Report

The Role of Limited Merits Review: A response to the COAG Energy Council SCO Review

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Professor Margaret Allars SC has reviewed this report and confirmed that she is in agreement with the analysis contained in it.

The following key propositions arise from this report:	
1.	Merits review and judicial review are not interchangeable or alternative forms of review. They are fundamentally different forms of review, undertaken by different bodies, relying on different forms of expertise and following distinct procedures.
2.	Judicial review is a constitutionally-entrenched limited form of review, conducted by judges operating alone following an adversarial process, focused on identifying legal error. This form of review does not address the "merits" of decisions and is not focused on factual error.
3.	Judicial review on its own is ill-suited to deal with factual errors in decisions involving intense questions requiring expert analysis or the exercise of discretion.
4.	AER decisions on complex regulatory issues involving elements of discretion with significant economic and other consequences for a range of people, including consumers, are suited to merits review. The ACT is well-positioned to conduct such reviews given its status, independence and the expertise of its membership.
5.	The ACT has demonstrated its ability to deal with AER decisions. The AER's reasoning has been affirmed by the ACT on many occasions and there are numerous instances of the "gateway" provisions of the LMR regime confining the scope of merits review.
6.	There are also a number of instances of successful applications for merits review to the ACT involving serious factual error in respect of which judicial review would not have been successful as a corrective mechanism. Unlike a court conducting judicial review, the ACT is able to vary AER decisions or remit them with detailed directives concerning factual and evidentiary matters to be addressed when the AER remakes its decision.
7.	The test of legal reasonableness as illuminated recently by the High Court in *Minister for Immigration and Citizenship v Li*[1] does not make judicial review any more palatable as a means by which such factually flawed decisions can be corrected. Subsequent authority confirms that "Cases where a decision is set aside for unreasonableness are rare birds. There is no reason to think that Li's case has changed that legal scenario".[2]
8.	In their 2005 joint opinion to the MCE review, Stephen Gageler SC (as his Honour then was) and Professor Allars identified a range of reasons why they were "strongly of the view" that merits review by the ACT should co-exist beside judicial review in the NEL and NGL. In 2012, the Yarrow Report concluded that merits review is "an important component of a system of checks and balances that supports the independence of delegated regulation". A considered review of the ACT's historical decisions, including in light of the 2013 reforms to the LMR regime, demonstrates that these observations remain correct.

[1] (2013) 249 CLR 332.

[2] *Pangilinan v Queensland Parole Board* [2014] QSC 133 per Jackson J at [70].

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Executive summary

1.1 Introduction

Substantial changes were made to the limited merits review (**LMR**) regime in 2013. These quite radical reforms are currently playing out.[3] A considered analysis of the ACT's detailed reasons in its historical decisions and recent reviews of the AER's revenue determinations demonstrate the ACT's cognisance of the important but confined review task it has under the NEL and NGL, and the utility of this unique form of review in addressing serious factual error when compared with judicial review.

A key question for the current review of the LMR regime is how to achieve an efficient form of merits based review that avoids the risk that future material erroneous findings of fact or defects in the weighing of evidence by the AER in revenue and other reviewable decisions that harm consumers will go uncorrected.

The 2012 Review of the Limited Merits Review Regime concluded that:

> *We are convinced of the contribution that merits review can make to regulatory decision-making, and, more specifically, we consider it to be an important component of a system of checks and balances that supports the independence of delegated regulation. … It is because the Australian Energy Regulator (AER) can exercise significant discretionary powers that merits review has such an important potential role to play.*

That statement remains correct.

1.2 Overview of this report

(a) Part 1 – Judicial Review and Merits Review

Part 1 of this report explores how the modern Australian concept of "merits review" developed following the 1970s watershed Kerr and Bland Committee reports, which recognised the fundamental constitutional and institutional limitations on the ability of judicial review to supervise the significant discretions conferred on administrative decision-makers in modern government.

The principal object of judicial review is to ensure that when official action affecting the subject is challenged in the courts, it has been taken within the boundaries of constitutional, statutory or executive power, and to set it aside and require its reconsideration if it has not.

[3] The application for judicial review of the ACT's recent decisions concerning the AER's revenue determinations will not be heard until mid-October 2016. A full understanding of how successfully the ACT has met the objectives of the 2013 reforms and the interaction between LMR and judicial review will not be possible until this has occurred.

The COAG Energy Council 6 September 2016 Consultation Paper referring to *Minister for Immigration and Citizenship v Li*[4] suggests that "Recent developments in the law have potentially expanded the ability of judicial review to provide further accountability for reasonable decision making."

Minister for Immigration and Citizenship v Li does not permit review simply for factual error, even serious error. There remains in Australia post *Li* a constitutional requirement that the role of the Courts in exercising judicial review is limited. Courts have no roving licence to cure administrative error. As Professor Allars SC concludes in her 3 October 2016 opinion on the LMR regime:

- Judicial review is fundamentally different from limited merits review, and has not become close to, or even similar to, limited merits review on account of *Li*;
- The High Court in *Li* made it clear that the requirement to act reasonably is not an opportunity to review the factual findings of a decision-maker in its area of decisional freedom. The Full Federal Court has consistently warned that *Li* does not allow it to trespass upon the merits of an exercise of discretion.
- Review for *Li* unreasonableness does not allow the Federal Court to engage in merits review of a decision of the AER. In particular, the AER's evaluation of the policy considerations involved in determining which is the materially preferable NEO decision, would, in the absence of limited merits review, remain free from review or correction.
- Where reasons have been given disclosing a justification for the AER's decision, the Court on a judicial review application would rarely intervene on the *Li* ground.

It is erroneous and misleading to suggest that somehow *Li* has expanded the grounds for judicial review to approach anything akin to merits review or limited merits review.

The raison d'être of external merits review is ordinarily to provide independent, public, de novo review "on the merits" which identifies the "correct or preferable" decision. Unlike courts, merits review tribunals can be constituted by legal and non-legal expert members and follow flexible, informal and quick procedures that are tailored to suit the demands of the relevant statutory framework and decision in question. The rationale for merits review is not confined to identifying the correct or preferable decision in the *particular* case, but also has *systemic benefits* such as improving quality and consistency in the relevant agency by providing guidance on interpretation and reasoning processes under particular

[4] (2013) 249 CLR 332.

legislative frameworks.[5] This leads to more consistent and better decision-making with long-term benefits for the public and private sector.

(b) Part 2 – The Limited Merits Review Regime

Part 2 of this report describes the current LMR regime. LMR is a bespoke review procedure created by the NEL and NGL. It is an *attenuated* form of merits review and does not task the ACT with performing a general de novo review to identify the correct or preferable decision. The LMR regime has been carefully constructed and reformed under the probing scrutiny of various wide-ranging reports commissioned by the Ministerial Council on Energy and the Standing Council on Energy and Resources. The most recent of these was the detailed review in 2012 resulting in the report by Professor George Yarrow, the Hon Michael Egan, and Dr John Tamblyn (the **Yarrow Report**). Following this Report, substantial amendments to the LMR regime were made in late 2013.

The most important change was to introduce the requirement throughout the LMR provisions that a decision under review is only liable to being varied or set aside if it is not a materially preferable NEO or NGO decision. The 2013 amendments reinforce the notion that the decision under review must be considered as a whole. It is not sufficient to identify error in the making of the decision or the findings of fact that formed the foundation of the decision if the decision was overall capable of supporting the NEO or NGO (as the case may be). This is an important restraining feature of the post 2012 LMR regime.

The application for review itself is limited to four grounds: the primary decision maker made a material error of fact; the primary decision maker made errors of fact which, together, were material; the exercise of the primary decision maker discretion was incorrect; and the primary decision maker's decision was unreasonable. The term "unreasonable" is not defined. It is not legislatively tethered to the meaning of that term when used in a judicial review context, and does not suffer from the constitutional prohibition on judicial review impermissibly straying into the merits of the decision – it is broader than judicial review for unreasonableness considered in *Minister for Immigration and Citizenship v Li*.

Another key legislative reform implemented in 2013 is the requirement for the ACT to undertake public consultation.[6] In its most recent determinations, the ACT recognised that

[5] Judicial review is unable to perform these functions because it is concerned with identifying legal error and remitting the decision to the primary decision-maker.

[6] Section 71R of the NEL and s 261 of the NGL were substantially changed by the 2013 amendments. As an example, the Tribunal must consult with network service users, prospective network service users, any relevant user or consumer association, and consumer interest groups that may have an interest in the determination: s 71R(1)(b) of the NEL and s 261(1)(b) of the NGL.

"In the course of the consultation process, a number of significant issues of concern to consumers and consumer interests were identified."[7]

(c) Part 3 – Tribunal decisions under the LMR regime

Part 3 of this report provides a catalogue of tribunal decisions since 2008 and identifies key procedural and substantive aspects of those decisions.

This analysis identifies a number of important trends and conclusions:

- The AER's reasoning has been affirmed by the ACT on many occasions.
- There are instances of the "gateway" provisions of the LMR regime confining the scope of merits review.
- There are instances of successful applications for merits review to the ACT in respect of which judicial review might also have been successful.
- There are instances of successful applications for merits review to the ACT involving serious factual error in respect of which judicial review may not have been successful.
- The AER has itself accepted in a number of merits review applications that its error was based on an error of fact in a material respect and was corrected by the ACT.[8]
- The latest round of electricity and gas distribution decisions made in April and June 2015 have been the subject of review by ACT. They have been heard and determined within a ten-month period from initiation by a Tribunal constituted by Mansfield J of the Federal Court of Australia together with two lay members.
- PIAC was an applicant and an intervener and the ACT commented on the important role played by PIAC and the public consultations for identifying a broad range of stakeholder interests, including consumer interests.
- There has thus only recently been an application of the new statutory LMR regime and the approach of ACT is yet to be tested by the Full Federal Court. In the circumstances, it would be both wrong (for the reasons set out below) and premature to reach a conclusion that the legislative changes are not achieving their objectives.

[7] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [52]-[53].

[8] *Application by Multinet Gas (DB No 1) Pty Ltd (No 2)* [2013] ACompT 6.

(d) Part 4 – LMR's performance against policy objectives

In light of the analysis in Parts 1 to 3 above, Part 4 makes some observations on the extent to which the LMR is achieving the policy intent of the 2012 reforms to the LMR regime and potential amendments to the regime.

Policy concerns which led to the current attenuated form of merits review regime have been expressed to include: time delay; costs; regulatory uncertainty; cherry picking and the "risk of gaming".

Time Delay and Regulatory Uncertainty

It is true that there is some delay between an AER decision and a reasoned decision on review by the ACT. But such delay is inevitable if the ACT is properly to give consideration to arguments put to it and to accord procedural fairness to the parties before it. Similar delays (if not greater) would be occasioned in the case of judicial review. The ACT, through its mandated consultation process and broad intervener provisions, facilitates consumer and industry participation in a way that judicial review does not. The provision for public consultation, public hearings and detailed published reasons from the ACT also achieves accountability objectives that underlie merits review.

The factual issues for determination by ACT in the latest round were complex and significant. The ACT used its processes to hear matters together and delivered a leading set of reasons consisting of 1230 paragraphs. The decision gives considerable guidance to the AER in a number of important areas. The period of ten months to conduct such a comprehensive and exhaustive review, including extensive consultation, is a quite reasonable period. It can be compared favourably with time taken to dispose of judicial review cases and for other administrative review bodies to arrive at reasoned determinations.

Costs and Regulatory Uncertainty

It is inevitable that significant cost will be involved in reviews of decisions that involve hundreds of millions or even billions of dollars and that engage often difficult concepts in a complex regulatory context where factual or other errors can have dire consequences for consumer and other interests. If there were no merits review available it is almost certain that affected industry participants, and consumer groups (if they have standing) would launch judicial review challenges to AER decisions. There can be no valid removal of a merits review process on an abstract cost basis without due consideration of the counterfactual and the societal benefits of merits-based accountability. Judicial review proceedings also involve significant cost. The ACT has more discretionary powers to make appropriate cost orders than the Court in dealing with a judicial review application.

The costs incurred by the network service provider in a review cannot be passed on. This statutory inhibition does not apply to costs incurred in judicial review proceedings.

Cherry Picking and Gaming

In the 2012 review it was said that a problem with the LMR regime was the fact that an interested party dissatisfied with a particular aspect of the overall decision (one of the building blocks) could select that aspect for review before ACT and leave other parts alone. This criticism, even if valid then, is now misplaced. First, the 2013 legislative changes require that the ACT cannot set aside or vary an AER decision unless to do so will likely result in a new decision that is materially preferable in making a contribution to the achievement of the NEO/NGO. The ACT in dealing with the recent challenges has applied that test. Secondly, parties cannot stray beyond their submissions made to the AER. Thirdly, the materials before the Tribunal are limited to those before the AER. Finally, user or consumer groups can be given (and are given) leave to intervene and they can raise matters not raised by the applicant including new grounds of review. These provisions were strengthened to clarify intervener rights in the 2013 amendments. These four factors mean that any attempt at cherry picking or gaming would be fruitless and yield no return.

1.3 Conclusion

The limitations on judicial review mean it is not, and cannot be, a substitute for merits review. As the Kerr and Bland committees recognised in the 1970s, the underlying premise of the separation of powers is that judicial review cannot provide review "on the merits". Review by external tribunals enable independent merits review to be conducted in public by those with expertise concerning the subject matter in question, following tribunal procedure and applying grounds of review crafted in the statutory framework to suit the decision in question.

The LMR regime is a purpose-built review framework designed to achieve the COAG Energy Council's stated policy objectives. It has achieved the substantial decisional and systemic benefits of merits review, while minimising time delay, costs, regulatory uncertainty, cherry picking and the "risk of gaming". In particular:

- The ACT need not act in a wholly adversarial character and can mould its procedures to suit the application before it. However, where hearings of an adversarial nature are appropriate to adjudicate matters involving review of complex decisions with multiple parties who are represented, they can be used. Judges presiding in the ACT in particular have the requisite legal skills and institutional independence to apply the complex legal provisions of the NEL and

NGL to disentangle a vast web of factual material. The ACT, comprised of selected judges and specialist members, with invaluable subject matter expertise, are uniquely qualified to evaluate complex factual determinations of the AER, give due consideration to discretionary elements and identify whether any factual errors have led to a decision that is not materially preferable having regard to the statutory objectives.

- The analysis of the ACT cases post-2008 demonstrate that the LMR regime has enabled significant factual errors to be corrected that would not have been capable of correction in an application for judicial review. Removing merits review would leave factual error, including serious factual error, at real risk of being uncorrected in most cases.

The ACT's 2016 decision in *Applications by Public Interest Advocacy Centre Ltd and Ausgrid*[9] demonstrates the Tribunal's focus, with express and considered regard to the 2013 amendments, upon correcting only those errors that would lead to a materially preferable NEO or NGO decision.[10]

The Yarrow Report concluded in late 2012 that merits review is "an important component of a system of checks and balances that supports the independence of delegated regulation"[11] and, more than 10 years ago, Stephen Gageler SC (as his Honour then was) and Professor Allars concluded that:

> *We are strongly of the view that a merits review of the economic regulatory decision-making of the AER is appropriate and desirable. … We regard the ACT as the appropriate tribunal in which merits review jurisdiction should be vested.*[12]

The LMR regime continues to serve the critical function of identifying and correcting serious factual error and discretionary error where an alternative decision would, or would be likely to, better serve the NEO or the NGO. Judicial review is an inadequate alternative and would not fulfil this objective.

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[9] [2016] ACompT 1.

