

TOTAL ENVIRONMENT CENTRE INC.

National Electricity Market Campaign

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Submission to DRET

Review of Limited Merits Review

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FAO: Professor George Yarrow, Chair, Expert Panel

Total Environment Centre's National Electricity Market Campaign

Established in 1972 by pioneers of the Australian environmental movement, Total Environment Centre (TEC) is a veteran of more than 100 successful campaigns. For the last forty years we have been working to protect this country's natural and urban environments: flagging the issues, driving debate, supporting community activism and pushing for better environmental policy and practice.

TEC has been involved in National Electricity Market (NEM) advocacy for eight years, arguing for greater utilisation of energy efficiency and demand side participation to meet Australia's electricity needs.

Review of Limited Merits Review

TEC thanks the Department of Resources, Energy and Tourism for the opportunity to contribute to this important review of the merits review process. TEC has noted on a number of occasions that the merits review process is weighted heavily in favour of NSPs, in contrast to other jurisdictions, and we welcome the review process.

At present, the appeal process is risk free as the appeal cannot result in an outcome less favourable to the NSP than the original determination. If the AER blocks unreasonable revenue proposals we estimate, based on past determinations, that there is approximately a 60% likelihood that they will be approved upon subsequent referral to the Competition Tribunal.

Given the weighting of this process, it is not surprising that almost all regulatory decisions are appealed. The AER's cost of capital allowances are almost always contested and are generally changed in favour of the NSP.

Garnaut recommends the need for a more balanced approach to appeals, such as that adopted by the UK. The UK appeals process effectively re-opens the complete revenue determination, thereby exposing the network entity to the risk of an unfavourable outcome on the complete decision rather than their 'cherry picked' elements. As a result, appeals are very rare in the UK.

Initial Views

We are writing to endorse the submission made by the Consumer Action Law Centre (CALC) to the Secretariat on 13 April 2012 with regards to the Energy Networks Association (ENA) report, *The Merits Review Provisions in the Australian Energy Laws*. We have had the benefit of reading CALC's comprehensive report, *Barriers to fair network prices: an analysis of consumer participation in the merits review of AER EDPR determinations*, and agree with the comments made in their submission. TEC agrees that the review process is in need of serious reform and not just minor changes, as suggested by the ENA. Specifically, TEC believes that:

- Contrary to the arguments of the ENA, *de novo* review, through judicial review or through the expansion of existing review processes, would be an effective means of eradicating cherry-picking from the review process. The ENA's characterisation of the process does not reflect the practical reality.
- The AER's right to raise additional matters does not act as a disincentive because the right has not been used in practice and is unlikely to be used in the future.
- The ENA places too much emphasis on the role of consumer groups as arbiters. While we support the ENA's recommendations to improve consumer group participation (which may simply be more passive committee/consultation processes), we agree with CALC that consumer groups would continue to face considerable difficulty in effectively engaging with the process. It should not be the role of consumer advocates to bolster an ineffective regulatory framework the framework itself must be robust enough to effectively limit the extent to which NSPs 'game the system'.
- There has been sufficient experience, particularly when considering overseas models, to conclude that the Australian appeals process is not functioning optimally.

Yours sincerely,

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