Electrical Trades Union

Submission to the Senate Environment and Communications Legislation Committee on the Inquiry into the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017

18 September 2017

Contents

1 PRELIMINARY SUMMARY

1. The ETU does not support the *Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017* (*the Bill*).

2. There is currently no evidence before Parliament which proves electricity costs will reduce as a result of the proposed amendment.

3. The amendments in the proposed Bill;

    a. have not been endorsed by the Coalition of Australian Governments (COAG) Energy Committee;
    b. are not supported by electricity consumers representatives;
    c. are not supported by industry; and
    d. are not fully supported by the Australian Energy Regulator;

4. Further, the proposed amendment to abolish Limited Merits Review (LMR);

    a. removes the opportunity for consumers, workers and their representatives, business and other interested stakeholders to question determinations of the AER;
    b. is likely to create unintended consequences for large numbers of workers in electricity transmissions and distribution businesses;
    c. is likely to lead to underinvestment in maintenance therefore reducing the reliability of networks; and
    d. is inconsistent with the National Electricity Rules intent to promote the long-term interests of consumers regarding to price, quality, safety, reliability and security of supply of electricity.

5. The Bill needs significant amendment to take into consideration feedback from consumer associations, industry participants and the regulator.

6. Any proposed amendments should be;

    a. endorsed by the COAG Energy Council;
    b. supported by consumer and industry representatives;
    c. in the form of legislative amendments which seek to strengthen the LMR process not abolish it; and
    d. be consistent with the objectives of the National Electricity Laws.

2 INTRODUCTION

The Electrical Trades Union of Australia (ETU) is the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The ETU represents approximately 65,000 electrical and electronic workers around the country and the CEPU as a whole represents approximately 100,000 workers nationally, making us one of the largest trade unions in Australia.

The ETU welcomes the opportunity to make a submission on the *Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017.*

There is no evidence to support that the abolishment of Limited Merits Reviews will reduce consumers quarterly electricity bills by a single dollar. It is short term, uninformed energy policy on the run by a Government desperate to be seen to be doing something.

Abolishing LMR is not supported by consumer advocacy groups, workers and their Unions, institutional investors, network companies or independent energy industry experts. Further, the Government unilaterally announcing the abolishment of LMR bypasses the longstanding practice of cooperative federalism in relation to energy laws.

The risks of abolishing LMR are well known, documented and supported by a range of independent energy industry experts. The only positive outcome of abolishing LMR is the reduction of the workload for an under resourced regulator.

The LMR process requires legislative improvement, not abolishment.

3 NOT SUPPORTED BY A DECISION OF THE COAG ENERGY COUNCIL

The Ministerial Council on Energy (MCE) is the body established on 8 June 2001, being the Council of Ministers with primary carriage of energy matters at a national level comprising Ministers representing the Commonwealth and each of the States and Territories.

The MCE is the national policy and governance body for the Australian energy market including for electricity and gas.

In December 2013, the Council of Australian Governments, as part of a decision to streamline the COAG council system and refocus it on COAG's priorities, established the COAG Energy Council. The MCE operates within the COAG Energy Council.

On 30 June 2004, the MCE entered into the Australian Energy Market Agreement[1] which sets out the terms under which the MCE will promote the long-term interests of consumers with

[1] Australian Energy Market Agreement

regard to the price, quality and reliability of electricity and gas services; and establish a framework for further reform. It is important to point out that at clause 6.6 of the Australian Energy Market Agreement, the MCE commits that;

"6.6 Australian Energy Market Legislation may only be amended, and regulations may only be made pursuant to the Australian Energy Market Legislation as amended from time to time, with the agreement of the MCE."

The following events show this agreement was directly contravened by the Commonwealth Government.

In October 2015, a comprehensive review of energy market governance, the *Review of Governance Arrangements in Australian Energy Markets*[2], was completed and was considered by the MCE at its December 2015 meeting.

This independent review outlined a range of recommendations relating to improvement of the regulation of Australia's Energy Market. It is important to note that no recommendation was made to abolish limited merits reviews and that the COAG Energy Council's response in January 2016 to the review did not include any desire to abolish limited merits reviews[3].
In fact, the authors expressed a clear view about the importance of such a review mechanism;

"The separation of the rule making and rule enforcement functions, the independent regulatory authorities and the availability ***of a merits review appeals regime*** *are key elements of the governance of the energy market which help establish credibility with investors and provide them with the confidence to invest in the sector."*

(Extract, emphasis added).