[10] See, for example, paragraphs [629]-[631] and [1165] of *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1. At [1165], for example, the ACT held:

> If error of the kind asserted by Ausgrid were made out, it is not at present obvious to the Tribunal that the correction of the asserted errors by remitting these issues to the AER would, or would be likely to, lead to a materially preferable NEO decision. As discussed in the concluding section of these reasons, it appears that to a significant extent, the AER (and on review the Tribunal) is charged with making the best or preferable decision in the long term interests of consumers which may involve a trade off between cost and quality or reliability of the provision of the service. At least on this particular topic, the trade off is not self-evidently in favour of increasing the cost to consumers, for the benefit of the installation of the Type 5 meters or for the benefit of the detailed usage data that can then be provided. That may or may not be the case. It is not necessary to decide it in this context.

[11] Council of Australian Governments Standing Council on Energy and Resources, Parliament of Australia, *Review of the Limited Merits Review Regime Stage Two Report* (2012) 3 (**Yarrow Report**).

[12] Stephen Gageler and Margaret Allars, *Joint Opinion to the Ministerial Council on Energy Standing Committee of Officials Review of Decision-making in the Gas and Electricity Regulatory Frameworks Discussion Paper*, 10 October 2005.

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Part 1: Judicial Review and Merits Review

1.1 Introduction

Judicial review and merits review of administrative decisions are fundamentally different tasks, generally undertaken by different bodies (courts versus administrative tribunals) adopting different processes (adversarial court procedure versus the more flexible and informal procedure of administrative tribunals as defined by the tribunal's enabling statute).

Judicial review is concerned with identification of *legal error* arising from a recognised ground for judicial review – "the object of judicial review … is to ensure that the decision made by the primary decision-maker was properly made within the legal limits of the relevant power."[13] As a consequence, it is frequently observed that "courts exercising powers of judicial review must not intrude into the 'merits' of administrative decision-making or of executive policy making."[14]

Merits review in its ordinary sense is concerned not with identifying *legal error* by reference to specified grounds of judicial review. Rather, it provides for a fresh determination, often by an external tribunal, as to whether the primary decision is the "correct or preferable" decision and, if not, the tribunal will substitute its own decision.[15]

We explore in Part 1 below how the modern Australian concept of "merits review" was born out of a recognition of fundamental constitutional and institutional limitations on the ability of judicial review to review the significant discretions conferred on administrative decision-makers in modern government.[16]

We address in Part 1:

[13] D Bennett, 'Balancing Merits Review and Judicial Review' (2003) 53 *Administrative Review* 3, 7.

[14] Justice Ronald Sackville, 'The Limits of Judicial Review of Executive Action – Some Comparisons between Australia and the United States' (2000) 28(2) *Federal Law Review* 315, 315.

[15] Administrative Review Council, Parliament of Australia, *Better Decisions*: Review of Commonwealth Merits Review Tribunals (1995) 175 (**Better Decisions)**: "The purpose of a merits review action is to decide whether the decision which is being challenged was the 'correct and preferable' decision. If not, a new decision can ordinarily be substituted. The process of merits review will typically involve a review of all the facts that support a decision." As Professor Cane has noted: "Traditionally, judicial review is concerned with legality, not merits. … In this more precise sense, the merits of decisions do not negatively define the limits of judicial review but positively characterise a mode of administrative adjudication distinct from judicial review.": Peter Cane, 'Judicial Review in the Age of Tribunals' (2009) *Public Law* 479, 484.

[16] It should be noted that, prior to the Kerr Committee's Report, a range of tribunals undertaking "merits review" existed, ranging from the Taxation Board of Review to the Boards of Inquiry and Promotion Appeals Committees to the Repatriation Commission and the War Pensions Entitlement Appeal Tribunal. See generally, Margaret Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41(2) *Federal Law Review* 197, 202-204.

- the nature of judicial review;
- the scope of review available under the grounds of judicial review, including in light of *Minister for Immigration and Citizenship v Li*;
- the nature and scope of merits review;
- the development and rationale for merits review; and
- the coexistence of merits review and judicial review in Australia's system of review of administrative decisions.

1.2 Judicial review – A Summary of General Propositions

(a) Source of power to undertake judicial review

The following principles summarise the source of power to undertake judicial review. The principles are addressed in more detail in **Appendix 2**.

1 The power derives from common law, the Constitution and statute.

2 The supervisory jurisdiction of the High Court (in the case of Federal administrative decisions) and the State Supreme Courts (in the case of State administrative decisions) for jurisdictional error cannot be removed.

3 Decisions under the NEL and the NGL are reviewable by the Federal Court of Australia under the ADJR Act.

(b) Grounds of judicial review

Judicial review is concerned with identification of legal error arising from a recognised ground of judicial review. The grounds of judicial review give rise to complexity because:

- the formulation of the grounds of review differs depending on the source of the court's power to undertake the review that is being invoked; and
- the scope of certain grounds of review and concepts such as jurisdictional error are incapable of precise definition.

The grounds of review are summarised in **Appendix 2**.

(c) Limited scope of judicial review

A mistake of fact itself, except in exceptional circumstances, as explained below, does not permit a court to intervene and correct the error. Judicial review is concerned with the authority to decide rather than what is the correct decision or the preferable decision.

For constitutional reasons and reasons of institutional expertise, legitimacy and method, judicial review is necessarily limited in its scope.[17] It has been noted that "the legality / merits distinction is the convenient shorthand often employed to express both the scope and limitations of judicial review".[18]

Examples of the limited scope of judicial review include:

- **Fact-finding:** as a matter of orthodox principle, judicial review does not extend to review of factual determinations by an administrative decision-maker: "there is no error of law simply in making a wrong finding of fact".[19] As a consequence, a court will not ordinarily quash a decision on the basis that an administrative decision-maker has improperly evaluated evidence or made their decision on the basis of an erroneous factual finding.
- **Review of polycentric decisions:** polycentric decisions may not be amenable to judicial review or, at least, judicial review may be unsuitable for polycentric decisions.[20] A polycentric decision, is one which is characterised by a complex spider web of intertwining and competing interests likely to have wide-ranging reverberations.[21]
- **Review of decisions involving the allocation of scarce resources:** for similar reasons, courts will be reluctant to judicially review a decision involving an allocation of scarce resources: *Re J (A Minor) (Medical Treatment)*.[22]
- **Review of decisions of a legislative character:** judicial review as historically understood is concerned with review of decisions of an administrative character, rather than decisions of a legislative character.

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[17] Judicial review has been described as "a role that is narrowly conceived to take account of the separation of powers and other limitations on judicial method and perspective": Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (LexisNexis, 4th ed, 2015) 397.

[18] Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (LexisNexis, 4th ed, 2015) 397.

[19] To similar effect are the observations of Menzies J in *R v District Court; Ex Parte White* (1966) 116 CLR 644, 654 that: "Even if the reasoning whereby the court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record."

[20] In *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, Heydon J described s 198A of the *Migration Act 1958* (Cth) (which set out a range of complex matters the minister was required to take into account before declaring a country as one to which an offshore entry person from Australia could be taken) as follows:

> *It does not appear to provide a basis upon which a court could determine whether the standards to which it refers are met. Their very character is evaluative and polycentric and not readily amenable to judicial review.*

[21] Fuller famously described a polycentric decision as follows:

> *We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" - each crossing of strands is a distinct center for distributing tensions.*

Lon Fuller, 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review* 353, 395.

[22] [1992] 4 All ER 614.

- **Other non-justiciable decisions**: there is a residual category of decisions that a court will not review. Non-justiciable decisions arise where "the decision-making function lies within the province of the executive and that it is inappropriate that the courts should trespass into that preserve".[23]

Courts have been mindful of the need to observe these constraints on the scope of judicial review, so that the courts do not enter the executive sphere by reconsidering the merits of a decision. The "canonical" statement of this principle was summarised by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-7 thus:

> *The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone. …*
>
> *… If the courts were to assume a jurisdiction to review administrative acts or decisions which are 'unfair' in the opinion of the court — not the product of procedural unfairness, but unfair on the merits — the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ. The absence of adequate machinery, such as an Administrative Appeals Tribunal, to review the merits of administrative acts and decisions may be lamented in the jurisdictions where the legislature has failed to provide it, but the default cannot be made good by expanding the function of the courts. The courts — above all other institutions of government — have a duty to uphold and apply the law which recognises the autonomy of the three branches of government within their respective spheres of competence and which recognises the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government.*[24]

This statement holds today. The recent developments in judicial review which are outlined below do not represent a departure from it.

(d) Minister for Immigration and Citizenship v Li

It has been noted that there is "a scarcity of cases in which administrative decision-making was declared invalid solely as being *Wednesbury* unreasonable, notwithstanding the frequency with which the ground was argued" and a decision invalidated solely on the ground of unreasonableness has been described as "a sighting of the 'rare bird' of unreasonableness in solo flight".[25]

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[23] The Hon Sir Anthony Mason AC KBE, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (Speech delivered at the Australian Bar Association Fifth Biennial Conference, Noosa, 4 July 1994) 14.

[24] Justice Gageler has recently described Brennan J's statement as "canonical". See Stephen Gageler, "The Constitutional Dimension' in Matthew Groves (ed), *Modern Administrative Law in Australia; Concepts and Context* (Cambridge University Press, 2014) 171.

[25] Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 117, 117; Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (LexisNexis, 4th edition, 2015) 919.

Citing the High Court's decision in *Minister for Immigration and Citizenship v Li*, the SCO's Consultation Paper in the current review suggests that "Recent developments in the law have potentially expanded the ability of judicial review to provide further accountability for reasonable decision making."

In fact, *Minister for Immigration and Citizenship v Li* does not permit review simply for factual error, even serious error. Rather *Li* and the cases which have applied and considered it emphasise that judicial review remains limited to those "rare cases" involving unreasonable or illogical decisions which lack intelligible justification. There remains in Australia, post *Li,* a constitutional requirement that the role of the Courts in exercising judicial review is limited. They have no roving licence to cure administrative error. As Professor Allars SC notes in her 3 October 2016 opinion on the LMR regime:

- The High Court in *Li* made it clear that the requirement to act reasonably is not an opportunity to review the factual findings of a decision-maker in its area of decisional freedom.
- Review for *Li* unreasonableness does not allow the Federal Court to engage in merits review of a decision of the AER. In particular, the AER's evaluation of the policy considerations involved in determining which is the materially preferable NEO decision, would, in the absence of limited merits review, remain free from review or correction.
- Where reasons have been given disclosing a justification for the AER's decision, the Court on a judicial review application would rarely intervene on the *Li* ground.

The judgment of Brennan J in *Quin* recited above which is regarded as the quintessential distillation of the reasons for the demarcation between judicial and merits review was referred to by the High Court in *Li* without any suggestion that the reasons of Brennan J no longer apply. Judgments applying *Li* have continued to emphasise the constitutional limitation on judicial review for unreasonableness, and that unreasonableness will only rarely provide relief.[26]

(e) Remedies in judicial review

Judicial review is concerned with identification of legal error. It is not the court's constitutional function to remake an administrative decision. A court will not vary a

[26] Justice Jackson has emphasised that: "cases where a decision is set aside for unreasonableness are rare birds. There is no reason to think that Li's case has changed that legal scenario": *Pangilinan v Queensland Parole Board* [2014] QSC 133 per Jackson J at [70]. For a careful analysis of the effect of *Li*, see: *Acquista Investments Pty Ltd v The Urban Renewal Authority* [2015] SASCFC 91 at [75], [344].

decision or substitute its own decision in the context of judicial review.[27] The ordinary remedy in a successful application for judicial review is to set aside a decision or refer it to the primary decision-maker for further consideration. It is only in the rarest of cases where there can be a single legally correct decision that the court can impose that decision on the decision-maker.

1.3 Merits review – A Summary of General Propositions

(a) The emergence of contemporary merits review

The limited nature of judicial review permissible within the Australian constitutional system of separation of powers outlined above provides the background for the emergence of the modern Australian concept of "merits review" following the Kerr Committee's report in 1971 and the Bland Committee report in 1973.[28] As Professor Pearce has noted, the Kerr and Bland Committees "were established largely because of dissatisfaction with the means available to review Australian governmental actions."[29]

A brief history of the emergence of merits review is summarised in **Appendix 3**.

(b) The nature of merits review

Merits review in its ordinary sense is not concerned with identifying *legal error* by reference to specified grounds of review. Rather, it provides for a fresh determination, often by an external tribunal, as to whether the primary decision is the "correct or preferable" decision and, if not, the tribunal will substitute its own decision.[30]

Merits review differs from judicial review in three fundamental ways:

1 the scope of review;

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[27] With perhaps the limited exception of peremptory mandamus. See *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 316 ALR 16, in which the High Court ordered that "A peremptory writ of mandamus should issue commanding the first defendant to grant the plaintiff a permanent protection visa forthwith."

[28] See Commonwealth, *Commonwealth Administrative Review Committee: Report*, Parl Paper No 144 (1971) (**Kerr Committee Report**); Commonwealth, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973) (**Bland Committee Report**).

[29] D C Pearce, 'The Australian Government Administrative Appeals Tribunal' (1976) 1 *University of New South Wales Law Journal* 193, 194.

[30] Professor Allars SC has described the process of merits review in the context of the AAT as follows:

> *The process includes undertaking the tasks of identification of the scope of the relevant statutory power and any available associated powers, the requirements of any statutory duty applicable at the stage of merits review, identification of any relevant policy followed by evaluation of its validity and propriety, weighing of relevant evidence to reach factual findings and application of any statutory test or acceptable policy to those findings. An overarching constraint is that the AAT acts within its jurisdiction, including by remaining within the scope of the review, acting for the purposes of the statute, taking into account relevant considerations, not taking into account irrelevant considerations, and acting on the basis of evidence. Apart from ensuring that its procedural rulings are within the powers conferred upon it by the AAT Act, the function of the AAT is primarily driven by the objects, purposes and proper construction of the statute which in each case conferred the power to make the original decision.*

Margaret Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41(2) *Federal Law Review* 197, 200-201.

2 the remedies available to the tribunal; and

3 the process adopted for review.[31]

In terms of scope, merits review is concerned with identifying the "correct or preferable" decision. Justice Kiefel has described the task of identifying the correct or preferable decision as follows:

> *"Preferable" is apt to refer to a decision which involves discretionary considerations. A "correct" decision, in the context of review, might be taken to be one rightly made, in the proper sense*.[32]

In determining the "correct or preferable" decision, the tribunal is said to "stand in the shoes" of the primary decision-maker.[33] In the context of the AAT, this means that:

- Merits review is de novo and conducted on the basis of the most up-to-date material which can be put before the tribunal, and is not limited to the material before the original decision-maker.[34]
- The tribunal generally has the power, and in certain circumstances may be compelled, to seek information to assist it to reach its decision.[35]
- The tribunal applies the law as at the date of its decision. [36]

The "correct or preferable" formula has important implications for the scope of factual review in merits review:

- Compared with judicial review, merits review will involve the tribunal correcting factual errors by the primary decision-maker when reaching the "correct or preferable" decision. Indeed, the tribunal is tasked with making its own evaluation of the facts. Professor Cane has noted that "'the correct or preferable' criterion by which fact-finding is judged in merits review proceedings

[31] Professor Cane has described these three differences as "the substantive", "the procedural" and "the remedial": Peter Cane, *Administrative Tribunals and Adjudication* (Bloomsbury Publishing, 2009) 145.

[32] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [140].

[33] In the context of the AAT, s 43(1) of the AAT's enabling legislation provides that: "for the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision". Section 43(6) provides that the AAT's decision is deemed to be the decision of the original decision-maker with effect (unless the AAT orders otherwise) from the date on which the original decision took effect.

[34] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 390.

[35] *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429.

