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## **REVIEW OF DECISION-MAKING IN GAS AND ELECTRICITY**

The Public Interest Advocacy Centre (PIAC) submits the following comments in response to the *Discussion Paper* on review of regulatory decision-making published by the Ministerial Council on Energy (MCE) on 10 October, 2005.

PIAC is an independent, non-profit legal centre based in Sydney. PIAC has established the Utility Consumers' Advocacy Program (UCAP) with funding from the NSW Government. The work of UCAP includes developing policy and advocating for the interests of residential consumers, particularly low-income consumers, in the NSW energy and water industries. Broad policy direction for UCAP comes from a community-based Reference Group.

### **1. The case for review of decisions**

Consumers are happy to contribute to the debate over possible changes to the process for review of regulatory decisions. On the other hand, the *Discussion Paper* appears to proceed from the view that the regulated businesses share little of the responsibility to make a substantive case for change. In other words, the document is based on the assumption that the interests of the regulated businesses in the energy supply industry carry greater weight than do those of end-users. To our mind this approach fails to take account of the objectives of the national energy market – particularly the *National Electricity Law* which states, in section 7, that the objective of the market includes the promotion of the long-term interests of consumers.

The *Discussion Paper* puts forward the view that the quality of regulatory decisions has not been affected adversely by the absence of opportunities for end-users to challenge those decisions. Surely this is a very difficult argument to have given the extremely limited opportunities for persons to pursue such reviews. Comparisons simply are not possible. However, the absence of complaints cannot be taken to indicate general satisfaction. While the regulated businesses have made little use of judicial review the fact of their being happy with regulatory decisions does not, in itself, provide any guidance as to the quality of regulatory outcomes.

In any event, the concern of PIAC is not to focus on past decisions, nor to criticise the regulators who have made them. Rather, it is to pursue arrangements which provide a better balance of the diverse and sometimes competing interests of stakeholders in the national energy market.

At present the process by which persons can obtain a review of regulatory decisions is very onerous. This is the case particularly for small end-users. In effect, residential consumers and many other end-users are excluded from judicial review (whether limited merit review or full judicial examination). This is an issue of end-users being able to demonstrate they have standing to initiate a review. It also is an issue of the considerable resources needed to do so. These arrangements cannot be said to provide an appropriate balance of the interests of the regulated businesses with those of end-users, especially domestic consumers.

## **2. Limited review**

As noted, the *Discussion Paper* proceeds from the view that it is the regulated businesses who have the predominant interest in challenging regulatory decisions. For example, at paragraph 2.28 the paper describes a process for regulatory decision-making which appears to limit the consideration of the views or interests of consumers to the preliminary, consultative processes.

PIAC agrees that there is an ‘inevitable tension’ between, on the one hand, lengthy and resource intensive consultation and, on the other, a right for any person to seek a review of a decision which may be comparable in the commitment of time and resources. This involves an issue of legal principle in the case of the regulated businesses. For consumers, the practical considerations in pursuing challenges to regulatory decisions are at least as significant as the current legal limitations. The *Discussion Paper* notes the burden of costs (para 6.13) but residential consumers, in particular, suffer equally the significant limitation of a lack of information by comparison with the supply businesses and regulators.

The view of PIAC, then, is that there is a clear basis on which to give end-users an improved capacity to challenge decisions and that it is reasonable to balance this with explicit limits on the scope of such challenges. Given the time available for us to respond to the *Discussion Paper* PIAC has not yet formed a view on the precise detail of those limits.

However, consumers have legitimate concerns that the regulated businesses should be limited in their capacity to challenge decisions of the regulators. Indeed, it should be recognised that even with a widening of the right to challenge regulatory decisions the regulated businesses likely will remain the most active litigants.

The legal and property interests held by the supply-side entities generally are given more than ample airing during the consultative parts of the decision-making process. Indeed, the chronic problem of information asymmetry means the regulated entities invariably enjoy an advantage in the consultative process in pressing their interests and demands on the regulators. This being the case, any arrangements for review of decisions likewise should limit the scope of any challenge from the regulated businesses.

### 3. Standing

As noted in the *Discussion Paper*, the need to establish standing as an ‘aggrieved person’ in relation to a regulatory decision currently serves to exclude most end-users, and particularly consumer advocates, from challenging these decisions. PIAC is strongly supportive of the thrust of the proposal for standing to be given to consumer advocates in more limited circumstances as outlined in the *Discussion Paper* (paragraphs 6.22 to 6.23). However, we make the point that further development of this proposal and consultation with consumer advocates is needed before the MCE makes a final decision.

