

Express law No. 205

3 December 2013

Bill introduces major reform of national energy regulatory system

The Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Bill 2013 (the Bill) was passed by the South Australian Parliament on 26 November 2013. The Bill will significantly amend the limited merits review regimes in the National Electricity Law (NEL) and National Gas Law (NGL) under which applicants may seek review of the regulator's determinations of what revenue energy businesses may earn.

The NEL and NGL are 2 Commonwealth–State–Territory cooperative legislative schemes in the energy sector. Each Law is set out in the schedule to a South Australian statute and is applied as law by legislation in force in those States and Territories that participate in each cooperative scheme and by the Commonwealth in the circumstances provided for by the *Australian Energy Market Act 2004*.

In addition to being a significant micro-economic reform, the reforms are an example of an innovative process for merits review of economic regulatory decisions.

Purpose of the Bill

The Bill clarifies the decision-making framework under which the Australian Energy Regulator (AER) may determine how much revenue energy businesses may earn from network services. The Bill will also change the terms on which merits review of those determinations may be sought from the Australian Competition Tribunal.

The primary objective of these reforms is to make the long-term interests of consumers, as set out in the national electricity and gas objectives, more prominent in deliberations of the AER and the Tribunal.

Major changes

The amendments made by this Bill will deliver changes to 4 key areas of the NEL and NGL relevant to the operation and effectiveness of the limited merits review regime:

- role of the AER
- role of the Tribunal
- application process for review of a decision
- involvement of consumers.

For simplicity, the discussion below focuses on the NEL, although the Bill makes equivalent amendments to the NGL.

Role of the Australian Energy Regulator

The Bill will make a number of changes to the AER's role to ensure that its determinations transparently reflect the relevant considerations on which the AER's decision is based.

The Bill will also require the AER to undertake appropriate consultation with relevant consumer organisations during its decision-making process.

However, the most significant change is to clarify that, where there is more than one reviewable regulatory decision open to the AER, the AER's role is to make the **preferable reviewable regulatory decision**, being the decision the AER is satisfied will, or is likely to, contribute to the achievement of the national electricity objective to the greatest degree.

Role of the Australian Competition Tribunal

Following the changes the Tribunal may only:

- vary the reviewable regulatory decision under review, or

- set it aside and remit the matter back to the AER

if the Tribunal is satisfied that to do so will, or is likely to, result in a decision that is materially preferable to the reviewable regulatory decision in making a contribution to the achievement of the national electricity objective (NEO) (a **materially preferable NEO decision**).

If the Tribunal is not so satisfied, the Tribunal must affirm the decision.

Consistently with the changes to the AER's role, the Tribunal will also:

- ensure that its determinations transparently reflect the relevant considerations on which its decision is based
- consult with relevant consumer organisations during its decision-making process.

Application process for review of a decision

Applicants seeking leave to apply for review of a decision must specify that a determination of the Tribunal on the basis of 1 or more grounds for review would, or would be likely to, result in a **materially preferable NEO decision**.

Involvement of consumers

In addition to the new obligations on the AER and the Tribunal to consult with relevant consumer organisations, the Bill will change the award of costs arrangements against consumers.

Consumers will also benefit from an express prohibition on energy businesses from passing on the costs of a review.

AGS involvement

AGS advised the Department of Industry on the Bill.

For further information please contact:

Danielle Chifley

Counsel

T 02 6243 7317

danielle.chifley@ags.gov.au

Jenny Francis

Senior General Counsel

T 02 6253 7108

jenny.francis@ags.gov.au

Robert Orr QC

Chief General Counsel

T 02 6253 7129

robert.orr@ags.gov.au

Leo Hardiman

Deputy General Counsel

T 02 6253 7074

leo.hardiman@ags.gov.au

Important: The material in Express law is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.