[36] As French CJ noted in *Minister for Immigration and Citizenship v Li* [2013] HCA 18, in relation to the powers of the former migration review tribunals, 'the word "review" has no settled pre-determined meaning, it takes its meaning from the context in which it appears' (at [9]). French CJ held at [10] that:

> *the nature of the powers conferred on these tribunals, the review each must undertake involves a fresh consideration of the application which led to the decision under review. The review must be based on the evidence and arguments placed before the tribunal and any other relevant information which the tribunal itself obtains. Each tribunal must identify for itself the issues that arise in the application before it. It is not confined to the issues considered by the delegate. There are similarities to the kind of review provided by the Administrative Appeals Tribunal.*

is more intrusive than the tests by which courts assess fact-finding in judicial review."[37]

- Compared with primary decision-making, the adjudicative model of tribunals means that the tribunal's evaluation of the facts may be more thorough and probing than the primary decision-maker's:

  (1) *"Tribunals are generally in a better position than agency decision makers to fully consider the law and facts in each individual case, and may therefore be less reliant upon policies or guidelines in deciding the appropriate outcome":* Administrative Review Council, Better Decisions Report.

  (2) *"Fact-finding is at the very core of merits review. Any and every relevant factual issue can be raised in merits review proceedings. … Not only is review by the AAT usually conducted on the basis of the facts as they stand at the time of review as opposed to the time when the original decision was made; the AAT is also typically able (and expected) to spend more time investigating the facts of the case than the primary decision-maker. On the positive side, this is precisely what justifies providing for external review, namely that the reviewer can add value to the decision-making process:* Peter Cane, "Judicial Review in the Age of Tribunals" [2009] *Public Law* 479, 486-487.

The Kerr Committee Report envisaged that the proposed Commonwealth administrative review tribunal that "would be mainly concerned with review as to fact-finding".[38]

(c) Attenuated forms of merits review

The scope of merits review, as a creature of statute, ultimately takes its form and scope from the legislation applicable to the tribunal's review of the relevant decision. Tribunals are not always tasked with identifying the "correct or preferable" decision.

There are various forms of merits review that place limitations on the broad scope of merits review described above. Statutory provisions may attenuate the scope of merits review by, for example:

- stipulating limited grounds on which the tribunal may review a decision – for example (1) limiting the review to an "error in the finding of facts" or (2) requiring that the original discretion must have been exercised "incorrectly or unreasonably" having regard to particular matters;
- providing that the tribunal cannot substitute its own decision for that of the primary decision-maker, but must remit the decision for reconsideration;
- placing a temporal limitation on the evidence to which the tribunal can have regard;
- requiring the tribunal only to have regard to the material before the original decision-maker; or

[37] Peter Cane, 'Judicial Review in the Age of Tribunals' (2009) *Public Law* 479, 490.

[38] Kerr Committee Report, 89 at [299].

- stipulating that review is to be by way of a "reconsideration" of the matter, rather than rehearing.[39]

(d) Rationale for merits review

In the more than four decades which have passed since the Kerr and Bland committees' reports, external merits review has come to be a significant feature of the administrative law landscape in the Commonwealth, states and territories.[40] The Kerr Committee identified the following rationale for its reform proposals:

> *If as a result citizens look more critically at and have the right to challenge administrative decisions, this should stimulate administrative efficiency. Our proposals, we believe, reconcile basic ideas of justice, acceptance of the wide and growing power of the administration and efficient and fair exercise of that power in a democratic society*.[41]

Over the last four decades, judicial and academic commentary has explored the rationale for merits review by external tribunals in more detail.[42] These rationales are explained in detail in **Appendix 3** and include:

1 Ensuring the correct or preferable decision is reached.

2 Improving quality and consistency in primary decision-making generally.

3 Affording natural justice.

4 Meeting community expectations for the availability of review of decisions affecting them on the merits.

5 Impartial decision-making.

6 Procedural advantages, including flexibility, informality and information gathering powers.

7 Reasons for decisions.

8 Considered interpretation and published rulings on legislation and soft law.

9 Identifying areas for law reform.

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[39] Margaret Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41(2) *Federal Law Review* 197, 213-221.

[40] See Linda Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' in Public Law in the Age of Statutes: Essays in Honour of Professor Dennis Pearce, (Federation Press) (2014).

[41] Kerr Committee Report at [364].

[42] See generally, Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (LexisNexis, 4th ed, 2015), Chapter 3; I Thompson and M Paterson, 'Public Benefit: The Administrative Appeals Tribunal' in John McMillan (ed), *Administrative Law: Does the Public Benefit?* (AIAL, 1992) 81; D Volker, 'The Effect of Administrative Law Reforms on Primary Level Decision Making' (1989) 58 *Canberra Bulletin of Public Administration* 112; A.N. Hall, 'Administrative Review Before the Administrative Appeals Tribunal: A Fresh Approach to Dispute Resolution? - Part 1' (1981) 12 *Federal Law Review* 71; J Dwyer and G Woodward, 'Dreams of a Fair Administrative Law' in S Argument (ed), *Administrative Law and Public Administration: happily married or living apart under the same roof?* (AIAL,1994) 197; P Stein, P O'Neill and A Coghlan, 'Can Review Bodies Lead to Better Decision-Making' (1991) 66 *Canberra Bulletin of Public Administration* 118, 118, 123, 128.

(e) Operation of external merits review tribunals

Merits review is the broad description of the task conferred on external administrative review tribunals but this general label should not obscure the fact that these tribunals operate in very different ways.

Certain unifying features common to administrative review tribunals can be identified, including that tribunals are generally:

- creatures of statute – each tribunal's enabling statute dictates its jurisdiction, including the nature of its review task and its mode of operation;
- able to affirm, vary, set aside or substitute their own decision for that of the primary decision-maker;
- independent of the primary decision-maker;
- required to give reasons for their decisions;
- subject to the supervisory jurisdiction of courts and, in some cases, appellate powers of courts;
- intended to operate in a less formal manner than the adversarial court process; and
- not bound to follow the rules of evidence.[43]

A summary of various features of merits review tribunals, including their constitution by expert panel members and their operation in a modified inquisitorial or less adversarial procedure, is set out at **Appendix 3**.

(f) Decisions appropriate for merits review

Not all decisions can be or should be subject to any form of merits review. A question arises as to what types of decisions under what types of legislation should be subject to external merits review. The AAT, for example, has jurisdiction to review decisions made under more than 400 Commonwealth enactments.[44] The Administrative Review Council concluded in its report *What Decisions Should be Subject to Merits Review?*[45] that:

[43] See Linda Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' in Public Law in the Age of Statutes: Essays in Honour of Professor Dennis Pearce, (Federation Press) (2014); Peter Cane, *Administrative Tribunals and Adjudication* (Bloomsbury Publishing, 2009) 144.

[44] The AAT's jurisdiction spans child support, Commonwealth workers' compensation, family assistance, paid parental leave, social security and student assistance, migration and refugee decisions, taxation, veterans' entitlements, citizenship, bankruptcy, civil aviation, financial services, customs, Freedom Of Information, the National Disability Insurance Scheme, passports and ASIO security determinations. See Administrative Appeals Tribunal, *List of Reviewable Decisions* (Jurisdiction as at 31 December 2015) < http://www.aat.gov.au/AAT/media/AAT/Files/Lists/Reviewable-Decisions-List-As-at-31-December-2015.pdf >.

[45] Administrative Review Council, Parliament of Australia, *What Decisions Should be Subject to Merits Review* (1999).

- All decisions that will, or are likely to, affect the interests of a person should, in principle, be subject to merits review. That is, "[i]f an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits."[46]
- If a more restrictive approach is adopted, "there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making."

The ARC concluded that legislation-like decisions and self-executing decisions are unsuitable for merits review and identified other factors that may justify excluding merits review.

1.4 Co-existence of merits review and judicial review

Merits review and judicial review are not interchangeable or alternative forms of review. Rather, they are fundamentally different forms of review, undertaken by different bodies, relying on different forms of expertise and following distinct procedures. These two forms of review naturally co-exist in the Australian legal landscape making their own significant contribution to administrative justice.

As Stephen Gageler (as his Honour then was) and Professor Allars noted in their 2005 joint opinion to the COAG SCO review:

> *Putting in place facility for merits review does not exclude judicial review. Judicial review will exist in any event and merits review may coexist with judicial review. … In our opinion merits and judicial review, can, typically do, and are intended to, happily co-exist. Merits review by a tribunal and judicial review may be concurrently available without any adverse effects. …*
>
> *We are strongly of the view that a merits review of the economic regulatory decision-making of the AER is appropriate and desirable. We agree with the principles set out at [2.23] – [2.31] of the Discussion Paper regarding the benefits of merits review in improving the quality of decision-making. Those principles apply to both the electricity and the gas regulatory regimes. … We regard the ACT as the appropriate tribunal in which merits review jurisdiction should be vested.*[47]

As will be seen, we respectfully agree that these observations were correct when made, and they remain true today.

[46] The ARC stated that this view is "limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding the merits review of a decision that otherwise meets the Council's test." See, Administrative Review Council, Parliament of Australia, *What Decisions Should be Subject to Merits Review* (1999).

[47] Stephen Gageler and Margaret Allars, *Joint Opinion to the Ministerial Council on Energy Standing Committee of Officials Review of Decision-making in the Gas and Electricity Regulatory Frameworks Discussion Paper*, 10 October 2005.

HERBERT SMITH FREEHILLS

Part 2: The Limited Merits Review Regime

2.1 Overview

We address in this Part 2 the limited merits review regime provided for in the NEL and NGL, in particular:

- the origins of the LMR;
- the 2012 Standing Council on Energy and Resources review of the LMR;
- the 2013 amendments to the LMR, which resulted in the current review regime;
- the key features of the current LMR regime; and
- how and why the current LMR regime differs from both judicial review and full merits review.

2.2 Introduction

The National Electricity Law and National Gas Law regulate, amongst other things, the pricing of energy in Australia.

As section 7 of the NEL and section 23 of the NGL provide, the NEL and NGL each have the objective of promoting the efficient investment in, and efficient operation and use of, electricity services and natural gas services (as the case may be) for the long term interests of consumers. These objects are described separately as the National Electricity Objective (**NEO**) and National Gas Objective (**NGO**).

To that end, the Australian Energy Regulator (**AER**) has power to make distribution determinations concerning the distribution charges that electricity and natural gas service providers can impose for their services. These distribution charges represent a significant component of the electricity and gas prices charged to consumers. In making its determination, the AER must have regard to the revenue and pricing principles set out in section 7A of the NEL and section 24 of the NGL as well as the NEO and NGO. The NEL

and the NGL must be construed harmoniously with and as far as is possible to give effect to the relevant objective.[48]

2.3 Origins of the current LMR regime

The NEL commenced on 1 July 2005 (*National Electricity (South Australia) (New National Electricity Law) Act 2005*). COAG amended the Australian Energy Market Agreement to provide for a national framework for energy access and a national framework for distribution and retail services. Prior to the introduction of the National Electricity Law, there was a very limited form of merits review for specified decisions of the National Electricity Code Administrator and the National Electricity Management Company and various state merits review regime.[49]

On 1 July 2008, the *National Gas (South Australia) Act 2008* commenced, implementing the NGL. The NGL reformed gas access regulation and replaced the *Gas Pipelines Access (South Australia) Act 1997*, commonly known as the Gas Code. Merits review had existed and been utilised under the Gas Pipelines Access Law since the introduction of the Code.

Then, in 2013, a series of further significant reforms were made following the Yarrow Report. The 2008 merits review reforms and the 2012 Yarrow Report are summarised in **Appendix 4**.

2.4 The response to the Yarrow Report

The relevant Ministers published their final decision on the recommendations emanating from the Yarrow Report on 6 June 2013 in their *Regulation Impact Statement, Limited Merits Review of Decision-Making in the Electricity and Gas Regulatory Frameworks - Decision Paper* (**Decision Paper**).

The Decision Paper considered that the objectives of the LMR regime at the time it was introduced remain current such that the review regime should continue to be a limited merits review process consistent with its original policy intent.

[48] Schedule 2 to both the NEL and NGL provide that: "In the interpretation of a provision of this Law, the interpretation that will best achieve the purpose or object of this Law is to be preferred to any other interpretation." See also s 15AA of the *Acts Interpretation Act 1901* (Cth) which provides: "In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation." The High Court has repeatedly affirmed that the process of statutory construction involves consideration of the statute as a whole. In *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ held at [69] that: "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'". See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [26] (Gleeson CJ) and [55], [65] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[49] Yarrow Report, 10.

The Decision Paper took the view that the most desirable approach was to reform the LMR framework but retain the ACT as the review body. This was seen to be able to ensure that the limited nature of merits reviews of energy decisions is retained and that the ACT is able to adequately take into account interlinked matters in its review process.

Key to the Decision Paper was the following position statement:

> *[The Standing Council on Energy and Resources' Senior Committee of Officials'] recommended preferred policy position makes a number of changes to the operation of the regime that will ensure the Tribunal explicitly considers the impact decisions may have on the long term interests of consumers, consistent with the NEO and NGO. This includes the introduction of a limited merits review process, whereby:*
>
> *1. an applicant must demonstrate that the original decision-maker made an error of fact, an incorrect exercise of discretion or was unreasonable in its original decision and make a prima facie case that addressing this would lead to a materially preferable outcome in the long term interest of consumers; and*
>
> *2. the Tribunal must assess whether, taking into account all interlinked matters, addressing the grounds and any interlinked issues would deliver a materially preferable outcome (in the context of the overall decision) in the long term interests of consumers, as set out in the NEO or NGO.*

This position was borne out in the 2013 amendments to the NEL and NGL.

Importantly, the Decision Paper rejected the introduction of a new administrative review body such as that proposed to be called the AEAA. The Decision Paper took the view that the recommendation:

> *is not justifiable at this stage as it is not supported by sufficient evidence and would introduce significant new risks and potential costs while being constrained from addressing risks associated with the existing arrangements, without changes similar to those flagged in [the Standing Council on Energy and Resources' Senior Committee of Officials] recommended policy position.*

Nonetheless the Decision Paper noted that it proposed an "independent review be undertaken of the Tribunal's performance under these reformed arrangements, to commence no later than the end of 2016" with such review intended to determine if additional amendments to the structure of the ACT's review or the establishment of a new review body are required to ensure the delivery of the policy intent.

2.5 The operation of the current LMR regime

The current LMR regime is a unique review procedure created by the NEL and NGL. LMR is, as its name suggests, an attenuated form of merits review of the kind described in Part 1.

As described in Part 1, full merits review involves the tribunal undertaking do novo review on the basis of material as at the date of the tribunal's review (including considering fresh or additional evidence), and the tribunal may make findings of fact additional or contrary to that made by the primary decision-maker. Many of these features of merits review are missing from the LMR regime.

Set out in **Appendix 4** is a more detailed overview of the key features of the current LMR regime.

In summary:

- Although the Yarrow Report made findings that the LMR regime under the NEL and the NGL as originally introduced were deficient having regards to their policy purposes, not all of the Yarrow Report's recommendations were implemented by the 2013 amendments.
- The most important change to the LMR regime as a result of the 2013 amendments was to introduce the requirement throughout the LMR provisions that a decision under review is only liable to being varied or set aside if it is not a materially preferably NEO or NGO decision. The 2013 amendments reinforce the notion that the decision under review must be considered as a whole, and it is not sufficient to point to mere error in the making of the decision or the findings of fact that formed the foundation of the decision if the decision was overall capable of supporting the NEO/NGO.
- Another key theme of the 2013 amendments was to reject the Yarrow Report's recommendation that the grounds of review be broadened or less constrained. The post-2013 amendment LMR regime retained the four grounds of review as originally introduced.
- The 2013 amendments also gave the ACT greater fact gathering powers, although in a manner which does not give the applicants or interveners to the review a right to put forward fresh evidence.