At its December 2015 meeting, the Energy Council endorsed a program of work proposed by officials to ensure, *inter alia*, the regulatory frameworks are fit for purpose. This endorsed program of work known as The Energy Market Transformation Project Team – 2016 Forward Work Program[4] was released to the public in June 2016 and contained no references to reviewing Limited Merits Reviews (LMR).

At the August 2016, Energy Council meeting LMR is discussed for the first time on the basis of commencing a review into its effectiveness to be completed by December 2016[5].

The 14 December 2016 COAG Energy Council meeting considered the review into LMR. Importantly the council noted in their communique[6] following that meeting;

[2] Review of Governance Arrangements in Australian Energy Markets
[3] Review of Governance Arrangements for Australian Energy Markets – Table of Responses
[4] Energy Market Transformation Project Team – 2016 Forward Work Program
[5] COAG Energy Council Communique 22 August 2016
[6] COAG Energy Council Communique 14 December 2016

"There was no consensus around the need for the LMR regime to be abolished. However there was in-principle agreement among Ministers to significant and immediate reform of LMR arrangements."

The Ministers also called on a working group to quickly develop proposed legislative amendments which would address the following areas of LMR;

- Tighten and clarify the grounds for review
- Higher financial thresholds for leave which apply to individual grounds for review
- Reviews to be conducted on the papers, rather than through expensive and adversarial oral hearings
- Reviews to be conducted within a strict timeframe
- A strengthened requirement for review appellants to demonstrate that overturning the regulator's decision would not be to the serious detriment of the long-term interests of consumers
- More flexible arrangements for consumer participation in reviews
- Introduction of a binding rate-of-return guideline, with relevant elements of the regulator's decision not subject to merits review
- Remove opportunities for gaming by limiting the timeframes in which material can be submitted to the regulator
- Costs of reviews, including those of the AER, to be borne by network businesses

(extract)

All of the areas identified by the Ministers address the concerns raised in nearly all submissions received by COAG on the LMR consultation.

The summary of the 17 February COAG Energy Council[7] meeting advises that an update was provided on the drafting of the above legislative amendment, that update describes the situation as;

Ministers discussed progress on the implementation of significant reforms to the Limited Merits Review regime, agreed in-principle on 14 December 2016. Officials are working to develop key elements of the reform package, designed to reduce electricity and gas bills through lower network costs.

(extract)

The 10 April 2017 meeting of the COAG Energy Council notes the council intend to finalise the proposed amendments at the August meeting.

A major deviation from the above program appears to occur at the 14 July 2017 COAG Energy Council meeting after which a communique is released stating;

"The Energy Council noted that the Commonwealth will abolish the Limited Merits Review and also agreed to ensure greater certainty by requiring the AER, in consultation with stakeholders, to develop a binding rate of return guideline."

[7] COAG Energy Council Meeting 17 February 2017

This statement is concerning for the following reasons:

- It goes against stakeholder feedback received during the consultations;
- It is a major deviation from the planned approach to legislative amendments outlined at the 14 December 2016 meeting without any explanation as to why; and
- There is no formal decision making recorded in relation to the change of approach.

It is relevant to point out that the Terms of Reference[8] for the COAG Energy Council describe decision making as by consensus or where a vote is required, under prescribed voting arrangements. There is no evidence that such decision making has occurred in relation to the abolition of LMR.

It appears that the COAG Energy Council processes have suddenly been circumvented. This is a major deviation from the cooperative federalism model used to date on national energy matters and is completely contrary to the Australian Energy Market Agreement requirements for legislative reform.

The biggest question of all is what compelling evidence was tabled by the Commonwealth at the July 2017 meeting to cause the MCE to abandon their legislative reform agenda and deviate so substantially from the requirements of the Australian Energy Market Agreement?

4 LOCKING WORKERS OUT OF THE PROCESS

In April and June 2015 the AER published final decisions on distribution determinations for NSW and ACT electricity distributors (Ausgrid, Endeavour Energy, Essential Energy and ActewAGL Distribution) for 2019-24, and on the access arrangement for the NSW gas distributor, Jemena Gas Networks for 2015-20.

