



Submission to the Ministerial Council on Energy 2006 Legislative Package: Gas and Consumer Advocacy

The Consumer Action Law Centre (**Consumer Action**) and Consumer Utilities Advocacy Centre Ltd (**CUAC**) welcome the opportunity to comment on the Ministerial Council on Energy's (**MCE**) *Draft Legislative Package 2006: Gas and Consumer Advocacy*.

Merits review

Part 6.5 of the draft National Gas Law (**NGL**) legislates the decision of the MCE on the review of decision-making in the gas and electricity regulatory frameworks (the **MCE decision**). We note that a corresponding part will be inserted into the National Electricity Law (**NEL**). We would like to comment on aspects of this Part as we are concerned it does not appropriately legislate the MCE decision.

Definition of user or consumer groups

The draft legislation differentiates between "user or consumer associations" and "user or consumer interest groups". The former is defined to have members who are users, prospective users or end users, while the latter is not required to have such members. Both, however, are defined to represent or promote the interests of users, prospective users or end users of natural gas and electricity services. Section 273 of the draft legislation then states that only user or consumer associations, that is, associations with members, can apply for review of regulatory decisions while the latter is limited to intervening in a review under section 281.

This appears to be a division that was not contemplated by the MCE decision. The restriction may also act so as to prevent many consumer groups representing domestic or residential users from initiating a review. This is because many of these consumer groups do not have individual members, but are set up as companies limited by guarantee with the object of pursuing consumer interests. The Consumer Action Law Centre and the Consumer Utilities Advocacy Centre are such organisations. While we envisage that our desire to initiate proceedings under the NGL or NEL would be rare, we believe that the draft legislation's prohibition against doing so is inappropriate and unintended. A more useful restriction on consumer groups' ability to initiate a review would be whether the group participated in the original decision-making process (e.g. made submissions). We note that the MCE decision specifically refers to the need to make the review process more accessible. The imposition of additional thresholds to participation by the NGL and NEL is a concerning and retrograde step.

Costs orders

We are also concerned that the application of section 291 to user or consumer groups will have unintended effects. The MCE decision gave specific standing to user or consumer groups to initiate and participate in reviews. The possibility of an adverse costs order, particularly on the onerous indemnity basis, will effectively prevent not-for-profit consumer or interest groups from initiating or participating in reviews. Even where there is a presumption against such an order, the potential liability to meet the costs of other parties would deter any participation and could bankrupt any organisation bold enough to take the risk.¹ While we recognise that the presumption that costs will be awarded on an indemnity basis is intended to act as a disincentive to regulated businesses from pursuing inappropriate appeals, the application of such orders to consumer or interest groups will distort the operation of the MCE decision.

We also note that section 290(3) intends to legislate the presumption that costs are not to be awarded against intervener user or consumer groups save where that group conducts its case regardless of cost, time and arguments of the applicant. However, we are concerned that the form of section 290(3) is inadequate. Section 290(3) states:

“The Tribunal may make an order requiring a user or consumer intervener that has intervened in the review to pay all or part of the costs of another party to the review if the Tribunal considers that is has engaged in inappropriate conduct during the review”

We are concerned that this clause does not legislate a presumption against awarding costs against consumer or user interveners, but instead provides the Tribunal with a power to award costs. In our view, the word “only” should be inserted before the word “if” in the provision. Furthermore, we are concerned that the words “inappropriate conduct” are overly vague, and are open to varying interpretations by the Tribunal. It would be more appropriate if the provision was to use a phrase that is better known to the legal system, such as “vexatious”, to more appropriately capture the sentiment that interveners should be discouraged from pursuing claims that are frivolous, repetitive and overly burdensome or lacking in legal merit.