Birdseye Comparison of the LMR regime with merits review

Common feature of merits review	LMR equivalent
The tribunal undertakes de novo review to identify the "correct or preferable" decision, from all the material put before it. In the well-known case of *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, the Full Federal Court, speaking of the Administrative Appeals Tribunal, said: *The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.*	ACT is required to identify whether there is a "materially preferable" NEO/NGO decision and is limited in the issues and evidence that it may consider.
The parties may raise new issues before the review forum	Save for the exception below, the aggrieved party is limited to the issues which it raised before the primary decision maker.
The parties may raise new evidence before the review forum	The ACT is limited to considering only a limited category of evidence, primarily by reference to the materials that were before the original decision maker. There is no facility for an aggrieved party to lead new or fresh evidence except in limited circumstances where the ACT invites a party to adduce further evidence.
The aggrieved party does not have the onus of proving that the primary decision was incorrectly made	The applicant or intervener under the LMR regime has the onus of proof.
The review forum has all the powers and discretions conferred on the original decision maker	The ACT has power to vary the decision or set aside and remit the decision. The ACT may not exercise its power to vary the decision if the decision is sufficiently complex, in which case it must remit the decision to the original decision maker.

Part 3: ACT decisions under the LMR regime

3.1 Introduction

A table summary of the decisions published by the ACT is set out at **Appendix 5**. The table outlines: each application made to the Tribunal for review; the applicant and any interveners in relation to each application for review; the issues and complaints raised by each party/intervener in relation to each application; the grounds for review on which each issue was sought to be made; the ACT determination and reasons in respect of each complaint.

In light of this analysis, this Part 3:

- addresses key procedural and substantive aspects of the review process in the ACT; and
- makes some observations on significant themes in the ACT's decisions which are relevant to an assessment of the LMR regime.

3.2 Procedural aspects of ACT reviews

(a) Number of reviews

In the period from the commencement of the LMR regime in January 2008 to 30 September 2016, approximately 46 separate applications have been made to the ACT in relation to the energy sector. Of these 46 decisions, approximately 40 involved a determination made by the Australian Energy Regulator (**AER**) and approximately 6 involved a determination made by the Economic Regulation Authority (**ERA**).

Of all of the cases considered, the ACT refused to grant leave to review and/or to intervene to at least one potential party to the proceedings in at least five matters.[50]

The table summarises:

1 the applicant and interveners in relation to each application made to the Tribunal;

[50] In *Application by Energy Users' Association of Australia [2009] ACompT 3* the ACT rejected the application of the Energy Users' Association on the basis that the value threshold requirements had not been met; in *In the matter of Energex Limited* [2010] ACompT 3, the ACT refused EnergyAustralia's application to intervene on the gamma issue on the basis that EnergyAustralia did not establish that it had a 'sufficient interest' in the decisions; in *Application by Jemena Gas Networks (NSW) Ltd (No 3)* [2011] ACompT 6, Madeleine Kingston, a consumer intervener, was refused leave to intervene in respect of an issue involving Bulk Hot Water; in *WA Gas Networks Pty Ltd (No 2)* [2011] ACompT 15, the ACT refused leave for WA Gas Networks to apply for review in respect of the ERA access arrangement decision regarding its Mid-West and South-West Gas Distribution Systems on the basis that the decision was not a reviewable regulatory decision; in *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8, the ACT refused leave to review and to intervene to SACOSS in respect of the AER distribution determination for SAPN. This was because SACOSS did not raise the matter in a submission to the AER before the AER's decision was made.

2 the issues and complaints raised by the applicant and any intervener in respect of each application;

3 the grounds for review on which each issue was sought to be made; and

4 the ACT determination and reasons in respect of each complaint.

There have been seven sets of reasons published by the ACT which have reviewed decisions subject to the post 2013 statutory amendments. Eight applications were heard by the ACT together in September and October 2015 (seven concerning review of electricity distribution determinations and one concerning a gas access arrangement decision). The ACT was constituted by the President Justice Middleton, Mr Davey and Dr Abraham. This produced five sets of reasons published on 26 February 2016. The other two sets of reasons concerned a challenge by the South Australian Council of Social Services Inc to an electricity distribution determination, in which the application was withdrawn or leave was not granted in respect of the issues raised,[51] and a review of a gas access arrangement decision which was remitted to the ERA to determine in accordance with directions of the Tribunal.[52]

(b) Parties and interveners to a review

On at least 6 occasions, the application for a review of a decision by the AER/ERA was made by a person who was not the entity the subject of the AER/ERA decision. Instead, the review was initiated by a non-service provider, and the relevant service provider either did not apply, or applied separately for, review of the applicable AER/ERA decision.[53]

At least one intervener was involved in at least 28 of the applications for review:[54] :

- consumers or consumer/user groups intervened in 11 applications for review;
- major users or retailers intervened in 3 applications for review;
- other gas or electricity network service providers intervened in 12 applications for review; and

[51] *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8.

[52] *Application by ATCO Gas Australia Pty Ltd* [2016] ACompT 10. Application for merits review of access arrangement decision by the ERA. See also *Application by ATCO Gas Australia Pty Ltd* [2015] ACompT 7 (application for leave).

[53] See for example, *Application by Energy Users' Association of Australia* [2009] ACompT 3 (in relation to the AER's determinations for Transend and TransGrid); *Application by Alinta Sales Pty Ltd (No 2)* [2012] ACompT 13 (in relation to the ERA's decision for ATCO (WA Gas Networks)); *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 (in relation to the AER's determinations for Ausgrid, Essential Energy and Endeavour Energy); and *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8 (in relation to the AER's determination for SAPN). .

[54] Refer to **Appendix 5**.

- a relevant Minister from a participating jurisdiction (State or Commonwealth) intervened in 19 applications for review.

(c) Consultation

As noted in Part 2, s 71R of the NEL and s 261 of the NGL were substantially changed by the 2013 amendments. As an example, the ACT must consult with network service users, prospective network service users, any relevant user or consumer association, and consumer interest groups that may have an interest in the determination: s 71R(1)(b) of the NEL and s 261(1)(b) of the NGL.

In respect of the ACT's recent review of the AER's revenue determinations, the ACT held community consultations in 2015. Information for participants was published on the ACT's website.[55] In its ultimate decision, the ACT described the nature of the detailed consultations it undertook:

> *The Tribunal, having given leave to apply for review in these and the related matters on 17 July 2015 (other than the JGN application where leave to apply for review was given on 30 July 2015) sought information from the AER as to all of the interest groups or persons who might have an interest in the review by the Tribunal under s 71R(1)(b) of the NEL and s 261(1)(b) of the NGL. ...*
>
> *The Tribunal then conducted an extensive communication process directly with each of those entities or persons to invite them to indicate whether they wished to consult with the Tribunal in relation to any of the Final Decisions, as to the nature of their proposed participation, and as to how the consultation might best be carried out. In the light of that material, the Tribunal consulted with all of those persons on 6 and 7 August 2015.*
>
> *During those consultations, members of the Tribunal sought clarification, and sometimes supplementation of comments or submissions or further development in the views expressed so that they were better understood or appreciated by the Tribunal.*[56]

(d) Conduct of hearings

In several instances, the ACT decided that it would be appropriate for a number of matters (in respect of different parties) to be heard together because some of the issues were common to each of the matters. In the case of the most recent electricity distribution determination decisions eight applications were heard and determined together. In this matter, the hearing also proceeded on a topic by topic basis, enabling the ACT to address the grounds of review in an efficient manner.

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[55] See ACT, *Information for Participants in the Tribunal's Community Consultation Process* <http://www.competitiontribunal.gov.au/current-matters/community-consultations/act-1-to-8-of-2015/information-for-participants>.

[56] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [50]-[52].

3.3 Substantive aspects of ACT reviews

(a) Grounds of review

In all of the substantive decisions (ie, excluding decisions regarding an *application* for leave to apply for review or intervene in a review), at least two grounds of review under section 71C(1) of the NEL or section 246(1) of the NGL were raised. Often, the ACT decisions did not articulate which particular ground for review was contended by each party in respect of each issue. However, in stating its conclusion, the ACT generally identified whether it considered that the error was a material error of fact, incorrect exercise of discretion and/or unreasonable decision.

Often, the grounds for review under subsections 71C(1)(c) and (d) (incorrect exercise of discretion and unreasonable decision) were raised or concluded simultaneously in respect of an issue. The ACT often concluded that in exercising an incorrect exercise of discretion, the AER/ERA made a decision that was unreasonable.

(b) Issues subject to review

The annual revenue requirement for a distribution network service provider for each regulatory year must be determined using a *building block approach*. This means that the AER makes decisions including in respect of the indexation of the regulatory asset base, return on capital (including return on equity and return on debt), depreciation, estimated cost of corporate income tax and forecast operating expenditure.

The most contested issues are in respect of:

Issue	Summary
Operating expenditure	The expenditure forecasted to be spent on operations for the purposes of providing a safe and reliable supply of electricity for consumers over the regulatory control period.
Capital expenditure	The expenditure forecasted to be spent on capital for the purposes of providing a safe and reliable supply of electricity for consumers over the regulatory control period.
Return on debt	The interest rate that the network business pays when it borrows money to invest.
Return on equity	The return shareholders of the business will require for them to continue to invest.

Issue	Summary
Estimated cost of corporate income tax (gamma)	Gamma represents the value of imputation credits in calculating the cost of corporate income tax allowance. The larger the value of gamma, the smaller the corporate income tax allowance for each service provider.
RAB indexation	The regulator makes a decision on the service provider's opening regulatory asset base. In doing so, the regulator considers the annual inflation rates for RAB indexation. The regulator uses this figure at the start of each regulatory year to determine the return of capital and return on capital building block allowances.

Several of the ACT decisions have involved the determination of an issue that was previously determined by the ACT. For example, in respect of gamma, the ACT has on a number of occasions set aside and remitted the AER and ERA determination to vary the value of gamma to 0.25, including in its most recent decisions.[57] Several network service providers have also contested various aspects of the AER and ERA's return on debt decisions.

Gamma

In all of the decisions involving the determination of gamma, the ACT concluded that the appropriate value of gamma is 0.25. Nevertheless, the AER and ERA have continued to impose higher values of gamma. This would have the effect of reducing the corporate income tax allowance that would otherwise be permissible.

In 2010, the ACT determined that the value of gamma should be 0.25 (not 0.65 as determined by the AER in respect of the Energex distribution determination), being the product of the distribution ratio of 0.7 and theta of 0.35, and varied the AER's decision on gamma accordingly.[58] In this matter, the AER had acknowledged that there was evidence submitted to the AER that identified the error and that the evidence was persuasive evidence justifying departure from the value of gamma selected by the AER.

One month before the ACT's *Energex* decision was handed down, the ERA applied a value of gamma of 0.53. Following the *Energex* decision, the ERA acknowledged that the

[57] See, for example, *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9; *Application by United Energy Distribution Pty Limited* [2012] ACompT 1; *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1.

[58] *Application by Energex Limited (Distribution Ratio (Gamma)) (No 3)* [2010] ACompT 9; *Application by Energex Limited (Gamma)* (No 5) [2011] ACompT 9.

value of gamma should be varied to 0.25 and the ACT thus decided that there was "no real benefit in a refined analysis of the nature of the error".[59]

Despite the ACT's determination on these occasions that the value of gamma should be 0.25, the AER then set a value of gamma of 0.4 in the Ausgrid, Endeavour, Essential and ActewAGL distribution determinations in 2015. Again, the ACT held that the AER's decision on gamma was too high and considered it was likely to result in a materially preferable National Electricity Objective decision to remit the issue to the AER to remake its gamma determination using a gamma value of 0.25.[60] The ACT noted the potential gravity of the AER's gamma error considered in isolation in the following passage of its decision:

> *The AER has estimated that, without allowing for interrelationships with other issues, varying gamma from 0.4 to the Network Applicants' preferred 0.25 would change allowed revenues by around 1.3 percent for Ausgrid, Essential and ActewAGL, 1.5 percent for Endeavour and 0.6 percent for JGN equivalent to, in nominal dollar terms, $110.4m Ausgrid, $62.3m for Endeavour, $65.5m for Essential, $10.1m for ActewAGL and $13.9m for JGN. Those amounts were specified as the revenue outcomes on the topic of gamma as presented by the AER in its closing submission. The amounts involved of themselves are clearly significant.*[61]

The ERA similarly refused to adopt the value for gamma of 0.25 in its access arrangement decision in respect of ATCO Gas for the 2014-19 period. In 2016, the ACT set aside and remitted the ERA decision, directing it to apply a gamma value of 0.25 instead of 0.4.[62] In reaching this decision, the ACT concluded that:

> *As the Tribunal has not found there to be any error in the ERA's decision, other than in relation to gamma, the question is as to the appropriate relief to provide. The Tribunal is of the view that the relevant decisions should be set aside and a new decision made so as to take into account the correct value of gamma, but this should be done by the ERA.*
>
> *The Tribunal is satisfied that for it to do so would require the Tribunal to undertake an assessment of such complexity that it is not appropriate for it to undertake that task and it is preferable that the matter be remitted to the ERA.*[63]

Return on debt

In 2010, the ACT decided to vary the debt risk premium decision in the AER's distribution determination in respect of ActewAGL on the basis that it was unreasonable for the AER not to include certain types of bonds in its consideration.[64]

In 2011, the ACT agreed with Jemena Gas Networks that, in determining the debt risk premium to be allowed, reliance should be placed solely on the Bloomberg fair value

[59] *Application by WA Gas Networks Pty Ltd (No 3)* [2012] ACompT 12.

[60] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1.

[61] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [1114].

[62] *Application by ATCO Gas Australia Pty Ltd* [2016] ACompT 10.

[63] *Application by ATCO Gas Australia Pty Ltd* [2016] ACompT 10 at [690]-[691].

[64] *Application by ActewAGL Distribution* [2010] ACompT 4.

curve.[65] The AER contended the CBASpectrum curve was the best fit with the observed yields of its selected bonds. However, the ACT decided that the Bloomberg fair value curve was a much better fit than the CBASpectrum curve and therefore should be used, instead of the CBASpectrum, to derive the debt risk premium.

A year later, Envestra successfully contended that the AER erred in deciding to apply a value for the debt risk premium of 3.81%. The ACT varied the AER's decision by substituting the figure for the debt risk premium and decided that the AER's decision to reject the applicant's adoption of the EBV on the basis of the APA bond and the weighting chosen amounted to a reviewable error. The ACT also noted that the AER did not investigate or methodically analyse the validity of the proposals from the applicant's expert economist.

Similarly, and for largely the same reasons, the ACT varied the AER's access arrangement decision in relation to APT Allgas by substituting the figure for the debt risk premium.[66]

In 2012, the ACT directed the ERA to reconsider the proper application of the bond yield approach in determining the cost of debt.[67] The ACT decided that the ERA fell into error in choosing a simple average approach when considering the various estimates for the debt risk premium which the bond yield approach produced.

Again, in 2012, the AER fell into reviewable error in determining the debt risk premium figures in respect of the United Energy Distribution, SPI Electricity, Citipower and Powercor distribution determinations.[68] The ACT varied each of those AER determinations and substituted the debt risk premium figure with a higher value. The AER and distribution network service providers ultimately agreed that the AER erred in deciding to annualise the Bloomberg fair bond yield data.

In the same year, the ACT affirmed the ERA approach regarding the debt risk premium but remitted to the ERA to determine the final value of the debt risk premium.[69]

In 2016, the ACT determined that Ausgrid, Endeavour, Essential and ActewAGL had established that the AER erred in its approach to the benchmark efficient entity (**BEE**)

[65] *Application by Jemena Gas Networks (NSW) Ltd (No 5)* [2011] ACompT 10.

[66] *Application by Envestra Limited (No 2)* [2012] ACompT 4.