All five businesses sought merits review of the AER's final decisions. The ETU along with the Public Interest Advocacy Centre (PIAC) also applied for review of the AER's NSW final decisions.

The Tribunal handed down its decisions in February 2016 (and March 2016 for JGN). It remitted the decisions back to the AER to be remade, in particular in accordance with its orders regarding the return on debt; the value of imputation credits (gamma), which is relevant to the businesses' tax allowance; the four electricity distributors' operating expenditure (and for ActewAGL the implications of this for the Service Target Performance Incentive Scheme); and aspects of JGN's capital expenditure.

In March 2016 the AER sought judicial review of the Tribunal's decisions on gamma, return on debt and opex in the Full Federal Court.

The Court upheld the AER's appeal in respect of the Tribunal's construction of the rules regarding gamma, which feeds into the businesses tax allowance. The Court dismissed the

[8] COAG Energy Council Terms of Reference

AER's appeal in relation to the cost of debt and the operating expenditures of the electricity businesses.

As a result, an estimated 2,000 electricity maintenance jobs were saved across NSW and the ACT and the condition of those networks has avoided serious neglect.

Without a Limited Merits Review process, the ETU and other stakeholders would have had no standing to participate in this review. The physical network would have now experienced some 18 months of dramatically reduced maintenance leading into the 2017 / 2018 summer period where we have already been warned of potential outages due to generation deficiencies. These potential outages would likely be compounded by network failures had the AER not been required to reconsider its decision relating to operational expenditure.

Should the LMR be abolished, rather than legislatively improved, workers, consumers, businesses and other stakeholders will be completely locked out of these processes. The limited judicial review avenue that remains open does not provide standing to workers, consumers and businesses and even if it did, introduces those parties to a cost jurisdiction effectively further removing their capacity to participate.

5 NETWORK RELIABILITY AND SAFETY

A series of events across Australia's three largest energy states was a trigger of significant network reliability reform in the energy sector. These events start in Qld in the early 2000's following numerous network failures and are followed by Victoria's failed privatisation of electricity which culminated in the horrific 2009 Black Saturday bushfires. Watching these events from NSW and experiencing signs of a similar escalation in electrical outages, faults and fatalities through 2008 – 2010 led to action from the NSW State Government.

Across all 3 jurisdictions, steps were taken at the time to significantly increase the requisite reliability standards associated with the network. After years of identified underinvestment and neglect across the networks, action was taken to both improve mandated reliability standards on the networks and massively boost investment in poles and wires infrastructure.

In 2015 politicians from all persuasions were concerned about the increased economic burden on households and sought to use this much needed investment in the networks as a reason for increased electricity prices. They sought to blame network providers by claiming they were "gold plating" the system.

The network operators were far from "gold plating", rather they were making significant investments in the future reliability and safety of the network. Over the course of the 6 month parliamentary inquiry only 3 isolated cases were tabled of alleged unnecessary spending on the network.

All 3 of these projects were submitted to and subsequently approved by the Australian Energy Regulator.

Of great concern to the ETU was the fact that the inquiry completely ignored that setting rates of return too high was the fault of the regulator and it took nearly 2 years to moderate those

rates of return – something that still hasn't occurred in the energy generation and retail sector. It was also recommended by the inquiry that a review of the effectiveness of the Australian Energy Regulator be undertaken, something which has not occurred. This is the same regulator whose advice the Commonwealth Government now appears to be relying upon for the current proposed Bill.

Underinvestment in network infrastructure is a danger to workers and the community. The 2009 Black Saturday bushfires in Victoria were the most devastating in Australian history; 173 people tragically lost their lives, 414 were injured, more than a million wild and domesticated animals were lost and 450,000 hectares of land were burned.