We also note that there are rules at common law about the awarding of costs in public interest litigation that has not been referenced by the draft legislation or the MCE decision. Claims or interventions from consumer or user groups, acting to promote the interests of consumers as a whole or classes of consumers, might rightly be described as public interest litigation. While the normal rules that costs follow the event is not altered merely by the fact that the litigation may be called ‘public interest litigation’, there are a number of factors that are generally considered by a court or tribunal in making costs orders²:

- the extent to which the plaintiff and defendant were successful in the action;
- where the plaintiff is an individual, whether he or she had any personal, private or financial gain to make from the litigation;
- where the plaintiff is an association, whether its objects have a public character, and whether the litigation was pursued in accordance with those objects and for the purpose of fulfilling them;

¹ See further, Catriona Lowe and Denis Nelthorpe, *Grounds for appeal – representing the public interest in the review of regulatory decision-making*, September 2006.

² See *Plumb v Penrith City Council* [2003] NSWLEC 161.

- whether there was widespread public interest in the litigation and its outcome, or the case was otherwise designed to effectuate important public policies;
- whether, if the plaintiff had succeeded, numerous people would have benefited from the action; and
- whether the plaintiff would have had sufficient economic incentive to file suit even had the action involved only narrow issues lacking general importance.

Where these factors exist, costs incurred have been described as incidental to the proper exercise of public administration, and so ought not to be wholly a burden on the particular litigant.³ We believe that the application of such principles by the Tribunal should be clarified by the legislation, so that user and consumer groups are not unfairly disincentivised from pursuing claims that are in the public interest.

Review of part

We note that section 292 of the draft legislation provides that Part 6.5 must be reviewed within 7 years of its commencement. In its decision, the MCE stated that the limited merits review scheme should be assessed at that time to see how it is operating.

Attached to this submission is a report authored by Catriona Lowe and Denis Nelthorpe, which was commissioned by CUAC, *Grounds for appeal – representing the public interest in the review of regulatory decision making in the energy market*. This report highlights a number of problems with the MCE’s limited merits review model (see box below) and proposes that judicial review would produce outcomes that are more in the public interest. Based upon these concerns, we believe that the time period for the proposed review should be brought forward from 7 years to 3 years, to reduce the possibility of further consumer detriment.

Concerns with MCE limited merits review scheme

Stakeholder input

- As a general rule, public interest organisations will have limited resources with which to engage in a merits review process.
- The interests of the range of stakeholders may be less likely to be factored into the final outcome as the merits review body does not provide a comparable investigative and consultative process to that which is used by the regulator.
- Leave requirements may prevent consumer or user groups from participating, where they lack significant information and resources open to regulated businesses.

Regulatory certainty and accuracy

- The nature and complexity of certain regulatory decisions will increase the risk of regulatory error if the merits review body is not resourced with sufficient expertise.
- The limitation on timeframe to initiate review may encourage the lodgement of speculative appeals to protect the position of the applicant for review.

Delays and costs

- The time and cost of conducting merits reviews are very substantial and can add delays to decision-making processes.
- A lengthy process may not only be costly, but may discourage the involvement of pro-bono participation from the legal and accounting

³ *Oshlack v Richmond River Council* (1983) 193 CLR 72 at 124 per Kirby J.

professions.

- Ultimately the costs of the regulator and regulated businesses will be born by consumers of energy.

Gaming

- A merits review model gives regulated businesses an incentive to delay implementation of decisions, withhold information from the original decision-maker and to limit the scope of appeal to only those aspects of the decision that do not favour the regulated business.

Information gathering powers of the AER

We are concerned about limits placed on the Australian Energy Regulator (**AER**) in Part 2.1 of the draft legislation in relation to its information gathering powers. Under section 59, the AER is to prepare performance reports in relation to the operation of network businesses. However, section 45(4) limits the information the AER can gather to contribute to such reporting, by stating regulatory information instruments must not be made solely for the purpose for collecting information for the preparation of performance reports. In our view, the AER's information gathering powers should not be restricted in this way.

Regular and public performance reporting contributes to competition by comparison which acts as an importance performance driver and is a key tenet of effective regulation of monopoly businesses. Comparison of the economic, social and environmental outcomes of regulated businesses enables government to make informed decisions about the networks in their jurisdiction. It can also contribute to informed consumer advocacy, which again leads to improved decision-making by regulators. Comparison of performance standards and network constraints is particularly important to regional and rural consumers, who often receive the worst levels of service, including poor reliability and quality of supply. The regulator must have information gathering powers that enable it to effectively track the worst serviced areas.