[67] *Application by WA Gas Networks Pty Ltd (No 3)* [2012] ACompT 12.

[68] *Application by United Energy Distribution Pty Limited* [2012] ACompT 1.

[69] *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14.

because the BEE as referred to in the Rate of Return Objective is not a regulated entity (as contended by the AER) and the AER erred in adopting a 'one size fits all' approach.[70]

(c) Orders made by the ACT

In a significant proportion of the decisions published by the ACT, the ACT made directions ordering a variation to a particular figure used in the AER/ERA determination and/or a remittal back to the AER/ERA for reconsideration of a building block to reflect the ACT's comments.

Excluding decisions where leave was refused and review of decisions already remitted, there has been only one decision post-2008 in which the AER/ERA determination was wholly affirmed by the ACT without any variations or remittals.[71]

In the recent round of reviews the ACT has set aside the decisions under review and remitted them to the AER accompanied by directions in respect of the errors that have been identified. However, the ACT has left it to the AER to revisit other matters having regard to the balancing of factors going to the long term interests of consumers. In doing so the ACT accepted the observations made to it by AER that:

> *overpricing leads to consumers not using or not efficiently using the network (and the longer term pricing for those consumers continuing to do so) on the one hand, and that underpricing by too low a revenue stream leads to investors being unwilling to invest in adequately maintaining the network so as not to adversely affect its safety, security and reliability to the detriment to consumers on the other. Either of those positions would not advance the NEO.*[72]

(d) Significance of the error

In some cases, the ACT commented on the significance of the errors to the AER's decision. For example, the ACT concluded in the most recent revenue review decision (currently the subject of judicial review in the Federal Court brought at the instance of the AER) that Networks NSW had established that:

> *[I]n significant respects the AER has formed its decision on foundations that are not properly established. Put another way, its decisions have been reached on complex factual bases and/or the exercise of discretions giving rise to very significant outcomes which, by reason of the ACT's conclusions on the grounds of review, are not appropriate to support the ultimate decision of the AER.*[73] [Emphasis added]

The grounds for review under section 71C(1)(a) and (b) of the NEL are that the AER made an error(s) of fact in its findings of facts, and that the error(s) was material to the making of the AER's decision. Therefore, where the ACT held that a ground for review

[70] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1.

[71] *Application by Alinta Sales Pty Ltd (No 2)* [2012] ACompT 13.

[72] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, at [1199].

[73] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [1218]-[1220], [1226].

under section 71C(1)(a) or (b) was made out, it is necessarily the case that the error was material to the AER's decision.

3.4 Observations on ACT's decisions

(a) Introduction

The analysis of the post-2008 decisions set out in the table at **Appendix 5** reveals some important trends that are relevant to the operation of the LMR regime, including that: the AER's reasoning has been affirmed by the ACT on many occasions; there are instances of the "gateway" provisions of the LMR regime confining the scope of merits review; the regulator has itself accepted in a number of merits review applications that its error was based on an error of fact in a material respect and was corrected by the ACT; there are instances of successful applications for merits review to the ACT in respect of which judicial review may also have been successful; there are instances of successful applications for merits review to the ACT involving serious factual error in respect of which judicial review may not have been successful.

(b) The AER's reasoning has been affirmed by the ACT on many occasions

The AER/ERA's reasoning has been affirmed either in whole or in part on many occasions.

For example, *Application by Alinta Sales Pty Ltd (No 2)*[74] the ACT affirmed ERA's decision as it was not persuaded that ERA had committed any error which fell within a ground of review raised by Alinta.[75]

In *Application by EnergyAustralia and Others*,[76] the ACT affirmed the AER's determination in respect of the benchmark rate for the cost of debt, step changes operating expenditure and maintenance operating expenditure. The ACT was not persuaded that the applicants had established any reviewable error on these grounds and concluded that the AER had "carefully considered the arguments that had been put to it".[77] The ACT varied or remitted other aspects of the AER's determination.[78]

In *Application by Envestra Limited (No 2)*,[79] the ACT affirmed the AER's decision on the market risk premium for the purposes of calculating the cost of equity. The ACT found no

[74] *Application by Alinta Sales Pty Ltd (No 2)* [2012] ACompT 13.

[75] *Application by Alinta Sales Pty Ltd (No 2)* [2012] ACompT 13at [105].

[76] *Application by EnergyAustralia and Others* [2009] ACompT 8.

[77] *Application by EnergyAustralia and Others [2009] ACompT 8.*at [121].

[78] Including in relation to the control mechanism for alternative services, the time period used to estimate variable on return on debt and equity, and determination of pass through events. See *Application by EnergyAustralia and Others (No 2) [2009] ACompT 9*.

[79] *Application by Envestra Limited (No 2)* [2012] ACompT 4.

error in the AER's decision regarding the market risk premium, noting that the AER's decision was "supported by a large body of evidence".[80] The ACT varied the Access Arrangement Decision by substituting an alternative value for the debt risk premium.[81]

Similarly, in *Application by DBNGP (WA) Transmission Pty Ltd (No 3)*,[82] the ACT affirmed the ERA's decision in relation to the nominal risk free rate of return on the basis that the "ERA committed no conceptual or empirical error in its choice of the length of the term to maturity".[83] The ACT thus concluded that the ERA's approach was reasonable. The ACT also found no error was established in respect of the ERA's decision concerning the market risk premium, the gamma value of 0.25, and the forecast inflation rate. The ACT also affirmed the ERA's decision in respect of the operation expenditure and concluded that the ERA's conclusion was "reasonably open to it on the information before it and it is not for the ACT to substitute a conclusion it might have reached on that information".[84] The ACT identified an error in relation to debt risk premium valuation, and remitted the decision for redetermination in accordance with the ACT's reasons on this issue.[85]

Recently, in *Applications by Public Interest Advocacy Centre Ltd and Ausgrid*,[86] rate of return on equity was raised as a ground of review but was not successful. The ACT carefully considered the contentions that the AER's factual conclusions were flawed. The ACT ultimately concluded that the mere existence of competing expert views on factual determinations was insufficient to give rise to factual error on the part of the AER.[87]

(c) "Gateway" provisions of the LMR regime has confined the scope of merits review

The ACT has refused leave for parties to apply for review, and to intervene, in respect of an AER/ERA decision on the basis of the value threshold requirements, and the requirement to establish that a matter had been raised and maintained before the AER/ERA made its decision. The "gateway" provisions of the LMR regime have also confined the scope of merits review.

[80] *Application by Envestra Limited (No 2)* [2012] ACompT 4 at [2], [172].

[81] *Application by Envestra Limited (No 2)* [2012] ACompT 4 at [1].

[82] *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14.

[83] *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 at [137].

[84] *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 at [487].

[85] *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 at Order 1, [620].

[86] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1.

[87] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [802]-[803]. See also, [808], [752].

In *Application by Energy Users' Association of Australia*,[88] the ACT rejected the application for leave on the basis that the value threshold requirements in section 71F had not been established. The ACT stated that it was not satisfied on the balance of probabilities that the threshold could be met by referring to comparative analysis and explained that the threshold must be met in relation to the case actually before the ACT. This was accepted by the applicant in oral submissions made before the ACT. The ACT accordingly refused the application.

In *Application by Ergon Energy Corporation Limited*,[89] the ACT agreed with the AER that section 71O(2) of the NEL precluded Ergon from raising its claims in respect of street lighting services. The ACT accepted that a matter needed to be raised in submissions made leading up to and relevant to the regulatory decision to fulfil the purpose of limited merits review.

Similarly, in *Application by United Energy Distribution Pty Limited (No 2)*,[90] the ACT rejected all of the applications made by United Energy Distribution, SPI Electricity, Citipower and Powercor in respect of the closeout of service incentive scheme, efficiency incentive scheme and RAB indexation on the basis that the applicants had not raised this matter previously.[91]

In *In the matter of Energex Limited*,[92] the ACT refused EnergyAustralia's application to intervene, and decided that EnergyAustralia did not establish that it had a "sufficient interest" in the decisions being reviewed and therefore was not a reviewable regulatory decision. The ACT did not accept that the AER determinations (or the ACT's decisions) will necessarily directly bear on the interests of EnergyAustralia.

Additionally, in *WA Gas Networks Pty Ltd (No 2)*,[93] the ACT refused leave for WA Gas Networks to apply for review of the ERA access arrangement decision in respect of the Mid-West and South-West Gas Distribution Systems, on the basis that it was not a reviewable regulatory decision.

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[88] *Application by Energy Users' Association of Australia* [2009] ACompT 3.

[89] *Application by Ergon Energy Corporation Limited* [2010] ACompT 6.

[90] *Application by United Energy Distribution Pty Limited* [2012] ACompT 1.

[91] SPI Electricity sought judicial review of the Tribunal's decision and was successful. This formed the basis of the amendments to s 71 of the NEL. See *SPI Electricity Pty Ltd v Australian Competition Tribunal* [2012] FCAFC 186.

[92] *In the matter of Energex Limited* [2010] ACompT 3.

[93] *WA Gas Networks Pty Ltd (No 2)* [2011] ACompT 15.

(d) Regulators have accepted in a number of merits review applications that their error was based on an error of fact in a material respect and was corrected by the ACT

The AER and ERA have accepted in a number of matters that it made an error of fact in a material respect. This often reduced the need for the ACT to analyse the nature of the error in great detail. In some of these matters, the AER/ERA reached an agreement with the applicants as to the appropriate decision and the ACT gave effect to that agreement.

For example, in *Application by Energex Limited (Gamma) (No 5)*,[94] the AER acknowledged that there was evidence submitted to the AER that identified error in the methodology it adopted in determining the gamma constituent decision, and that the evidence was persuasive evidence justifying departure from the value of gamma.

In *Application by WA Gas Networks Pty Ltd (No 3)*,[95] the ERA had accepted that the value of gamma should be changed, and the ACT decided that there was therefore "no real benefit in a refined analysis of the nature of the error".[96]

In *Application by United Energy Distribution Pty Limited (No 2)*,[97] the AER agreed with the applicants that it had erred in deciding not to annualise the Bloomberg fair bond yield data in the debt risk premium issue. The ACT gave effect to that agreement.

(e) There are instances of successful applications for merits review to the ACT in respect of which judicial review might also have been successful

There are instances of successful applications for merits review in which the ACT decided that the making of the AER/ERA's decision was an improper exercise of power or that there was "no evidence" or other material to justify the making of the decision. This would give rise to a ground of judicial review under section 5(1) of the ADJR Act. For example, in *Application by EnergyAustralia*,[98] the ACT held that the AER incorrectly exercised its discretion in failing to consider relevant matters which were material to the determination. Similarly, in *Application by ETSA Utilities*,[99] the ACT concluded that the AER incorrectly exercised its discretion in not considering the submission made by ETSA in relation to the easement value in detail.

[94] *Application by Energex Limited (Gamma)* (No 5) [2011] ACompT 9.

[95] *Application by WA Gas Networks Pty Ltd (No 3)* [2012] ACompT 12.

[96] *Application by WA Gas Networks Pty Ltd (No 3)* [2012] ACompT 12 at [124].

[97] *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8.

[98] *Application by EnergyAustralia* [2009] ACompT 7.

[99] *Application by ETSA Utilities* [2010] ACompT 5.

(f) There are instances of successful applications for merits review to the ACT involving serious factual error in respect of which judicial review may <u>not</u> have been successful

There are instances of successful applications for merits review to the ACT involving serious factual error in respect of which judicial review would likely not have been successful.

For example, in *Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 3)*[100], the ACT found that the CPI figure which Ergon contended for the pre-regulatory period (2.3%) was appropriate. The AER made an error of fact, and the AER's exercise of discretion was incorrect. The ACT was satisfied that, in respect of the first regulatory period, the AER not investigating the circumstances in which the union collective agreement had been negotiated but rather relying on its consultant's figure to arrive at the real escalator was an error of material fact and an incorrect exercise of the discretion.[101] The ACT accepted the nominal figure of 4.5% derived from Ergon's UCA should be accepted and a CPI figure of 2.13% should be applied. The AER's decision was varied in relation to pre-regulatory control period and the first year of the regulatory control period.[102]

In *Application by WA Gas Networks Pty Ltd (No 3)*,[103] the ACT identified a number of serious factual errors relating to gamma, cost of debt, bridging finance and other issues affecting ERA's decision. It remitted the decision to ERA with directions crafted to correct these factual errors, including that ERA:

- determine the amount allowed cost of capital using as the gamma input 0.25 for imputation credits;
- reconsider the bond yield approach having regard to the ACT's criticisms of ERA's simple averaging process in its analysis of the debt risk premium to allow; and
- allow the amount claimed by ATCO for the costs of bridging finance as an operating expense.

By contrast, judicial review would not ordinarily afford the opportunity for detailed factual scrutiny of ERA's determinations and provide specific directives as to factual determinations upon remitting the decision to the regulator.

[100] *Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 3)* [2010] ACompT 11.

[101] *Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 3)* [2010] ACompT 11.

[102] *Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 3)* [2010] ACompT 11, [34]-[41], [59]-[62].

[103] *Application by WA Gas Networks Pty Ltd (No 3)* [2012] ACompT 12.

In *Application by Multinet Gas (DB No 1) Pty Ltd (No 2)*,[104] following an application for review to the ACT, the AER recognised a serious factual error in its access arrangement decision relating to capex forecast, which was material to its access arrangement decision. The ACT then remitted the matter to the AER with specific directions as to how the capital expenditure should be calculated.[105]

Recently, in *Applications by Public Interest Advocacy Centre Ltd and Ausgrid*,[106] the ACT found that the forecast of operating expenditure (opex) involved error because the estimate of opex was too low. The ACT reached this decision on the basis of a combination of a number of aspects of the AER's reasoning on opex with which it disagreed, including that the AER placed too much emphasises on the Economic Insights model:

> *As is apparent from the above, there are a number of respects in which, or reasons for, the Tribunal on these applications being of the view that one or more of the grounds of review under s 71C(1) are made out. At a general level, that is because the AER placed too much weight on the outcome of the EI model. That, in the Tribunal's view represents an exercise of the AER's discretion about the use to which the EI model should have been put which was incorrect.*
>
> *Underlying that view are a series of concerns about the inputs to the EI model, and the OEF adjustments (including those of concern to PIAC), and including the AER's treatment of the vegetation management costs of Essential, Endeavour and ActewAGL, and further including the AER's treatment of the labour costs of the Networks NSW DNSPs. Those concerns can generally be described as errors of fact by the AER in its findings of fact, as discussed in detail above. Those errors do not simply reflect the AER's choice of competing expert views. There are underlying elements to the EI model which mean that the AER at this point (accepting that the available Australian data is not sufficiently extensive for appropriate modelling) should not have placed the weight it did on the output of the EI model. As the earlier Introduction to these reasons discuss, there may be room for debate about whether a particular step shows an error of fact in a finding of fact, or is an incorrect exercise of a discretion. It would be possible, in a number of the specific instances (in particular in relation to the OEFs) to use either description by the use of different semantics. The line between the two is often hard to draw. The Tribunal, having regard to its conclusion in the preceding paragraph, does not think it is helpful to embark on that exercise.*[107]

As noted in Part 1 of this report, factual conclusions including the weighing of evidence are not ordinarily bases for challenging a decision on judicial review.

(g) The materially preferable criterion, the NEO/NGO and the revenue and pricing principles

As summarised earlier, the 2013 amendments introduced in s 71P of the NEL and s 259 of the NGL an important limitation or constraint on ACT's power to vary or set aside a decision where a ground or grounds of review have been made out and the statutory

[104] *Application by SPI Electricity Pty Limited* [2013] ACompT 1.

[105] *Application by SPI Electricity Pty Limited* [2013] ACompT 1 at [8]-[10].

[106] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1.

