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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPETITION AND CONSUMER AMENDMENT (ABOLITION OF LIMITED
MERITS REVIEW) BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for the Environment and Energy, the Hon Josh Frydenberg MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AEM Act	<i>Australian Energy Market Act 2004 (Cth)</i>
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
ERA	Economic Regulation Authority
LMR	Limited merits review
NEL	National Electricity Law
NERL	National Energy Retail Law
NGL	National Gas Law
Tribunal	Australian Competition Tribunal

General outline and financial impact

Abolition of limited merits review

Schedule 1 to the *Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017* amends the *Competition and Consumer Act 2010* to prevent the Australian Competition Tribunal from reviewing certain decisions made under the national energy laws and to ensure that decisions made by the Australian Energy Regulator under those laws are not subject to merits review by any other State or Territory body.

Date of effect: The amendments will commence on the day after the Bill receives the Royal Assent.

Proposal announced: 20 June 2017.

Financial impact: Nil.

Human rights implications: This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.8 and 2.9.

Compliance cost impact: Nil.

Chapter 1

Abolition of limited merits review

Outline of chapter

1.1 Schedule 1 to this Bill amends the *Competition and Consumer Act 2010* (CCA) to prevent the Australian Competition Tribunal (the Tribunal) from reviewing certain decisions made under the national energy laws and to ensure that decisions made by the Australian Energy Regulator (AER) under those laws are not subject to merits review by any other State or Territory body.

Context of amendments

1.2 The national energy laws (consisting of the National Electricity Law (NEL), the National Gas Law (NGL) and the National Energy Retail Law (NERL)) form part of a State-based cooperative legislative scheme. The laws are schedules to South Australian Acts and apply as State/Territory law by legislation in force in the States and Territories that participate in the scheme, and as Commonwealth law in the circumstances provided for in the *Australian Energy Market Act 2004* (AEM Act).

1.3 The NEL and the NGL provide for the economic regulation of electricity transmission and distribution networks and covered gas pipelines. They do this by giving the AER (or in the case of Western Australian pipelines, the Economic Regulation Authority (ERA)) power to set the prices that businesses may charge for, and the revenue they may earn from, the provision of electricity network services and access to covered pipelines. The AER is a Commonwealth body established by section 44AE of the CCA. Section 44AI of the CCA provides Commonwealth consent to the conferral of functions on the AER under the State and Territory versions of the national laws; the AEM Act provides that the AER has the functions conferred on it under the Commonwealth version of those laws. The ERA is a State body, established by Western Australian legislation.

1.4 The regulator must perform economic regulatory functions in a manner that is likely to contribute to the achievement of the national electricity and gas objectives. The objective is to promote efficient investment in, and efficient operation and use of, electricity/gas services for the long term interests of consumers with respect to price, quality, safety, reliability and security of supply of electricity/gas and, in the case

of electricity, the reliability, safety and security of the national electricity system.

1.5 The process through which the AER develops its revenue and access determinations involves extensive inquiry processes, analysis and consultation. For electricity networks, the regulatory process commences with preliminary consultation on the framework and approach to regulation. This occurs around two and a half years before the current regulatory period expires.

1.6 Network businesses periodically submit regulatory proposals (electricity networks) or access arrangements (gas pipelines) to the regulator for consideration. The proposals include forecast expenditure and revenue requirements (typically covering a five year period); for gas, they also include a reference tariff (which an access seeker may seek to have the AER enforce in the event of an access dispute) and associated terms and conditions.

1.7 The regulator has 15 months to review an electricity network's regulatory proposal before releasing a final decision, and six months to decide whether to approve a gas access arrangement, with provision for extension to a maximum of 13 months. Proposals and arrangements are assessed against legislative criteria, accounting for issues raised in consultation. Forecast revenue requirements are assessed using a building block model that accounts for operating and maintenance expenditure, capital expenditure, asset depreciation costs and taxation liabilities, and an appropriate return on capital. The return on capital is determined by the size of the network business' asset base (and projected investment) and the weighted average cost of capital (the rate of return necessary to cover a commercial return on equity and efficient debt costs). The return on capital may account for up to two thirds of revenue.

1.8 Consumer engagement is a central part of the process. When the regulator assesses a proposal, it considers how effectively the network business has consulted with the community. It also seeks stakeholder input through public forums and by consulting with network businesses, consumer representatives, governments and investment groups. To inform such stakeholders and encourage their participation, the regulator publishes a framework and approach paper (electricity only), the regulatory proposal and an issues paper; invites submissions; holds public forums; publishes a draft decision and its reasoning; invites submissions on the draft decision; holds pre-determination conferences (required for electricity only); publishes any revised proposals; and holds a further round of submissions and consultations. It also seeks input from the Consumer Challenge Panel, which provides an independent consumer perspective to challenge the regulator and network businesses during the process.

