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19 December, 2006

Dear Madam/Sir

2006 Legislative Package

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to comment on the details of the MCE's 2006 legislative package. Although the package will introduce a significant amount of reform to the national energy market it has not been possible for PIAC to analyse the provisions in detail. Our comments thus are limited to two areas of the package:

- merit review and the question of costs under the new National Gas Law; and
- the definition of small to medium consumers for the purposes of the new Consumer Advocacy Panel.

Section 290 of the *Exposure Draft* of the proposed National Gas Law provides that the Australian Competition Tribunal *may* make a costs order against an intervener under certain circumstances. We understand this provision attempts to implement the decision of the MCE in relation to merit reviews published in May 2006 where it held that:

> the presumption will be that costs would not be awarded against user and consumer groups unless the ACT is satisfied that they have conducted their case in the review regardless of cost, time and the arguments of the applicant.

This view is confirmed by the *Gas Legislative Framework* paper published by the Standing Committee of Officials (SCO) along with the *Exposure Draft* that states the Law will include:

> strict requirements as to the presumption that indemnity costs are to be awarded by the ACT unless exceptional circumstances exist (s 291).

In our view, however, the proposed wording of s.290 lacks the certainty suggested by the MCE decision and the statement of the SCO. Our reading of the proposed s.290 suggests that the Tribunal would not necessarily be limited in making costs orders against an intervener to the circumstances prescribed in s.290 (3). Such a limitation, we believe, is essential to the balance sought by the MCE in giving access to merit reviews to parties such as consumer associations or representatives. An important part of this balance is that interveners not be prevented from making use of their limited rights to legitimate participation in reviews of regulatory decisions by the prospect of a substantial costs order.

PIAC argues that it would be appropriate to amend the draft Gas Law by amending s.290 so that costs orders against interveners clearly are limited to the circumstances set out in s.290 (3).

On the subject of the new Consumer Advocacy Panel, the question of which consumers should be able to apply for funding is proposed to be left to regulations to be made under the amended *Australian Energy Market Commission Establishment Act 2004*. However, the SCO has indicated an intention to define these consumers by reference to volume of energy consumed with an upper limit of 4GWh of electricity per year or 100TJ of gas per year. This follows a decision of the MCE that access to the Consumer Advocacy Panel primarily should be reserved for *small to medium consumers*.

PIAC simply cannot accept the view of the SCO that small to medium consumers includes those using as much as 4GWh of electricity per year or 100TJ of gas per year. We note, for example, that the average household in NSW without gas supply would use between eight and nine MWh of electricity per year. By contrast with the threshold proposed by the SCO the current limit for ‘small’ users in the National Electricity Market is 160MWh per year.

Consumers using energy up to the limit chosen by the SCO would have annual bills in the order of hundreds of thousands of dollars per year. Such end-users would not be seen by the rest of the market as ‘small to medium’ consumers. Certainly end-users with this level of consumption could be expected to undertake direct negotiations with energy suppliers or to have the resources to represent their interests directly to the supply industry, regulators and governments. By that measure alone it would be more than reasonable to expect such end-users to resource their advocacy in the national market other than by calling on the relatively limited funds of the new Consumer Advocacy Panel.

In other words, the threshold proposed by the SCO is contrary to the intent of the MCE decision that funds for advocacy purposes should primarily be provided to small to medium consumers.

Yours sincerely

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