[107] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [471]-[472].

threshold in s 71F had been exceeded. These provisions require the ACT to consider the decision under review as a whole, how the constituent components of the reviewable regulatory decision interrelate with each other and take into account the relevant revenue and pricing principles.[108] The NEL and NGL expressly provide that establishing a ground of review itself is not sufficient to vary or set aside the decision under review.[109] Rather, the ACT can only set aside or vary a decision if satisfied that to do so will, or is likely to, result in a materially preferably NEO or NGO decision.[110]

In the 2016 *PIAC and Ausgrid* decision the ACT engaged with these provisions. It concluded that the statutory tests had been passed but that the ACT did not have the resources sufficient to undertake the complex task involved in varying the AER's decisions. So it set aside the decisions and remitted them with directions. The ACT concluded that the identification of errors in some of the building blocks did not of itself lead to a conclusion that a materially preferable decision would follow. The ACT then made the following observations. It is important to set these observations out in full for they reflect the ACT's application of the statutory criteria the subject of the SCO review:

> *1179 There is, however, an additional step required. The fact that (as may be accepted) the proper application of the NER on the building block methodology under Part C of the NER will promote the NEO does not mean that, where a step taken by the AER is, or is not, in full accordance with the building block methodology, the NEO is not being achieved. There may be other matters which the AER considered, and which may balance out any adverse consequences of such non-compliance. The amounts involved may not merit the description of a departure from the building block approach so as to impair in a material way the NEO. Depending on the options considered by the AER, there may be two or more possible decisions which may contribute to the achievement of the NEO, and the AER may have formed an appropriate assessment of those alternatives: s 16(1)(d) of the NEL. As was pointed out by the AER, s 16(2) requires it to "take into account" the RPP in s 7A when exercising a discretion in relation to a regulatory distribution or transmission determination, or when making an access determination relating to a rate or charge for an electricity network service provider. The AER says that how it takes the RPP into account is a matter for it.*
>
> *1180 It is also important to acknowledge, as was very clearly demonstrated by the consultation undertaken by the Tribunal, that the elements of the NEO – in the long term interests of consumers – are potentially in conflict. In particular, the price at which electricity is supplied to consumers is presently (and will continue to be under the new regulatory regime) one which many consumers find confronting. There are significant numbers of consumers or potential consumers who either cannot pay, or have great difficulty in paying, that price. The difficulty in paying that price was also reported by some small and medium sized businesses, so that alternatives to using the electricity network or a focus on minimising that usage, were explained. On the other hand, for obviously good personal or commercial reasons, there were a significant number of consumers who expressed the need to have a very reliable and secure supply of electricity, and others who emphasised the need for safety in the structure and operations of the network.*
>
> *1181 Where the line or lines are to be drawn between price on the one hand, and quality service, reliability and security of supply (or some of those elements) on the other, is not*

[108] Section 71P(2b) NEL, s 259(4b) NGL.

[109] Section 71P(2b)(d)(i) NEL; s 259(4b)(d)(i) NGL.

[110] Section 71P(2a)(c) NEL; s 259(4a)(c) NGL.

an easy question. The line nevertheless is clearly one which must be drawn. The consultation process, and the submissions of all parties, made it clear that some compromise is necessary. Also, as observed in the Introduction to these reason, it was specifically noted on the introduction of the NEO (which has remained constant) that the NEO did not (and has not) extended to "broader social and environmental objectives": Legislative Council, South Australia, 16 October 2007, Hansard p 886.

1182 It is also important to note that the NEO is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers with respect to the identified topics. Efficiency is an economic concept. It is then explained or expanded on by the RPP. It is not necessary to list the RPP serially to reinforce that point; they include references to consideration of the potential for under and over investment and under and over utilisation where regulatory control is imposed. The building blocks specified in Part C of the NER, as generally identified in r 6.4.3 and as then specified in r 6.5 fortify the appropriateness of that observation.

1183 Consequently, the line to be drawn involves or requires a regulatory assessment to be made about those matters.

(h) Concluding remarks on trends from ACT decisions

It is evident from a considered review of ACT decisions under the LMR regime that:

- The ACT acts in a manner independent of all interested parties.
- The ACT does not adopt a purely adversarial approach, which is evident from its consultation of interested groups prior to its oral hearings. A Court cannot engage in such an exercise.
- The ACT was cognisant of and gave careful regard to the NEO and the revenue and pricing principles.
- Important errors of fact and exercise of discretion were identified which will, or be likely, to result in a materially preferable decision in achieving the NEO.
- The ACT has generally varied the regulator's decisions or remitted them with detailed directives concerning factual and evidentiary matters to be addressed when the AER remakes its decision. This would not occur in judicial review of the AER's decisions.
- The ACT reasons will also play an important normative role in assisting the regulator in its future decision making exercises. That is significant given that similar types of contested issues have been raised before the ACT.
- The 2013 legislative amendments have been applied and have operated in a manner consistent with the policy objective of introducing them, although they do add a level of complexity to the ACT's task.

Part 4: LMR performance against policy objectives

4.1 Introduction

In light of the analysis in Parts 1 to 3 above, this Part 4 makes some observations on the extent to which the LMR is achieving the policy objectives of the 2013 reforms as identified by the SCER in its December 2012 Statement of Policy Intent.[111] We consider each of the policy objectives under the headings below.

Of course, these observations on whether the quite radical changes to the LMR regime implemented in 2013 following the comprehensive Yarrow Report have been effective in achieving the stated policy objectives is necessarily preliminary, especially given that the application for judicial review of the ACT's recent decision concerning the AER's revenue determinations[112] will not be heard until mid-October and judgment may be reserved for some time. A full understanding of how successfully the ACT has met the objectives of the 2013 reforms and the interaction between LMR and judicial review will not be possible until after this has occurred. In any event, to the extent that the performance of the current regime must be assessed at this early stage, it must be done against a considered analysis of the ACT's detailed reasons and should seek to take account of the Full Federal Court's reasons in the forthcoming application for judicial review.

4.2 Observations on LMR's performance against policy objectives

(a) Providing a balanced outcome between competing interests

The SCER's intention was that the LMR regime was to provide a balanced outcome between competing interests and protect the property rights of all stakeholders by (1) ensuring that all stakeholders' interests were taken into account, including those of network service providers, and consumers and (2) recognising efforts of stakeholders to manage competing expectations through early and continued consultation during the decision making process.

ACT's statutory review task

As discussed in Part 1, where a decision involves polycentric considerations, as may be the case with decisions on revenue or access arrangements for the supply of electricity or gas, a statutory review procedure should be capable of balancing competing interests.

[111] SCER, Parliament of Australia, *Statement of Policy Intent, Review Framework for Electricity and Gas Regulatory Decision Making* (2012).

[112] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [50]-[52].

The current design of the LMR is more capable of balancing competing interests than judicial review. The features of the ACT's task in conducting merits review that enable it to take account of competing interests include:

- the ACT is tasked with considering how the constituent components of the decision under review interrelate with each other and with the matters raised as a ground for review;
- the ACT must consider the revenue and pricing principles under the NEL and NGL;
- the ACT must consider the reviewable regulatory decision as a whole in assessing the extent of the contribution to the achievement of the national electricity objective; and
- the ACT is constituted by a judicial member expert in competition and regulatory matters accompanied by specialist lay members.

By contrast to the LMR regime, judicial review is concerned only with identifying legal error. The consequence of this if LMR were abolished would include, for example:

1 a procedural error alone could invalidate an entire AER decision in an application for judicial review;

2 an error of construction or principle by the AER could give rise to an error of law that would invalidate the whole decision, irrespective of the materiality of the error and regardless of whether an alternative materially preferable NEO/NGO decision is available.

In a comparison of LMR and judicial review therefore, there is considerably greater scope for a non-judicial body to consider matters of policy and balance the competing interests of suppliers and consumers of energy. On judicial review a judge alone will determine the outcome; ordinarily, there is no capacity for expert assistance and any expert evidence would be strictly limited to anything that could assist the court identify legal error.

ACT's procedure

The statutory requirement that the ACT conduct public consultation before the hearing, the provision for interveners and the ACT's power to inform itself on matters is designed to ensure stakeholders' interests are taken into account.

1 **Consultation:** As noted in Part 3 above, in light of the substantial amendments to s 71R of the NEL in 2013, the ACT is now required to, and has, consulted with network service users, prospective network service users, any relevant

user or consumer association, and consumer interest groups that may have an interest in the determination.

In respect of the ACT's recent review of the AER's revenue determinations, the ACT stated in its ultimate decision that the consultation process enabled it to take into account a broader range of stakeholder interests than in an ordinary merits review adjudication hearing. The ACT held that:

> *In the course of the consultation process, a number of significant issues of concern to consumers and consumer interests were identified. It is fair to say that price was a significant concern. It is also fair to say that there were a number of persons who participated, and whose concern was to ensure the quality, safety, reliability and security of the supply of electricity either because of their particular circumstances or their particular geographical location, or for other reasons. The balance, as the submissions exposed, is a very difficult one. ..*
>
> *The matters which emerged in the course of the consultation process, apart from informing the Tribunal about the concerns or views expressed, also provided the foundation for matters the Tribunal raised with the applicants, the AER and the interveners during the hearing. They also served as the focus for questions of the Minister, during the hearing, as to how the various concerns or matters raised were to be taken into account by the Tribunal in reaching its decisions on the several applications*.[113]

Of course, a consultation process such as this could not be undertaken as part of a judicial review hearing and a consultation process subsequent to the regulator's determination would be irrelevant to the validity of the decision in a judicial review application.

2 **Interveners:** As noted in Part 2 above, under the current LMR regime, the parties to a review include the applicant, the regulator and any intervener. Third parties may therefore intervene in review proceedings. The following categories of persons have intervention rights: a service provider to whom the reviewable regulatory decision being reviewed applies; the relevant Minister, without leave; a person who made a submission or comment in relation to the making of the primary decision; and various consumer interest bodies.

In respect of the ACT's recent review of the AER's revenue determinations, the ACT described in detail the significant role played by the Public Interest Advocacy Centre in ensuring consumer interests (including those voiced during the consultation process) were taken into account in the ACT's decision:

> *In the matters concerning the Final Decisions of the AER regarding the Networks NSW businesses, in large measure (and as set out later in these reasons) the role of PIAC was a particularly helpful one. Its three applications sought to have the relevant AER Final Decisions set aside, and to have substituted determinations through the Tribunal which would substantially lessen the amounts recoverable by the Networks NSW businesses over the*

[113] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [52]-[53].

> *regulatory period 2015-19, as well as presenting the viewpoint that the matters raised by Networks NSW to have the recoverable amounts increased were erroneous. ... Many of the views put forward by those on the consultation process were therefore reflected or represented by the contentions of PIAC during the hearing. …*
>
> *As also noted, in relation to this decision (and those concerning Essential and Endeavour), the Tribunal has had the benefit of the applications by PIAC and its helpful submissions. That has enabled the Tribunal to be acutely aware of its obligation ultimately to ensure that its decisions in relation to these applications are those which, in its view, best serve the long-term interests of consumers in terms of the NEO. It has also, by the grounds of review raised by PIAC alleging error on the part of the AER, led to a focus on those particular matters where, it is said, the AER itself has failed to respond appropriately to s 16(1)(d) of the NEL or has otherwise fallen into error to the detriment of consumers. The particular errors asserted by PIAC are addressed in the course of this decision, and to the extent to which they require separate consideration, in the course of considering the reviews of the Final Decisions of the AER in relation to Essential and Endeavour.*[114]

Unless provided for in statute, such a significant role for a general public interest body such as PIAC would not be available under the ordinary rules of standing to bring or intervene in judicial review proceedings.

Consideration should be given to whether the interveners' role is operating appropriately in the current LMR regime, and, given the complexity of the subject matter before the ACT, all stakeholders are able to fully participate. In particular, consideration might be given to automatic standing for particular bodies or for public funding of a consumer representative intervener.

3 **Power to inform itself:** the ACT has the power to inform itself on any matter that would assist it in order to determine whether it will come to a materially preferable decision, by way of inviting parties to make further submissions and by its own initiative. As the SCO Consultation Paper notes, consideration should be given as to whether the ACT should operate in a more investigative manner, particularly in relation to ensuring all stakeholder interests are taken into account.

(b) Maximising accountability by allowing parties affected by decisions appropriate recourse to have decisions reviewed

A general jurisdiction to review administrative decisions on the merits is the most effective manner in which policymakers can maximise accountability of decision-makers and provide recourse to affected parties who are impacted by decisions which are incorrect or less than preferable. As noted in Part 1, accountability and providing citizens with a right of redress "on the merits" was a core rationale for the Kerr Committee's recommended introduction of a general merits review tribunal. As also noted in Part 1, the Administrative

[114] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [58]-[64].

Review Council's *Better Decisions* report recognised that providing accountability in the context of review of significant regulatory discretion is important in meeting community expectations of government.

Where a tribunal is given a limited jurisdiction to engage in merits review, that policy goal of maximising accountability is reduced accordingly. Although the LMR regime suffers from limitations as to materiality thresholds, grounds and evidence the ACT may consider, the LMR can achieve the objective of accountability because:

- the ACT provides a public forum in which the regulator's decisions are subject to scrutiny, which results in detailed public reasons;
- the ACT may review incorrect findings of fact;
- the ACT may review the exercise of discretion;
- the ACT is obliged to consider how the constituent components of the decision under review interrelate with each other and with the matters raised as a ground for review;
- the ACT is obliged to consider the revenue and pricing principles under the NEL and NGL;
- the ACT is obliged to consider the reviewable regulatory decision as a whole in assessing the extent of the contribution to the achievement of the national electricity objective;
- the ACT may affirm, vary or set aside the decision for remittal; and
- the ACT is an established and respected institution, presided over by a Federal Court judge and specialist lay members who are independent of the regulator and all other interested parties.

Nonetheless, the ability of the LMR regime to provide "maximum accountability" is limited by the materiality thresholds and leave requirements. Whilst these limitations to review serve the policy goal of minimising the costs of review, they come at the public cost of reducing accountability and increasing uncertainty amongst suppliers and consumers of electricity.

By contrast to LMR, judicial review alone cannot meet the policy objective of ensuring that the most preferable decision is made. Whilst judicial review is an important (indeed constitutionally-entrenched) institution to ensure the accountability of decision makers, the focus of judicial review is on the legality of and conditions attending a decision maker's power to make the decision, and not the policy or merits of the decision. As a result, although judicial review is designed to keep a decision maker to account if the

decision-maker exceeds the legal constraints on his or her power to make the decision, it does not keep the regulator accountable on the merits of the decision. In *Actew AGL Distribution v AER*,[115] a judicial review challenge to AER decisions, Katzmann J, in considering whether judicial review proceedings should be dismissed because "adequate provision" was made by any law for review by a court or tribunal, observed at [193]:

> *For the purpose of hearing a review, the Tribunal is constituted by a judge of this Court, who presides and is required to determine any question of law, together with two lay members, who are appointed for their knowledge or experience in industry, commerce, economics, and/or public administration: Competition and Consumer Act 2010 (Cth), ss 37, 42. The grounds of review are very broad, certainly far broader than those provided for in the ADJR Act. The Tribunal's powers are also greater than the powers given to the Court on an ADJR Act application; they include the power to vary the decision under review: NEL s 71P(2). [Emphasis added]*

A successful judicial review application would ordinarily result in the decision being quashed, with accompanying reasons as to why the ground of judicial review had been established. By contrast, the ACT can ensure greater accountability by addressing the merits of the decision in its reasoning and remitting the matter to the AER to act in accordance with its directions, as it has done in the 2016 decisions. A court on judicial review is unable to provide this type of direction to the decision maker.

(c) Maximising regulatory certainty by providing due process and a robust review mechanism

The LMR regime promotes regulatory certainty by providing due process and a robust review mechanism.