1.9 Economic regulatory decisions are currently subject to limited merits review (LMR) by the Tribunal. The Tribunal is a Commonwealth body established by section 9 of the *Trade Practices Act 1965* and continued in existence by section 30 of the CCA. Section 44ZZM of the CCA provides Commonwealth consent to the conferral of functions on the Tribunal under the State and Territory versions of the national laws; the AEM Act provides that the Tribunal has the functions conferred on it under the Commonwealth version of those laws.

1.10 Decisions may (with leave) be reviewed on the ground(s) that the regulator made an error(s) of fact in its findings of fact, and that error(s) was material to the making of the decision; the exercise of the regulator's discretion was incorrect, having regard to all the circumstances; and/or the decision was unreasonable, having regard to all the circumstances. Certain financial thresholds and other criteria must also be satisfied. The Tribunal must make a determination which either affirms or varies the original decision, or sets the decision aside and remits the matter back to the original decision maker to be remade in accordance with any direction or recommendation of the Tribunal. The Tribunal must use its best endeavours to make a determination within three months of granting leave.

1.11 Certain other decisions made under the national laws may also be reviewed by the Tribunal. These include decisions made by a Minister as to whether a pipeline should be covered by the NGL (and therefore subject to economic regulation), decisions made by the National Competition Council about whether a pipeline should be subject to light regulation (rather than full economic regulation), and certain decisions made by the AER, ERA and the Australian Energy Market Operator (AEMO) about the disclosure of confidential or protected information collected under the national laws (information disclosure decisions).

1.12 The LMR regime was established in 2008 and reviewed in 2012 by an independent panel led by Professor George Yarrow. The review identified serious shortcomings with the regime. Consequently, in 2013 reforms were introduced to improve timeliness, reduce costs, increase consumer participation and refocus the process on the long term interests of consumers.

1.13 The regime was reviewed again in 2016 by the COAG Energy Council's Senior Committee of Officials, following applications for review of 12 of 20 of the AER's post-2013 electricity and gas decisions (in which affected businesses sought a total of around \$7.3 billion in additional revenue) and two of the ERA's gas decisions. The review again identified a number of significant regulatory failures, including that LMR reviews of economic regulatory decisions remain a routine part of the regulatory process, involve significant costs to all participants, continue to

present barriers to meaningful consumer participation, lead to significant regulatory and price uncertainty, and are failing to demonstrate outcomes that serve the long term interests of consumers.

1.14 In response to the 2016 review, the COAG Energy Council acknowledged (at its 14 December 2016 meeting) that the LMR regime is failing to meet its policy intent and is leading to higher prices for consumers. The Commonwealth has decided that the most effective way to address these failings, and reduce pressure on energy prices, is to abolish the regime.

1.15 Divesting the Tribunal of its function of reviewing decisions made under the national energy laws (other than decisions relating to the disclosure of confidential or protected information) is consistent with the principles developed by the Administrative Review Council in its publication *What decisions should be subject to merits review?* The AER's decisions involve extensive public inquiry processes and consultations, which cannot adequately be replicated in the Tribunal, particularly having regard to its three month target for completing reviews.

Summary of new law

1.16 The Tribunal can no longer review decisions made under the national energy laws (other than decisions relating to the disclosure of confidential or protected information), and the merits of an AER decision cannot be reviewed by any other State or Territory body.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Tribunal cannot review decisions made under the national energy laws, other than decisions relating to the disclosure of confidential or protected information.	Affected or interested persons may, with the leave of the Tribunal, apply to the Tribunal for a review of a reviewable regulatory decision on the ground(s) that the regulator made an error(s) of fact in its findings of fact, and that error(s) was material to the making of the decision; the exercise of the regulator's discretion was incorrect, having regard to all the circumstances; and/or the decision was unreasonable, having regard to all the circumstances.

<i>New law</i>	<i>Current law</i>
	A person whose interests are adversely affected by an information disclosure decision may apply to the Tribunal for review of the decision on the ground that the decision was not made in accordance with law or is unreasonable having regard to all relevant circumstances.
The merits of an AER decision made under the national energy laws cannot be reviewed by any other State or Territory body.	No equivalent.

Detailed explanation of new law

1.17 Schedule 1 amends subsection 44AI(1) of the CCA to make the Commonwealth’s consent to the conferral of national energy law functions on the AER subject to the operation of new section 44AIA. *[Schedule 1, item 1, subsection 44AI(1) of the CCA]*

1.18 New section 44AIA ensures that AER decisions made under the national energy laws are not subject to merits review by any State or Territory body. A person’s right to seek judicial review of an AER decision is unaffected. *[Schedule 1, item 2, section 44AIA of the CCA]*

1.19 Schedule 1 also amends subsection 44ZZM(1) of the CCA to make the Commonwealth’s consent to the conferral of national energy law functions on the Tribunal subject to the operation of new section 44ZZMAA. *[Schedule 1, item 3, subsection 44ZZM(1) of the CCA]*

