

10 July 2013



Ms Jodi Smith
Manager, SCER Secretariat
Department of Resources, Energy and Tourism
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By email: SCER@ret.gov.au

Dear Ms Smith

Statutes Amendment (National Electricity and Gas Laws—Limited Merits Review) Bill 2013

The Public Interest Advocacy Centre (PIAC) thanks the Standing Council on Energy and Resources (SCER) for the opportunity to provide feedback on the Draft Statutes Amendment (National Electricity and Gas Laws—Limited Merits Review) Bill 2013 (the Draft Bill). PIAC's comments are limited to one matter related to the awarding of costs against small/medium users or consumer interveners in the merits review process.

By way of background, PIAC is an independent, non-profit, law and policy organisation that works for a fair and democratic society by taking strategic action on public interest issues. PIAC has, as a key area of work, energy and water policy. The Energy + Water Consumers' Advocacy Program (EWCAP) represents the interests of low-income and other residential consumers of electricity, gas and water, including social housing residents.

PIAC supports the policy intention to limit costs that can be awarded against a small/medium user or consumer interveners. Sub-clause 15(2) of the Draft Bill proposes to add a new provision, s 71Y(2), in the existing legislation dealing with merits review:

(2) If the Tribunal makes an order for costs against a small/medium user or consumer intervener in favour of another party in a review under this Division, the order must be limited to the payment of the reasonable administrative costs (as determined by the Tribunal) of that other party.

In PIAC's experience, there are three categories of costs that may be awarded by a court or tribunal:

1. professional costs (all professional legal service costs incurred by the solicitors);
2. counsel's fees; and
3. disbursements.

Disbursements include costs incurred additional to fees for legal professional services, and could include photocopying, printing, court filing fees, and significantly, the costs of retaining any expert consultants that are required for any particular matter, and payment due to such experts for the provision of any report. Depending on the expert that is required to be engaged, the cost for expert fees

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could be very significant. In PIAC's own casework experience, such expert fees can amount to between \$5,000 and \$50,000 for a report. In some cases, disbursements could be reasonably larger than professional costs, because a party could require any number of experts to assist with any particular matter.

PIAC understands the Draft Bill seeks to be non-prescriptive. The use of the term 'administrative costs' is presumably intended to connote a narrower subset of the material usually understood as falling within the scope of the broader term 'disbursements'. Our assumption here is reinforced by SCER's stated intention to remove the risk of consumers incurring legal costs,¹ and SCER's observation that the risk of having costs awarded against consumer groups is a major barrier to their participation in reviews.² PIAC endorses this approach on the part of SCER.

However, as the term 'administrative costs' does not have a generally-accepted meaning in court or tribunal proceedings, it would be open to multiple interpretations – including even a broader statutory construction than that which is currently ascribed to the term 'disbursements'. Any uncertainty could itself cause small organisations to attach greater risk to having administrative costs awarded against them than was ever intended by the legislature.

It is also possible, and perhaps even likely, that parties to merits review proceedings will disagree as to what falls within the ambit of 'administrative' costs. Inevitably, this would result in time-consuming and costly debates as to what a reasonable figure for administrative costs would be for any particular matter.

To overcome the risk regarding the uncertainty of the term 'administrative costs', PIAC makes two recommendations. First, the Draft Bill should be amended to make clear what is meant by 'administrative costs' – ideally by providing an exhaustive definition of the items that fall within the scope of the term. Secondly, the Explanatory Memorandum accompanying the final version of the Bill as introduced to Parliament should make clear the legislative intent to allow recovery of only a small subset of items that would otherwise fall within the scope of disbursements, as against a small/medium user or consumer intervener in merits review proceedings. Such a definition may also remove any opportunity for non-legal consultancy fees being recoverable in this limited merits review process.

If you would like to discuss any matters related to these issues further, please contact myself or Carolyn Hodge, Senior Policy Officer in the Energy + Water Consumers' Advocacy Program, on 8898 6520 or chodge@piac.asn.au.

Yours sincerely



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¹ Standing Council on Energy and Resources, Regulation Impact Statement, Limited Merits Review
² Ibid, iv.