Through the LMR regime, an aggrieved party can challenge an incorrect decision or a decision tainted by material errors of fact. In arriving at the materially preferable decision under the LMR regime, the ACT will also tend to cure procedural errors by the regulator. In that way the LMR regime plays an important role in promoting due process.

It is important to note that providing for merits review aids, rather than undermines, regulatory certainty, by ensuring that enormous discretion conferred on regulators is appropriately checked. That check on discretion arises from review of individual decisions as well as the ACT's detailed reasons and directives for remaking decisions (which guide the exercise of the regulator's discretion in future cases). As the current Solicitor-General, Justin Gleeson SC, noted in 2004:

> *… we are seeing a transitional period in which regulators like the ACCC have been given immense power to make administrative decisions which have huge commercial consequences. Ten years ago, the relevant state governments, through their monopoly powers, and without any great transparency, simply made whatever decisions they saw fit. …*

[115] [2011] FCA 639.

> *There is a period required in which regulators will learn what is required of them. In that period they may fall foul, even often, of review by superior administrative bodies or courts. The process is a learning one. Ultimately the aim should be that the strike rate for successful appeals or reviews is low. The ACCC should not be criticised because at present is has lost a number of large cases. Nor should the Australian Competition Tribunal, or the court be criticised for regularly finding error in the ACCC's decisions. This process will work itself out over time.*[116]

These statements of principle apply with equal force to the recent round of reviews under the 2013 legislative scheme.

It has also been recognised by market observers that a robust review procedure maximises regulatory certainty by acting as a check on substantial discretionary power in the hands of the regulator:

> *Appeal process balances the Australian Energy Regulator's (AER) discretionary powers. The ability of the networks to contest the regulator's revenue/tariff decisions evidences limits on the increase since 2013 in the AER's level of discretionary power, and reinforces the transparency and predictability of the regulatory framework, a fundamental credit support for the networks*.[117]

In order to maintain a robust review process, it is necessary that the review mechanism is not constrained by legal technicalities and inflexible procedures. When compared to traditional merits review, or merits review de novo, the gatekeeper provisions of the LMR regime means that it has limitations in providing full due process.

(d) Maximising the conditions for the decision-maker to make a correct initial decision providing an accountability framework that drives continual improvement in initial decision-making

The objective of the SCER that the statutory regime must maximise conditions for the regulator to make a correct initial decision and drive continual improvements in the regulator's decision-making processes is consistent with the core justifications for merits review tribunals generally as described in Part 1 of this report. As noted in Part 1:

- The Kerr Committee's stated rationale for the introduction of general merits review was that "If as a result citizens look more critically at and have the right to challenge administrative decisions, this should stimulate administrative efficiency."[118]
- To similar effect, the Administrative Review Council's *Better Decisions* report identifies improving quality and consistency in primary decision-making as a key rationale for merits review. The ARC noted that merits review can achieve this in two ways. First, by ensuring that particular review tribunal decisions are,

[116] Justin Gleeson SC, 'Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?' (2005) 46 *Australian Institute of Administrative Law Forum* 28, 36.

[117] Moody's, "Australian Regulated Electricity and Gas Networks – 2017 Outlook" (14 June 2016).

[118] Kerr Committee Report at [364].

where appropriate, reflected by agencies in other similar decisions. This normative effect may also arise from the very existence of a merits review tribunal, as it should ensure that all reviewable decisions are capable of intelligible justification by the agency. Secondly, consistency and improved quality in agency decision-making can be achieved because the agencies should take into account review decisions in the development of future policy and legislation.[119]

There is evidence to suggest that the LMR regime is improving conditions for the regulator to make a correct initial decision and is driving improvements in its initial decision-making:

1 First, as the table of cases at **Appendix 5** indicates, the ACT's approach is to provide detailed and cogent reasons regarding the correctness of those aspects of the regulator's decisions which have been challenged. Where a particular methodology is appropriate, the ACT identifies this; where a particular methodology has led the ACT into error such that it is not a materially preferable NEO/NGO decision, the ACT will explain why. The ACT's guidance on these matters is significant given that, as identified in Part 3, common issues are raised in review applications (operating expenditure, capital expenditure, return on debt, return on equity, estimated cost of corporate income tax (gamma) and RAB indexation). These reasons and directives from the ACT will continue to guide future decision-making by the regulator, maximising conditions for the regulator to make a correct initial decision and continuing to drive improvement in its decisions.

2 Secondly, the AER has itself recognised that reviews by the ACT are one indicator it uses to assess its own performance[120] and has stated that:

> *The [LMR] framework appropriately allows parties affected by our decisions to challenge them under merits review processes. However, it is important to note that outcomes under merits review can reflect a range of factors – uncertainty around interpretation of rules (particularly new rules), the operation of the merits review framework and the fact that there legitimately can be room for disagreement on a range of issues (such as rate of return issues) all affect outcomes under merits review. …*
>
> *The regulator can make errors, particularly given the wide range of 'constituent decisions' involved in making a regulatory determination. During 2009 and 2010 a number of businesses successfully challenged some aspects of our determinations. In the past four years, we have seen fewer businesses seek review of our decisions, the grounds of appeal are narrowing, and even on the grounds that are being reviewed we are being more successful. To the extent these are relevant measures of the AER's performance they indicate fewer errors are being made in our decisions. We are happy*

[119] ARC, Better Decisions at [2.11].

[120] Australian Energy Regulator, Submission to the Energy Governance Review Expert Panel, *Review of Governance Arrangements for Australian Energy Markets Issues Paper*, 15 May 2015, 10.

to provide greater detail on the specifics of these recent cases to the Review Panel if this would be useful.[121]

3 Thirdly, as the decisions summarised in Part 3 indicate, the AER and ERA have accepted in a number of matters that it made an error of fact in a material respect, and have reached agreement with the applicants as to the appropriate decision.

(e) Achieving the best decisions possible and minimising the risk of "gaming" or "cherry picking"

The SCER's intention was that the LMR achieve the best decisions possible by ensuring that the review process reaches justifiable overall decisions against the energy objectives.

Achieving the best decisions possible

The object of achieving the best decisions possible is one which is within the province of merits review. As identified in Part 1, the classic task assigned to merits review tribunals is to identify the "correct or preferable" decision.

The LMR regime does not give the ACT carte blanche to identify the "best decision possible". Rather, the ACT's statutory task is limited by the overarching objective to take into account the objects of the NEL and NGL as a whole and, in identifying material error, consider whether there is a materially preferable NEO/NGO decision available.

By contrast, in the context of judicial review, Parliament does not have a similar capacity to direct the exercise of judicial power. To touch on the heart of the matter, a court cannot be directed to affirm a decision that is overall correct if it is nonetheless affected by a category of error capable of sustaining an application for judicial review. In these circumstances, if judicial review was being brought at common law, it falls to the court's exercise of its discretion to withhold relief to save the decision from invalidity. The result is that a merits review regime, being a creature of statute, can be more appropriately designed and calibrated to mitigate the risk of gaming and promoting preferable outcomes according to policy. As noted above, if merits review by the ACT were abolished, judicial review of AER decisions could involve AER decisions being quashed for procedural errors or errors of construction regardless of the impact of that error on reaching a materially preferable NEO/NGO decision.

[121] Australian Energy Regulator, Submission to the Energy Governance Review Expert Panel, *Review of Governance Arrangements for Australian Energy Markets Issues Paper*, 15 May 2015, 10-11.

Minimising the risk of gaming or cherry picking

In the 2012 review it was said that a problem with the LMR regime was the fact that an interested party dissatisfied with a particular aspect of the overall decision (one of the building blocks) could select that aspect for review before ACT and leave other parts alone, effectively "gaming" the review system or "cherry picking". Similar concerns have been expressed in the current SCO Consultation Paper.[122] This criticism is difficult to sustain against the post-2012 legislative framework and ACT's reasoning processes.

First, the 2013 legislative changes require that the ACT cannot set aside or vary or set aside an AER decision unless to do so will likely result in a new decision that is materially preferable in making a contribution to the achievement of the NEO/NGO. The ACT, in dealing with the recent challenges, has described its new task as follows:

> *… the correction of error or errors in a decision under review will not necessarily lead to a materially preferable decision. Whether there is a preferable decision to the decision made by the AER depends upon an assessment of the decision as a whole, and a comparison of that decision with a putative alternative decision; it does not depend simply on an assessment of errors in individual components of the decision under review. ...*
>
> *The 2013 Legislative Amendments reflect a deliberate policy decision to change the NEL and NGL and, in particular, to change the scope of the Tribunal's limited merits review function. They introduce a series of steps which require the Tribunal, even if it is satisfied of one or more grounds of review arising from one particular aspect of the AER's decision, to consider whether and how the potential consequences of that ground being established may be reduced, counterbalanced or rendered immaterial following the processes mandated by ss 71P(2a), 71P(2b)(a) and 71P(2b)(c) of the NEL and ss 259(4a), 259(4b)(a) and 259(4b)(c) of the NGL.*[123]

The ACT's decision in *Applications by Public Interest Advocacy Centre Ltd and Ausgrid*[124] demonstrates the Tribunal's focus upon correcting only those errors that would lead to a materially preferable NEO or NGO decision.[125]

Secondly, parties cannot stray beyond their submissions made to the AER and the materials before the Tribunal are limited to those before the AER.

Thirdly, a user or consumer group can be given (and are given) leave to intervene and they can raise matters not raised by the applicant and raise new grounds of review. The

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[122] Limited Merits Review Project Team, 'Review of the Limited Merits Review Regime' (Consultation Paper, COAG Energy Council, 6 September 2016) 11.

[123] *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [91]-[92].

[124] [2016] ACompT 1.

[125] See, for example, *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [629]-[631], [1165]. At [1165], for example, the ACT held:

> If error of the kind asserted by Ausgrid were made out, it is not at present obvious to the Tribunal that the correction of the asserted errors by remitting these issues to the AER would, or would be likely to, lead to a materially preferable NEO decision. As discussed in the concluding section of these reasons, it appears that to a significant extent, the AER (and on review the Tribunal) is charged with making the best or preferable decision in the long term interests of consumers which may involve a trade off between cost and quality or reliability of the provision of the service. At least on this particular topic, the trade off is not self-evidently in favour of increasing the cost to consumers, for the benefit of the installation of the Type 5 meters or for the benefit of the detailed usage data that can then be provided. That may or may not be the case. It is not necessary to decide it in this context.

result of the 2013 legislative reforms is that any attempt at "cherry picking" or "gaming" would be fruitless and yield no return.

(f) Time Delay and Regulatory Uncertainty

One of the historical concerns with the introduction and operation of the LMR, repeated in the SCO's Consultation Paper, is time delay and regulatory uncertainty. In particular, the Consultation Paper states that: "Legal challenges mean revenue determinations finalised by the AER more than 16 months ago (April 2015) will likely remain uncertain until at least early 2017."[126]

Ironically, as identified in Part 1 of this report, the ability of a merits review tribunal to provide speedier decisions (through more tailored and flexible procedure, as defined by statute) than courts operating in a formal adversarial model is one of the core rationales for merits review. It is true that there is some delay between an AER decision and a reasoned decision on review by the ACT. But such delay is inevitable if the ACT is properly to give consideration to arguments put to it and to accord procedural fairness to the parties before it.

The factual issues for determination by the ACT in the latest round were complex and significant. The ACT used its processes to hear a number of matters together and it delivered a leading set of reasons consisting of 1230 paragraphs. The decision gives considerable guidance to AER in a number of important areas. The period of ten months to conduct such a comprehensive and exhaustive review is not an unreasonable period:

- It can be compared favourably with time taken to dispose of judicial review cases. See for example *Ergon Energy Corporation Ltd v Australian Energy Regulator*[127] and *Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)*,[128] where judicial review took considerably longer than the Tribunal's decision.
- By way of comparison, and without being critical of the body, the Australian Information Commissioner, charged with the responsibility of reviewing decisions made under the *Freedom of Information Act 1982* (Cth), identified as an example of a "fit-for-purpose" body has taken on average over a year to dispose of such cases. These matters also often only involve disputes concerning a few documents.

[126] Limited Merits Review Project Team, 'Review of the Limited Merits Review Regime' (Consultation Paper, COAG Energy Council, 6 September 2016) 4.

[127] [2012] FCA 393.

[128] [2010] ACompT 14.

It is also inevitable that significant cost will be involved in reviews of decisions that involve hundreds of millions or even billions of dollars and that engage often difficult concepts in a complex regulatory context where factual or other errors can have dire consequences for the long term interests of consumers.

Consideration should be given to whether further procedural innovations to the ACT's hearing processes could be introduced to reduce the time lag between AER and ACT decisions. Professor Creyke has noted that tribunals employ a range of informal pre-hearing processes and investigations to identify and confine issues in dispute, including preliminary conferences, conciliation, mediation, case appraisal and neutral evaluation.[129] The ACT should not be criticised for the volume of documents they need to consider – there appears to be widespread misinformation on this topic. The documents are generated at the AER level and not expanded before the ACT. Indeed, the use of written submissions and oral advocacy assists in the process of focussing on the directly relevant material to the grounds of review. Abolishing merits review would not reduce the volume of documents which the AER must consider or which a Court might be asked to consider. Rather, the resolution of that issue lies within the design of the primary regulatory process.

If merits review were simply abolished, it is to be expected that affected industry participants, and consumer groups (if they had standing), would launch judicial review challenges to AER decisions. As set out in Part 1:

- Judicial review of the AER's decisions cannot be validly removed.
- Judicial review will likely also involve substantial time delay, without (1) addressing the merits of the decision directly; (2) providing a mechanism for stakeholder consultation; or (3) the ability to vary or substitute the AER's decision.
- Judicial review proceedings can involve significant cost. Indeed, on one view, successful judicial review will almost always be attended by cost issues because on the remission or the setting aside of a decision, parties will invariably incur further costs in the remaking of the decision. By contrast, the ACT is empowered to vary the decision without remission, or if remitted the ACT directions will assist to identify the issues still open for consideration. Also, the ACT has more discretionary powers to make appropriate cost orders than the Court in dealing with a judicial review application. The costs incurred by the

[129] Robin Creyke, 'Tribunals and Merits Review' in Matthew Groves (ed), *Modern Administrative Law in Australia; Concepts and Context* (Cambridge University Press, 2014) 397; Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006).

network service provider in a review cannot be passed on. This restriction does not apply to judicial review proceedings.

In an ideal context, both the ACT and the Federal Court are each timely fora for making a determination of the decision under review. The Tribunal has a statutory target time of three months between the granting of leave and the rendering of judgment and the Federal Court has a performance goal of three months between the reservation of judgment and the delivery of judgment.

Alternative forms of review or oversight of the AER's determinations could be considered by the SCO. However, as experience from the latest round of AER decisions demonstrates, it would be difficult for some other external body to complete a comprehensive, considered and reasoned review of these complex and significant decisions, which provides procedural fairness to affected stakeholders and in a more limited timeframe than ten months. If an alternative review body was not entirely independent of the AER, the Minister and all interested parties such a body would also suffer from criticism that it did not approach its task with a completely open mind and free from any perceived or subtle biases inherent in its constitution and function. A price to be paid for comprehensive, procedurally fair, rigorous and institutionally and internationally celebrated independent merits review is some limited delay. However, the offsetting benefits are numerous and significant.

(g) Concluding remarks

A considered review of the ACT's decisions demonstrates the Tribunal's cognisance of its distinct and important review function under the purpose built LMR regime. Limited merits review by the ACT serves the purposes identified by the ARC and others as the rationale for merits review:

1 The preferable decision is more likely to be made.

2 The quality and consistency of primary-decision making, in the long term interests of legislative objectives, is more likely to be achieved.