1.20 New section 44ZZMAA prevents the Tribunal from reviewing decisions made under the national energy laws, other than decisions relating to the disclosure of confidential or protected information collected under those laws. In particular, any provision in a State/Territory energy law or the AEM Act which purports to require or permit the Tribunal to review decisions made under the national laws (other than decisions relating to the disclosure of confidential or protected information) is rendered ineffective by the amendment. *[Schedule 1, item 4, section 44ZZMAA of the CCA]*

1.21 In effect, the Tribunal is divested of its LMR function in respect of all ‘reviewable regulatory decisions’ made under the national laws, including:

- Under the current version of the NEL: network revenue and pricing determinations, and determinations relating to approved and required pass through amounts;
- Under the current version of the NGL: coverage decisions, decisions in relation to the making and revoking of light regulation determinations, access arrangement decisions, AER ring fencing determinations and exemptions, and decisions about the approval of associate contracts.

1.22 The Tribunal retains its LMR function in respect of ‘information disclosure decisions’, which (under the current versions of the laws) are decisions of the AER, ERA or AEMO to disclose confidential or protected information under sections 28ZB or 54H of the NEL, sections 329 or 91GH of the NGL or section 214 of the NERL.

Application and transitional provisions

1.23 Section 44AIA applies to all AER decisions, whenever made. Effectively, no AER decision, whether made before or after the commencement of the amendments, may be reviewed by a State or Territory merits review body.

1.24 Section 44ZZMAA applies to all decisions made under the national energy laws, whether made before or after the commencement of the amendments, but the existing LMR regime will continue to apply to a decision that, at the commencement time, was being reviewed by the Tribunal, provided the application to review the decision was made on or before 20 June 2017 (when the proposed amendments were announced).

1.25 In effect, any reviewable regulatory decision made after the commencement of the amendments cannot be reviewed by the Tribunal; decisions made before the commencement of the amendments can only be reviewed if the application for review was made before 21 June 2017; any review proceedings that are on foot at the commencement time can continue, but if the Tribunal remits the matter back to the original decision maker, any remade decision cannot be reviewed by the Tribunal; and any court order made as the result of any judicial review of a Tribunal determination (whether the order or the determination is made before or after the commencement time) requiring the Tribunal to reconsider its determination can be implemented, but if the Tribunal remits the matter back to the original decision maker, any remade decision cannot be reviewed by the Tribunal.

Chapter 2 Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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

2.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

2.2 The Bill amends the *Competition and Consumer Act 2010* to prevent the Australian Competition Tribunal from reviewing decisions made under the national energy laws (other than decisions relating to the disclosure of confidential or protected information) and to ensure that decisions of the Australian Energy Regulator (AER) are not subject to merits review by any other State or Territory body.

2.3 The national energy laws (consisting of the National Electricity Law (NEL), the National Gas Law (NGL) and the National Energy Retail Law) form part of a State-based cooperative legislative scheme. The laws are schedules to South Australian Acts and apply as State/Territory law by legislation in force in the States and Territories that participate in the scheme, and as Commonwealth law in the circumstances provided for in the *Australian Energy Market Act 2004*.

2.4 The NEL and the NGL provide for the economic regulation of electricity transmission and distribution networks and covered gas pipelines. They do this by giving the AER (or in the case of Western Australian gas pipelines, the Economic Regulation Authority (ERA)) power to set the prices that businesses may charge for, and the revenue they may earn from, the provision of electricity network services and access to covered pipelines. These decisions are subject to merits review by the Tribunal, which may either affirm or vary the decision under review, or remit it back to the original decision maker to be remade in accordance with any direction or recommendation of the Tribunal.

2.5 Certain other decisions made under the national laws may also be reviewed by the Tribunal. These include decisions made by a Minister as to whether a pipeline should be covered by the NGL (and therefore subject to economic regulation), decisions made by the National Competition Council about whether a pipeline should be subject to light regulation (rather than full economic regulation), and certain decisions made by the AER, ERA and the Australian Energy Market Operator in relation to the disclosure of confidential or protected information collected under the national laws.

2.6 The merits review regime was reviewed in 2016 and found to be failing, including because reviews remain a routine part of the regulatory process, involve significant costs to all participants, present barriers to meaningful consumer participation, lead to significant regulatory and price uncertainty, and are failing to demonstrate outcomes that serve the long term interests of consumers. In response to the review, COAG Energy Council Ministers agreed that the regime has failed to meet its policy intent and is leading to increased energy prices for consumers.

2.7 Preventing the Tribunal from reviewing decisions made under the national energy laws (other than decisions relating to the disclosure of confidential or protected information), and ensuring that the AER is not subject to merits review by any other State or Territory body, should reduce pressure on energy prices. It is also consistent with the principles developed by the Administrative Review Council in its publication *What decisions should be subject to merits review?* In particular, the AER's decisions involve extensive public inquiry processes and consultations, which cannot adequately be replicated in the Tribunal.

Human rights implications

2.8 This Bill does not engage any of the applicable rights or freedoms.

Conclusion

2.9 This Bill is compatible with human rights as it does not raise any human rights issues.