INFRASTRUCTURE PARTNERSHIPS AUSTRALIA

21 September 2017

Senator Jonathon Duniam
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Duniam,

RE: INQUIRY INTO THE COMPETITION AND CONSUMER AMENDMENT (ABOLITION OF LIMITED MERITS REVIEW) BILL 2017

We are pleased to make a submission to your Committee on the proposed abolition of the Limited Merits Review (LMR) regime, which provides oversight and review of the Australian Energy Regulator's revenue determinations.

From the outset, we respectfully submit that the abolition of the LMR would be very poor public policy – which would continue the recent history of heavy-handed political intervention in Australia's already-damaged energy markets.

In terms of our substantive views, we attach the following which should be read as part of this submission:

- Submission to the Minister for Energy on the Review of the LMR Regime (16 March 2017); and
- Submission to COAG Energy Council on the Review of the LMR Regime (2 October 2016).

OUR RECOMMENDATION:

A streamlined merits review process must be retained, in an appropriate form, because it is in the long-run interests of the customer.

THE KEY ISSUE:

A merits review process is a cornerstone of good economic regulation models – because it provides checks and balances on the Government's independent regulator – and is fundamentally designed to protect the 'long-term interests of consumers' from poor regulatory decisions.

Suite 3.03 Level 3, 95 Pitt Street, Sydney NSW 2000
PO Box R1771, Royal Exchange NSW 1225
T +61 2 9152 6000 **F** +61 2 9152 6005 **E** contact@infrastructure.org.au **www.infrastructure.org.au**

The Government's bill is seeking to remove this most basic protection – leaving customers and network companies (and the superannuation funds who own them) with no clear ability to contest the revenue decisions imposed by the Government's independent regulator.

The LMR exists to provide an avenue for expert third party reviews of the regulatory determinations made by the Australian Energy Regulator (AER), through the Australian Competition Tribunal, an independent review body which includes specific industry expertise. The LMR provides an important layer of independent assessment, ensuring that the regulator is accountable for its decisions through appropriate checks and balances.

The Government has argued that network companies will continue to have access to 'judicial review'; however this means that a poor decision by the regulator will stand – provided the regulator applies the right process, to deliver the wrong answer.

As noted in our enclosed October 2016 submission, judicial review is limited to testing the regulator's competence in ensuring that its determinations are permitted by law.

Judicial review does not test the regulator's judgement or technical competence on key issues of its decisions or principles of sound regulatory economics. Judicial review also limits broader stakeholder input, because it is limited to parties 'with standing' – e.g. the network companies on the one side, and the regulator on the other. Consumer groups are excluded from the process altogether.

In practice, it is likely that the removal of the LMR may in fact serve to increase the cost and the amount of time taken to settle each regulatory (determination) period – noting that network companies may need to seek relief from poor regulatory determinations by using the judicial review more actively.

OUR UNDERSTANDING OF THE ISSUE:

1. The LMR regime was introduced in 2008, and strengthened further in 2013 through clarity of the goal of network price regulation – which is to serve *'the long-term interests of the customer'*;
2. In August 2016 the COAG Energy Council tasked its Senior Committee of Officials to review the effectiveness of the LMR regime, due to concern about the volume, costs and timelines of appeals processes – and most likely, the regulator's mixed success rate on appeal;
3. 52 appeals have been made for merits review to the Australian Competition Tribunal, which found the regulator erred in 31 instances;
4. The December 2016 meeting of the Council of Australian Governments (COAG) Energy Council saw Australia's governments agree to retain the LMR regime, but with some streamlining amendments.
5. Across early 2017, the COAG Energy Council worked broadly with industry and stakeholders to develop streamlined options to simplify the LMR process and allow for quicker resolution, while maintaining important appeal rights.

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6. The 9 June release of the *Independent Review into the Future Security of the National Electricity Market* (Finkel Review) recommended that *"… the COAG Energy Council should finalise and implement the proposed reforms to the Limited Merits Review regime [by the end of CY2017]".*
7. The Finkel Review Panel noted that a simplified LMR would help to deliver long-term price benefits for consumers.
8. Across the early part of 2017, the Commonwealth Government began to express its desire to remove the Merit Review altogether, through the COAG Energy Council – a move that was vigorously opposed by the NSW and Queensland governments.
9. On 20 June 2017 the Federal Government announced that it would abandon the COAG Energy Council process to unilaterally abolish the LMR via Commonwealth legislation – effectively walking away from the fundamental underpinning agreements that created and sustained the National Electricity Market (NEM).
10. The Federal Energy Minister argued at that time that *"We will stop big electricity companies from running to the courts to try to overturn the Australian Energy Regulator's decisions".*
11. On 10 August 2017, the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017, was introduced to Parliament, which would give effect to the unilateral removal of the LMR regime.
12. The bill has now been referred to the Committee for its report on the subject legislation.

