ongoing appeals by the AER in the Full Federal Court almost 18 months since the original decision is clear evidence that the current framework does not provide sufficient or timely regulatory certainty. Many of the issues raised in those reviews apply across all regulated networks, meaning delays in the process creates uncertainty for all participants.

It is unclear how the LMR regime could be altered to overcome this problem under the current regulatory framework. The creation of a new investigatory body is also unlikely to resolve this issue. The focus of reviews on technical economic matters necessarily requires detailed submissions and investigation. It is difficult to see how the tribunal or investigatory body could be expected to make effective decisions without first considering all the information made available to the AER, meaning that any assessment of the technical detail of a decision is unlikely to be possible within a timeframe that could promote regulatory certainty for all participants.

Moving to judicial review, with a focus on process rather than the decision itself, simplifies the role of the review body and would significantly shorten the review process.

#### *Focus on achieving the best possible decision*

Economic determinations require expert knowledge and are arrived at through extensive consultation processes. The technical nature of these decisions means that they that they are not well suited to merits review.

Under merits review processes to date, it is arguable that the Tribunal has gone beyond questions of error and has based some decisions on a difference of economic opinion. AER network decisions are made through extensive, thorough and consultative processes. Consumer Action holds the view that this cannot be replicated in a Tribunal process, and have little confidence that the Tribunal is better placed to decide on matters involving a difference of economic opinion than the AER as the initial decision-maker. The relatively short LMR process, and the limited resources available to the Tribunal, means that the Tribunal is unable to fully assess all information presented to the AER as part of the original consultation process. Instead, it is reliant on the participants in the review to highlight evidence supporting their positions. This clearly results in a less informed decision-making environment.

The option to replace the Tribunal with an expert investigatory body does little to ease these concerns. The new body would still be constrained by resources and time limits, meaning that it is still unlikely that it would be better placed than the AER to decide on contested matters. Further, a review framework that allows these issues to be heard undermines the position of the AER as the original decision-maker. In these circumstances, regulated businesses may adopt a strategy that focuses on the review body rather than fully engaging with the AER.

#### **Sufficiency of judicial review**

A framework limited to judicial review would provide an overall superior outcome to merits review in respect of the various objectives of a review mechanism.

Judicial review can look at whether the process of making the decision was reasonable; whether principles of procedural fairness were observed; whether there was bias on the part of the decision-maker; and whether the decision was within the power of the decision-maker. These grounds of review provide an appropriate balance between providing regulatory accountability and maximising the opportunity to reach the most preferable decision on the one hand, and minimising the risk of delays, high costs and the potential for network businesses to game the process on the other.

#### *Accountability of decision-making and regulatory certainty*

Judicial review shifts the focus from the technical detail to whether the AER has made its decision in accordance with the detailed guidance provided in the regulatory framework. The focus of on the legal basis for the decision recognises that an independent, expert regulator, through a thorough consultation process, is best placed to decide on complex technical questions and competing economic arguments.

The grounds for judicial review are sufficiently broad to ensure the AER undertakes its determinations appropriately and considers all relevant material before it. In the recent judgement

of *Minister for Immigration and Citizenship v Li*,<sup>2</sup> the High Court confirmed that judicial review can be used to assess whether statutory discretion has been exercised reasonably. Reasonableness in that case was assessed with regard to factors including: taking irrelevant considerations (or failing to take relevant considerations) into account; bad faith; dishonesty; disregard of public policy and misdirecting oneself as to the operation of the statute.<sup>3</sup> The Australian Government Solicitor suggested that the case provides that 'even when an administrative decision-maker has a wide discretion, significant care needs to be taken in order to ensure that the decision is lawfully made'.<sup>4</sup>

By limiting the scope of review and ensuring decisions are made in a timelier manner, there is greater regulatory certainty for all participants.

*Minimises time delays and cost*

While a judicial review process still involves some delays and costs, this is clearly lesser than under a regime with both merits and judicial review available.

Most businesses that have sought merits review of AER decisions have also applied for judicial review. In practice, however, these businesses have not proceeded with judicial review following the merits review process (as they have been largely successful in those initial merits review processes). To the extent that judicial review replaces merits review as the sole avenue of review pursued in practice, the narrower focus of judicial review should still result in cost and time savings relative to current outcomes.