We also note that there is increasing use of complex corporate structures by regulated businesses ostensibly designed to evade the regulatory framework. The AER's information gathering and other powers must be robust enough to ensure that information is not hidden within corporate structures. In its review of the Gas Access Regime, the Productivity Commission was alive to this problem, noting that corporate structures have been developed which provide opportunities to escape associate or related party definitions and avoid some aspects of the regulatory regime and the information disclosure provisions.⁴ Alinta Asset Management (**AAM**) has recently commenced litigation against the Essential Services Commission Victoria claiming that it is not a regulated entity under the relevant legislation and is therefore not required to provide information, even though it performs the majority of a Victorian network business's functions (Multinet). In our view, the regulator's ability to obtain accurate information from regulated businesses and their associated service providers should lead to more efficient (and cheaper) prices and should also mitigate against the risk that the regulator will set too low a price resulting in under investment and shortages in supply. For these reasons, we believe that the regulator's information gathering powers must be robust enough to obtain the required information from related parties. The costs to those parties in providing the information should not result in inefficiencies, considering that if the functions were undertaken by the regulated entity directly, they would be obtainable by the regulator.

⁴ Productivity Commission, *Review of the Gas Access Regime*, Inquiry Report No 31, 11 June 2004, p 461.

The current draft legislation provides that a person is not required to provide information to the AER where they have a “reasonable excuse” for not doing so. Sub-section 41(4) states that is a reasonable excuse if a person is not capable of complying. We are concerned that the complex corporate structures might enable related parties to argue they have a “reasonable excuse” for not complying with information orders or argue that they are not capable of complying. The draft legislation should ensure that such arguments do not amount to a “reasonable excuse”.

Advocacy Panel

Overall we support the proposed structure and functions of the new Advocacy Panel, but have the following specific comments on elements of the proposed changes to the Australian Energy Marketing Agreement.

Functions of the Panel

We welcome the clear definition that the Panel can support research and advocacy projects. We are, however, bemused by the definition the Panel has given to ‘small and medium consumers’, as consumers who use less than 4GWh of electricity or 100TJ of gas per annum.

In Victoria, an electricity consumer of that size would be paying an annual bill of around \$350,000, and for gas the bill would be closer to \$1 million. Such companies have contracts with a retailer and distributor tailored to their individual consumption patterns and will rely on specialist staff (either internal or through subcontractors) to negotiate their energy contracts.

This definition is not consistent with the notion of small to medium consumers used by jurisdictional regulators or by the MCE in defining other elements of the framework – these thresholds are unlikely to be applied for general consumer protections, for instance.

The usual threshold of definition for small to medium consumers is annual consumption of less than 160MWh/10Gj and we recommend a similar threshold be applied to the Panel.

We do not see that a reduction in the threshold restricts large users from applying to the Panel for support and there are undoubtedly some issues (e.g. on governance and institutional arrangements) where the interests of all users collide, and the Panel should be able to respond appropriately.

However, we understand that the intent of the MCE in establishing the new Consumer Advocacy Panel is to facilitate consumer advocacy and greater consumer engagement with industry. The focus on small to medium consumers rightly recognises that it is those consumers in need of greatest assistance.

Panel funding and annual report

While we strongly support the need for appropriate and public accountability for the expenditure of Panel grants, we are concerned at how the MCE intends applicants to report on the outcomes of projects and research.

It is our experience that decision-makers, including Government and regulators, rarely indicate that a submission or piece of research has altered or affected their decision. When stakeholders' views are recorded, often one will be cited to represent a range of views. And, as the SCO is aware, even when advocacy is valid, well-considered and appropriate, the decision-maker can still elect to take an opposite position, having weighed input from a range of stakeholders.

We would recommend that the MCE is therefore realistic in its expectations of what 'outcomes achieved' can be reported, and that terminology cannot be used to exclude consumer organisations from access to support.

If you have any questions about the submission, please contact Gerard Brody, Consumer Action Senior Policy Officer, on 03 9670 5088 or Kerry Connors, CUAC Executive Officer, on 03 9639 7600.

Yours sincerely

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