The framework of a ‘two-level’ right to challenge a regulatory decision reflects statutory arrangements already in place. The *Administrative Decisions Judicial Review Act*, for example, provides in s.12 that a court may grant an application by a person to be made a party in the matter where they are ‘a person interested in a decision’. This is an especially important provision since it extends some opportunity for persons affected by a decision but not ‘aggrieved’ in a legal sense to have their interests raised with the body undertaking the review of a decision. We point out that the Full Federal Court has stated that ‘interested’ is to be treated as a broad term going beyond legal, proprietary, financial or other tangible interests or interests necessarily peculiar to the person (extracted in *Annotated Administrative Appeals Legislation*, 2<sup>nd</sup> edition, Butterworths, p.99).

Clearly, however, the provisions of s.12 of the *ADJR* have not been sufficient to permit consumers or their advocates to overcome the handicap of standing in relation to regulatory decisions.

The *Discussion Paper* notes the modified standing test described in the *Administrative Appeals Tribunal Act*. Section 27 provides that applications for review of certain decisions may be made by any *person or persons whose interests are affected* by the decision. Importantly, given the capacity of individual consumers, the right to make such an application is extended by s.27 to organisations or association of persons if the decision in question relates to a matter included in the objects or purposes of the organization or association.

It also should be noted that the courts themselves can be prepared to hear from persons who lack the stricter legal qualification of standing. An example is a recent ruling by Gyles J of the Federal Court in relation to a matter before the Australian Competition Tribunal (see *Application by Services Sydney Pty Ltd* [2005] ACompT 2 at 9 per Gyles J). In considering an application by the NSW Premier to be permitted to intervene in the matter Gyles J held that the ACT is entitled to receive submissions ‘from such sources in such manner as it sees fit’.

A more formal approach to being heard by the courts is applications to appear as *amicus curiae*. Consumer advocates have been making limited use of *amicus curiae* applications to courts in order to raise issues of concern while lacking the qualifications to meet tests for standing. One example of this was the intervention made by PIAC following an application to be heard as amicus by the Australian Competition Tribunal in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCA 694.

We understand that the legal advisers to the MCE may have only limited knowledge or experience of *amicus curiae* interventions. In any event, it is clear that applications to be heard as *amicus* can be made only once a matter is on foot. This provides, then, limits on the circumstances in which consumer advocates can seek to intervene in a matter where they lack legal standing.

As stated above, PIAC supports the establishment of an easier test for standing on the part of consumers and their advocates in respect of reviews of regulatory decisions. Accordingly, we welcome the general proposal made in the *Discussion Paper* for two levels of standing in relation to reviews of regulatory decisions and for clear rules which extend to both consumers and consumer advocates the right to intervene in such proceedings once they have been commenced.

#### **4. Grounds for seeking review**

Our reading of the *Discussion Paper* suggests the authors, and perhaps the MCE itself, are concerned that the grounds on which a regulatory decision may be challenged should not be too limited (paras 2.6 to 2.13). This is not to say that challenges should be entertained for the widest set of reasons. PIAC agrees that it is appropriate for the regulators to have a large amount of discretion in making their decisions. The nature of the processes by which those decisions will be reached should mean that significant consideration is given to many of the concerns and interests of the regulated businesses and end-users.

On the other hand, too much discretion for the regulators or putting the exercise of discretion beyond challenge obviously would mean almost any decision of a regulator could be justified. Under these circumstances a system of review would have no utility for end-users or the regulated businesses.

Accordingly, PIAC agrees it is appropriate for the body undertaking the review to apply an understanding of what is ‘reasonable’ which is less onerous than the principle in *Wednesbury*.

#### **5. Consistency**

The *Discussion Paper* has raised the question of whether a process for review of regulatory decisions should be applied to both electricity and gas. In fact, the paper appears to imply that the status quo should remain and gas and electricity treated differently unless forceful support can be mustered from end-users. Whereas PIAC had expected that a substantive case against consistency would have been attempted rather than simply placing on end-users the onus for making the argument. This is particularly so given that consistency is a major driver for the

current reforms to energy market regulation of which the consideration of merit review forms a part.

The view of PIAC is not that consistency across electricity and gas should be achieved merely for the sake of consistency alone. As the paper points out (para 5.7), the economic regulatory functions which should be subjected to the possibility of review are those which combine high levels of discretion and possibly high economic costs to society (and, we would add, consumers). The need to balance diverse and often economically significant interests arises equally in electricity and gas.

Moreover, household consumers likely will feel that it is the supply of electricity which is most critical given its character as an essential service and the fact distribution and retail supply is universal by comparison with gas. It is on these grounds, rather than the simple pursuit of consistency, that an improved regime for review of regulatory decisions should be applied both to electricity and gas.

Yours sincerely  
Public Interest Advocacy Centre Ltd

A handwritten signature in black ink, appearing to read 'JW', with a long horizontal flourish extending to the right.

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