*Provides a balanced outcome between competing interests*

A robust initial decision-making framework, including detailed consultation, provides the best opportunity for all stakeholders to engage effectively in the process. Judicial review ensures that stakeholders have a right to seek review where the appropriate process has not been followed or the regulator's decision is unreasonable.

Amendments to the framework should include provisions that ensure consumer groups can gain standing in judicial review processes on a similar basis to that applied currently for LMR, and that there is no risk of adverse cost orders against these participants.

*Maximises conditions for an initial correct decision and minimises the risk of gaming and 'cherry-picking'*

The technical nature of economic determinations, which often require the decision-maker to choose between competing economic arguments, mean that they are not well suited to merits review. A review body, constrained by time and resources, is unlikely to be sufficiently placed to better judge the merits of competing arguments than the original decision-maker that has engaged in an extensive consultation process.

The focus of judicial review on legal correctness and process reduces the ability for network businesses to pick and choose elements of the decision to challenge. This should incentivise full and frank engagement with the initial decision-making process by businesses.

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<sup>2</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

<sup>3</sup> Australian Government Solicitor, *High Court considers unreasonableness ground of judicial review of administrative decisions*, 21 May 2013.

<sup>4</sup> *Ibid.*

Better information through the initial decision process would also allow consumer groups to more effectively contribute at this stage. To the extent that a move to judicial review as the only appeals mechanism reduced the total number of reviews, this would also potentially allow consumer groups to dedicate more of their limited resources to the initial decision stage.

### **Limiting merits review to AER decisions on binding guidelines**

Some stakeholders have recommended that regardless of whether LMR is removed from electricity revenue determinations and gas access arrangement decisions, it should be retained for other decisions such as revisions to the weighted average cost of capital (WACC) guideline. This could be implemented alongside changes that require the AER to set key decisions through the guideline that restrict its discretion in subsequent revenue determinations and access arrangements.

The justification provided for this proposal is that it provides stakeholders with the full protections available through LMR for those elements of AER decisions that have been the main focus of LMR processes to date, while limiting the number and scope of reviews.

We agree that there is merit in amending the framework so that reviews of sector-wide issues such as elements of the WACC are heard concurrently for all affected businesses. However, for the reasons presented above, we consider that a judicial review framework would provide an overall superior outcome to merits review in respect of these decisions. In particular, issues relating to the WACC involve a complex assessment of competing economic views that is best determined through a thorough consultation process undertaken by the original decision-making body.

We would support changes to the framework that provide greater confidence in the robustness of the original decision-making process on these more technical matters, including requirements for the decision-maker to consider evidence from an expert panel.

Under this framework, a review body focused on legal correctness and due process can ensure accountability of the original decision-maker, and would incentivise full and frank engagement with the initial decision-making process by businesses.

### **Further improvements to consultation processes**

Adjustments to the AER's decision making process that occurred alongside changes to the LMR framework in 2013 have resulted in the opportunity for more effective public consultation. These processes provide various opportunities for consumer groups to present their views to both the AER and regulated businesses.

We recognise that these consultation processes are still being implemented and refined. Removal of LMR and a greater focus on getting consultation right at the initial decision-making stage is likely to be the most beneficial path to enable the views of consumers groups to be appropriately heard and reflected in final revenue decisions.

A more fundamental shift in the regulatory framework may also need to be explored, should the current consultation processes being developed prove inadequate. For example, there is scope to make consumers more central to the decision-making process upfront, and for the role of bodies such as the Consumer Challenge Panel (or an equivalent) to be expanded to support consumer participation in the decision-making process, and in any subsequent appeals.

We note that with the current evolution of the energy sector, different models of network regulation are being explored internationally. These include more output-focused, incentive based mechanisms. The Energy Council should undertake a cost/benefit assessment of these regulatory models for Australian conditions and against the objective of outcomes in the long-term interests of consumers. The review should have a clear focus on implementing a model that makes consumers a key participant throughout the determination process.

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Yours sincerely



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