Extract from 2009 Victorian Bushfires Royal commission:

Victoria's electricity assets are ageing, and the age of the assets contributed to three of the electricity-caused fires on 7 February 2009—the Kilmore East, Coleraine and Horsham fires. Distribution businesses' capacity to respond to an ageing network is, however, constrained by the electricity industry's economic regulatory regime. The regime favours the status quo and makes it difficult to bring about substantial reform. As components of the distribution network age and approach the end of their engineering life, there will probably be an increase in the number of fires resulting from asset failures unless urgent preventive steps are taken.
The Commission considers that now is the time to start replacing the ageing electricity infrastructure and to make major changes to its operation and management. The seriousness of the risk and the need to protect human life are imperatives Victorians cannot ignore. The number of fire starts involving electricity assets remains unacceptably high—at more than 200 a year. Although it is not possible to eliminate the risk posed by electricity assets, the State and the distribution businesses should take the opportunity to invest in improved infrastructure and substantially remove one of the primary causes of catastrophic fires in Victoria during the past 40 years.

In view of the size of Victoria's electricity distribution network, any replacement program will take years to complete even if it begins immediately. It is therefore necessary to consider interim measures for reducing the bushfire risk associated with the current network and the Commission suggests ways by which this could be done.

History shows that without appropriate investment in the network, consumers will once again experience the results of that underinvestment through increased outages, network failures and catastrophic incidents such as the 2009 Black Saturday bushfires.

Simply abolishing the LMR will only lead to underinvestment in energy networks due to arbitrary slashing of operational maintenance budgets without reasonable grounds for review.

6 INCONSISTENT WITH STAKEHOLDER SUBMISSIONS

On Tuesday 6 September 2016, the COAG Energy Council called for submissions in relation to the Limited Merits Review processes. As part of that process COAG specifically asked stakeholders to consider 4 options.

Those options were:

- Option 1: Retain the Tribunal as the review body without legislative amendment (status quo)
- Option 2: Retain the Tribunal as the review body with legislative amendments
- Option 3: Replace the role of the Tribunal with a new investigatory body
- Option 4: Remove access to LMR

36 Submissions were made to this review from a broad cross section of stakeholders, including;

- Network businesses
- Consumer advocacy groups
- Financial institutions
- Unions; and
- Policy experts

Of those submissions, 31 parties of the total 36 who made submission expressed a specific preference, **more than eighty percent** supported the retention of Limited Merits Review, with over two-thirds in favour of targeted reforms to the current review process administered by the Australian Competition Tribunal. Only four organisations (or 10%) supported the abolition of merits-based review and reliance on judicial review alone, including the Australian Energy Regulator (AER) itself.

It is important to note, however, that while the AER indicated a preference for abolishment of LMR they went to some effort to outline a range of risks to this proposal, particularly for consumers.

These included;

- The issue of timeliness of judicial reviews not being addressed;
- The issue of consumers and other stakeholders having standing at a judicial review;
- The barrier of judicial review being a cost jurisdiction; and
- Limitation on consumers and other stakeholders raising evidence should they be granted standing due to the narrowness of appeal provisions.

7 RECOMMENDATION

At the December 2016 meeting of the COAG Energy Council it was decided by the Ministers to quickly develop proposed legislative amendments which would address the following areas;

- Tighten and clarify the grounds for review
- Higher financial thresholds for leave which apply to individual grounds for review
- Reviews to be conducted on the papers, rather than through expensive and adversarial oral hearings
- Reviews to be conducted within a strict timeframe
- A strengthened requirement for review appellants to demonstrate that overturning the regulator's decision would not be to the serious detriment of the long-term interests of consumers
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- Costs of reviews, including those of the AER, to be borne by network businesses

All of the areas identified by the Ministers address the concerns raised in nearly all submissions received by COAG on the LMR consultation.

Recommendation

> That the COAG Energy Council urgently finalise its draft amendments to Limited Merits Review in line with the decision of the December 2016 meeting so they are available to be considered by the Federal Parliament before the end of 2017.

8 CONCLUSION

The *Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017* is a continuation of the Turnbull Governments failure to develop sensible, long term energy policy.

Evidence shows that the abolition of limited merits review will lead to further investor uncertainty at a time when investor confidence is already at record lows.

The Bill has been drafted outside the Australian Energy Market Agreement, is not supported by industry participants, including independent energy experts, consumer advocacy groups and workers and fails to provide policy certainty.

The National Electricity Objective 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 price, quality, safety, reliability, and security of supply of electricity; and the reliability, safety and security of the national electricity system.

This *Bill* fails to deliver this objective.