Queensland Law Society

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Your ref Our ref: KB – C&C

Committee Secretary
Senate Standing Committee on
Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By post and by email: ec.sen@aph.gov.au

Dear Committee Secretary

Competition and Consumer (Abolition of Limited Merits Review) Bill 2017

Thank you for the opportunity to provide comments on the Competition and Consumer (Abolition of Limited Merits Review) Bill 2017.

The Queensland Law Society (the Society), in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise. In doing so, the Society achieves its objective of proffering views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. This furthers the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

This response has been compiled with the assistance of the Competition and Consumer Law Committee whose members have substantial expertise in this area.

Merits Review

The Society is concerned with the proposed amendments to the *Competition and Consumer Act 2010* (the CCA) to remove the ability of the Australian Competition Tribunal (the ACT) to review decisions made under the national energy laws (other than decisions relating to the disclosure of confidential or protected information). The Society's submits that a limited form of merits review should remain available to aggrieved parties.

We make this submission on the basis the energy regime exists to serve the long-term interests of consumers. Merits review is an integral part of this framework. A court or tribunal should be the final arbitrator of a decision that affects the income/livelihood of a business, especially considering that these participants do choose to have their decisions assessed by the regulator.

Further, in the experience of our members, the regulator does not always make informed, rational decisions and in fact, the majority of its decisions are overturned. This is understandable given the size of the task however it is not satisfactory given the importance of efficient economic regulation to ensure the right investment signals are sent to guarantee reliable, secure, safe and affordable energy networks. The ability to have limited merits review of decisions, by an independent umpire, provides confidence to investors, shareholders and consumers.

The Society is aware that the decision-making process of the Australian Energy Regulator can be lengthy, complicated and process expensive – and that limited merits review adds a further layer of cost and time to that process. We note the Explanatory Memorandum cites the 2016 review of the regime which found that the review of decisions involves significant costs to the parties. While this is a concern, it needs to be balanced against the cost to a party who has received an erroneous decision. A decision to seek a review may be taken, or not taken, due to cost factors. However, that should never be ground for removal of the right to seek a review.

Reviews of administrative decisions are a fundamental part of the operations of a democratic society. A decision made at first instance, which involves a significant assessment process against a number of legislative criteria is capable of being erroneous in a number of ways. Abolishing the right to have this decision reviewed may create unjust and unintended consequences. Further, we note that as a party needs to seek leave of the ACT to have a decision reviewed, which requires various criteria to be satisfied, frivolous applications for review are not permitted.

As the Committee will be aware, over the last 12 months COAG has been working on further reforms to the limited merits review regime in conjunction with industry and consumer groups. This Bill ignores that work, and COAG's decision to improve rather than remove the regime, in favour of potential short term political gain.

Transitional provisions

Clause 5 of the Bill provides:

The amendment ... to insert section 44AIA of the Competition and Consumer Act 2010 applies in relation to a decision that is made before, on or after the commencement of this Schedule

Clause 6 contains similar provisions with respect to proposed section 44ZZMAA.

The Society is very concerned by the retrospective application of these amendments which will create uncertainty for parties involved in this process. Such an application may create unjust and unforeseeable outcomes and may be contrary to section 12(2) of the *Legislation Act 2003*.

If these amendments are to be made,(and it is the Society's opinion that they should not be made) then only matters that are referred to the Regulator after the commencement of the amendments should be affected.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Kate Brodnik on 07 3842 5851 or K.Brodnik@qls.com.au.

Yours faithfully

Christopher Coyne
Vice President