REMOVING THE LMR IS COSMETIC, DOES NOT CUT BILLS IN THE SHORT TERM AND IS AGAINST THE LONG-RUN INTERESTS OF CONSUMERS:

The LMR process only sees the regulator's decision overturned where the Government's independent expert panel, the Australian Competition Tribunal, finds that the decision is not in the long-term customer interest.

It is therefore hard to understand the Government's to characterise the LMR's removal as an opportunity to reduce costs to consumers.

Indeed, with network prices determined for a five year period, it is even harder to understand how the removal of the LMR can have any immediate impact on household bills at all.

- NSW network charges will not be reviewed for two years;
- Queensland network charges will not be reviewed again for five years; and
- Victoria will not be reviewed for three years.

Leaving aside the inappropriateness of removing the LMR regime – this means that the abolition bill will also be thoroughly ineffective in relieving energy prices in the short term; rather it gives only an appearance of activity and will do nothing good for customers or the energy market.

On the other hand, it is far easier to understand how removing merits review could in fact damage the customer's long-term interests.

Without the discipline and accountability of reviewable decisions that can (and are) overturned, there is a material risk that the regulator may be overly focused on political imperatives; for example, by artificially suppressing legitimate and appropriate maintenance and network expansion to keep prices suppressed in the short term.

Sydney's series of major blackouts in 2009 are a solid example – as are the (very, very) costly and urgent 'catch up' investments to 'gold plate' the network which followed. These costs were absorbed on the household energy bill and have driven part of the massive increase in consumer prices.

This shows clearly why merits review is in the customer interest.

CONCLUSION

Australia's energy sector is suffering from widespread and accelerating political interventions – including the unilateral removal of the LMR – as well as schemes to subsidise particular generation types and ongoing carbon emissions policy uncertainty.

It is these political interventions that have been the key driver of unsustainably large increases in customer bills over the past decade.

For clarity, it has not been due to the existence of normal, appropriate and necessary checks and balances on the independent Government regulator.

Australia badly needs to return to a settled, stable and predictable regulatory regime to maintain investor confidence in Australia's electricity networks and other national infrastructure.

Failure to return to this kind of approach risks further erosions to living standards, economic performance and national economic competitiveness.

The observed level of haste and political priority attached to removing the LMR is therefore concerning and adds to the existing uncertainty in the energy market. Moreover, it is not in the national interest.

The Federal Government's decision to legislate around the COAG Energy Council process shows disregard for the consultation work conducted with industry and consumer groups – and threatens the continued existence of the National Electricity Market itself.

That's why we submit that the bill should be removed from the legislative programme.

Electricity is expensive precisely because of heavy-handed political interventions – which have been undertaken without the benefit of a unifying national energy policy.

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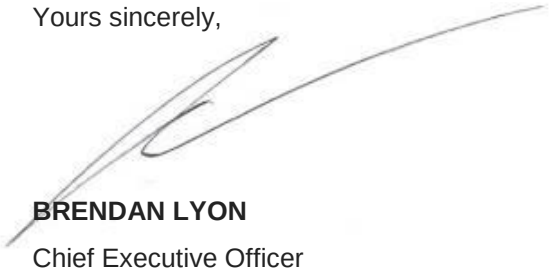
While beyond the scope of your Committee – through you we would encourage all Members of Parliament, the Government and Cabinet in particular – to pause all proposed energy market interventions.

Instead, the Commonwealth should dedicate its efforts to the type of positive, meaningful and effective changes that would actually deal with the core drivers of customer bills – through an agreed, evidence based and comprehensive national energy policy.

I thank you for your consideration of this submission letter, if you require any further detail please contact IPA's Senior Policy Advisor Lydia Robertson on (02) 9152 6011 or lydia.robertson@infrastructure.org.au.

Yours sincerely,



BRENDAN LYON
Chief Executive Officer

Suite 3.03 Level 3, 95 Pitt Street, Sydney NSW 2000
PO Box R1771, Royal Exchange NSW 1225
T +61 2 9152 6000 **F** +61 2 9152 6005 **E** contact@infrastructure.org.au **www.infrastructure.org.au**