3 Those who have interests will be afforded procedural due process.

4 The Tribunal can mould its procedures to fit the particular review.

5 Community expectations can be accommodated as part of the consultation process.

6 Decisions are independent and impartial thereby enhancing their acceptance.

7 Reasons and directions can assist the primary decision maker on remittal.

In their 2005 joint opinion to the Ministerial Council on Energy review, Stephen Gageler SC (as his Honour then was) and Professor Allars identified a range of reasons why they were "strongly of the view" that merits review should co-exist beside judicial review in the NEL and NGL. These reasons included:

1 Errors of technical and economic reasoning rarely lend themselves to redress by judicial review – "technical and economic issues are generally issues of fact or discretion which are part of the merits. Save when an error of law can be established, the court on judicial review does not interfere with such factual findings or exercises of discretion."

2 Attempting to present economic or technical errors in the form of a judicial review ground "often results in a distorted representation in a judicial review of the real concern about the decision-maker's reasoning".

3 An adversarial court process "has proved particularly expensive and cumbersome in circumstances where the error of law is alleged to have occurred in a technical or economic context." Reasons for this include:

- the prospect that a judge in a judicial review application may lack the requisite technical or economic expertise;
- delays in the court process, including the allocation of a hearing date and delivery of judgment;
- the need to lead new expert evidence in admissible form to prove the regulator fell into legal error; and
- uncertainty as to what is and is not an error of law.

4 By contrast, merits review by the ACT is conducted by a judge with specialist knowledge and experience and tribunal members who can be expected to have some economic or technical expertise, and is well equipped to address allegations of error in technical and economic reasoning. The ACT is not bound to consider those errors within the constraints of errors of law and it is able to adopt flexible procedures without being bound by the rules of evidence or the adversary system.

For the reasons expressed in this report, the Gageler and Allars rationales for merits review to be undertaken by the ACT persist just as strongly today as a decade ago.

HERBERT SMITH FREEHILLS

Appendix 1

Instructions

On 19 August 2016, the COAG Energy Council tasked its Senior Committee of Officials with conducting a review of the LMR regime.

The Terms of Reference for the Current Review require the SCO to:

- assess the effectiveness of LMR under the NEL and the NGL since the 2013 reforms were implemented;
- consider the role of the ACT under the amended legislative regime; and
- explore all feasible options, including the removal of LMR, to achieve the objectives of administrative review generally and the energy sector specifically.

As part of this review, public consultations are now underway.

Herbert Smith Freehills have been engaged by the Energy Networks Association to prepare a report on the nature and role of judicial review and merits review, including in the context of the existing LMR regime under the NEL and NGL.

Herbert Smith Freehills have briefed Professor Margaret Allars SC to provide an opinion on the difference, if any, between judicial review and limited merits review, having regard to:

1 the scope in judicial review for a court to correct factual error, in particular following the High Court's decision in *Minister for Immigration and Citizenship v Li*; and

2 the suitability of judicial review and limited merits review as avenues for of decisions involving highly technical and complex economic reasoning.

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Appendix 2

Judicial review

(a) Source of power to undertake judicial review

Judicial review derives from the inherent supervisory jurisdiction of superior courts of record. It emerged historically from at least the thirteenth century in the common law jurisdiction of courts of record to issue, on behalf of the Crown, the prerogative writs, including habeas corpus, prohibition, mandamus and certiorari.[130]

The High Court of Australia has original judicial review jurisdiction under s 75(v) of the *Constitution* in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Certiorari will issue as an ancillary prerogative remedy to one of these three constitutional writs.[131] The original judicial review jurisdiction conferred by s 75(v) cannot be excluded by statute.[132] The High Court can remit matters to the Federal Court pursuant to s 44 of the *Judiciary Act 1903* (Cth).

The Federal Court has jurisdiction to conduct judicial review by virtue of:

- s 39B(1) of the *Judiciary Act 1903* (Cth), which confers an equivalent original jurisdiction on the Federal Court with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth;
- s 39B(1A), which confers an additional jurisdiction in any matter (1) in which the Commonwealth is seeking an injunction; (2) arising under the *Constitution* or involving its interpretation; or (3) arising under any laws made by the Parliament other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter; and
- the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**). The NEL and the NGL are enactments for the purposes of the ADJR Act.[133]

State Supreme Courts have inherent power to conduct judicial review as a matter of common law. In addition to this inherent power, Victoria, Queensland, Tasmania and the

[130] See the historical overview in Peter Cane, *Administrative Tribunals and Adjudication* (Bloomsbury Publishing, 2009) 24.

[131] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673.

[132] The effect of this is that the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be excluded: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also s 75(iii).

[133] *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 3, s 3 (the definition of 'enactment').

Australian Capital Territory have introduced statutory judicial review which, other than in Victoria, is modelled on the ADJR Act.[134]

In *Kirk v Industrial Court of New South Wales*[135], the High Court held that State parliaments cannot exclude the power of State Supreme Courts to review administrative decisions for jurisdictional error. It is beyond the State parliament's power to alter the constitutional character of the State Supreme Court such that it no longer meets the constitutional description provided for in s 73 of the *Constitution.* The effect of *Kirk* was explained by Chief Justice Spigelman:

> *The effect of Kirk is that there is, by force of s 73, an 'entrenched minimum provision of judicial review' applicable to State decision makers of a similar, probably the same, character as the High Court determined in Plaintiff S157/2002 v Commonwealth ... to exist in the case of Commonwealth decision makers by force of s 75(v) of the Constitution.*[136]

At the very least then, judicial review of administrative decisions for jurisdictional error cannot be ousted from the administrative law landscape at a State or Federal level.[137] In the case of any particular administrative decision either judicial review exists on its own or it coexists with merits review, which is a mechanism that only exists if provided for by legislation.

(b) Grounds of judicial review

In broad terms, the common law grounds of review include:

- lack of procedural fairness;
- real or apprehended bias;
- "ultra vires" – lack of jurisdiction;
- acting under dictation;
- inflexible application of a policy;
- taking into account irrelevant considerations;
- failing to take into account relevant considerations;
- extraneous (improper) purpose;
- error of law on the face of the record;
- no evidence;

[134] Administrative Review Council, Parliament of Australia, *Federal Judicial Review in Australia* (2012) at [3.74].

[135] (2010) 239 CLR 53.

[136] The Honourable Justice James Spigelman, 'The Centrality of Jurisdictional Error' (Speech delivered at the AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010).

[137] See generally, Administrative Review Council, Parliament of Australia, *Federal Judicial Review in Australia* (2012).

- bad faith; and
- unreasonableness.[138]

The ADJR Act provides for eighteen grounds of review. Each of those grounds has "a common law progenitor" and courts routinely refer to the common law grounds of review in expounding the scope of the ADJR Act grounds.[139]

The concept of review for jurisdictional error has emerged as a "governing concept" in the jurisdiction of the High Court conferred by the Constitution s 75(v).[140] The definition of jurisdictional error has been considered by the High Court in cases such as *Craig v South Australia*[141] and *Kirk v Industrial Court of New South Wales*[142], but its precise scope remains elusive. As the High Court cautioned in *Kirk,* there is no "rigid taxonomy of jurisdictional error" and "[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error."[143] Professor Aronson has identified a non-exhaustive list of "generic instances or jurisdictional error"[144] which include:

1 A mistaken assertion or denial of the very existence of jurisdiction.

2 A misapprehension or disregard of the nature or limits of the decision-maker's functions or powers.

3 Acting wholly or partly outside the general area of the decision-maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances.

4 Mistakes as to the existence of a jurisdictional fact or other requirement, when the relevant Act treats that fact or requirement as something which must exist objectively as a condition precedent to the validity of the challenged decision.

[138] These are the common law grounds of review specified in the New South Wales Supreme Court Practice Note SC CL 3, issued 9 July 2007. Differing formulations of the common law grounds arise. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock suggested that the common law grounds can be reduced to three or four broad concepts: "illegality", "irrationality", "procedural impropriety" and, possibly, "proportionality". Aronson, Dyer and Groves note that "the overall ground of judicial review is that the repository of public power has breached the limits placed upon the grant of that power": Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) 93. Cane and McDonald identify three broad grounds: failing to comply with the legislation, acting irrationally or unreasonably, and failing to follow proper procedures: Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2009) 180.

[139] Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (LexisNexis, 4th edition, 2015) 408.

[140] Ibid 409.

[141] (1995) 184 CLR 163.

[142] (2010) 239 CLR 531.

[143] (2010) 239 CLR 531, 573-4.

[144] Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed), *Modern Administrative Law in Australia; Concepts and Context (*Cambridge University Press, 2014) 256.

5 Disregarding relevant considerations or paying regard to irrelevant considerations, if the proper construction of the relevant Act is that such errors should result in invalidity.

6 Some, but not all, errors of law. In particular, if the decision-maker is an inferior court or other legally qualified adjudicative body, the error is likely to be jurisdictional only if it amounts to a misconception of the nature of the function being performed or of the body's powers.

7 Acting in bad faith.

8 Breaching the hearing or bias rules of natural justice.

9 Acting "extremely unreasonably, whether in the exercise of a specific procedural power, or in the exercise of the substantive powers either to determine facts or determine an outcome."[145]

[145] Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed), *Modern Administrative Law in Australia; Concepts and Context (*Cambridge University Press, 2014) 256.

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Appendix 3

Merits review

(a) The emergence of contemporary merits review

Although the SCO's Consultation Paper for the Current Review suggests that "Merits review was introduced in the Australian legal system in 1977",[146] merits review in one form or another has a long history in Australian administrative law. Prior to the Kerr Committee's report, a wide assortment of Commonwealth tribunals tasked with various forms of statutory merits review existed, ranging from the Taxation Board of Review to the Boards of Inquiry and Promotion Appeals Committees to the Repatriation Commission and the War Pensions Entitlement Appeal Tribunal.[147]

Rather, the reforms proposed by the Kerr and Bland committees in the 1970s led to the modern Australian concept of merits review, consisting of a more comprehensive and sophisticated system of merits review. This modern concept has been taken up, to varying degrees, at both Federal and State level.

The Kerr Committee considered that the existing system of judicial review coupled with ad hoc specialist tribunals providing external merits review was inadequate. Constitutional and institutional limitations on judicial review inhibited its capacity to provide a generally available avenue of review of the significant discretions conferred on administrative decision-makers in modern government. The Kerr Committee concluded that review of decisions "on the merits" was required. In the words of the Kerr Committee:

> *The basic fault of the entire structure is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained "on the merits" – and this is really what the aggrieved citizen is seeking.*[148]

Under Australia's constitutional requirement of the separation of powers, federal judicial power cannot be conferred on bodies other than courts established under Chapter III of the *Constitution*, and non-judicial power cannot be conferred on Chapter III courts.[149]

[146] Limited Merits Review Project Team, 'Review of the Limited Merits Review Regime' (Consultation Paper, COAG Energy Council, 6 September 2016) 6.

[147] See generally, Margaret Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41(2) *Federal Law Review* 197, 202-204.

[148] Kerr Committee Report at [44].

[149] The same restrictions do not apply at the state level, in that a merits review jurisdiction can properly be vested in a state Supreme Court in addition to that court's inherent judicial review jurisdiction. For example, in New South Wales, the Land and Environment Court is vested with both judicial review and merits review jurisdictions.

Merits review could not therefore be conferred on a federal court.[150] Again, in the words of the Kerr Committee:

> *courts cannot be entrusted with the unrestricted review of discretions which are not judicial; nor can courts be called upon to review administrative decisions on any basis which requires the ultimate decision to be given by reference to policy or non-legal considerations.*[151]

The Kerr Committee recommended the establishment of a new general jurisdiction tribunal to provide review on the merits. Merits review provided for in the existing specialist tribunals was to be conferred on this general jurisdiction tribunal, unless there was a particular reason justifying that specialist tribunal's continued operation. This new general jurisdiction tribunal was to have "a wide-ranging jurisdiction extending beyond specific areas within the purview, and control of separate Departments."[152]

The Kerr Committee's proposed general jurisdiction tribunal was established in the form of the AAT. In his second reading speech introducing the AAT's enabling legislation, the Attorney-General, the Honourable Kep Enderby QC expressed that:

> *An inevitable development of modern government has been the vesting of extensive discretionary powers in Ministers and officials in matters that affect a wide spectrum of business and personal life. Unfortunately, this development has not been accompanied by a parallel development of comprehensive machinery to provide for an independent review of the way these discretions are exercised … The intention of the present Bill is to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible.*[153]

(b) Rationale for merits review

Over the last four decades, judicial and academic commentary has explored the rationale for merits review by external tribunals in more detail.[154] These rationales are commonly identified as:

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[150] Commonwealth, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) at [233], [282]. The ARC Better Decisions Report concludes at [8.2] that: "The major theme underlying the 1971 report of the [Kerr Committee] was the need to develop a comprehensive, coherent and integrated system of Commonwealth administrative law. The committee concluded that the role of performing external merits review should be conferred on a general administrative review tribunal." For a discussion, see Peter Cane, 'Judicial Review in an Age of Tribunals' (2009) *Public Law* 479, 484-485; Margaret Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41(2) *Federal Law Review* 197.

[151] Commonwealth, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) 24 at [67]. For a more detailed discussion, see Peter Cane, *Administrative Tribunals and Adjudication* (Bloomsbury Publishing, 2009) 59–61.

[152] Murray Gleeson, 'Outcome, Process and the Rule of Law' (Speech delivered at the Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2006). Published in (2006) 65(3) *Australian Journal of Public Administration* 5, 5.

[153] Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1186-7 (Kep Enderby QC, Attorney-General).

[154] See generally, Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (LexisNexis, 4th ed, 2015), Chapter 3; I Thompson and M Paterson 'Public Benefit: The Administrative Appeals Tribunal' in John McMillan (ed), *Administrative Law: Does the Public Benefit?* (AIAL, 1992) 81; D Volker, 'The Effect of Administrative Law Reforms on Primary Level Decision Making' (1989) 58 *Canberra Bulletin of Public Administration* 112, 112; A.N. Hall, 'Administrative Review Before the Administrative Appeals Tribunal: A Fresh Approach to Dispute Resolution? - Part 1' (1981) 12 *Federal Law Review* 71; J Dwyer and G Woodward, 'Dreams of a Fair Administrative Law' in S Argument (ed), *Administrative Law and Public Administration: happily married or living apart under the same roof?* (AIAL, 1994) 197; P Stein, P O'Neil and A Coghlan, 'Can Review Bodies Lead to Better Decision-Making' (1991) 66 *Canberra Bulletin of Public Administration* 118,123, 128.

1 **Ensuring the correct or preferable decision is reached:** the Administrative Review Council noted in its *Better Decisions* report that "the overall objective of the merits review system is to ensure that all administrative decisions of government are correct and preferable."[155]

2 **Improving quality and consistency in primary decision-making generally:** The Administrative Review Council notes that merits review can achieve this in two ways. First, by ensuring that particular review tribunal decisions are, where appropriate, reflected by agencies in other similar decisions (the "normative effect"). This normative effect may also arise from the very existence of a merits review tribunal, as it should ensure that all reviewable decisions are capable of intelligible justification by the agency. Secondly, consistency and improved quality in agency decision-making can be achieved because the agencies should take into account review decisions in the development of future policy and legislation.[156]

3 **Natural justice considerations:** the opportunity to challenge a primary decision in an external body following an adjudicative model should ensure that individuals are afforded procedural fairness.

4 **Meeting community expectations:** merits review contributes to accountability and openness of government through a fair and open process for testing those decisions.[157] The expectation that there will be an opportunity for governmental decisions to be tested on the merits in a thorough and open way by an impartial body may be particularly pressing in relation to decisions that have a substantial impact on individuals or on the community as a whole.

5 **Impartial decision-making:** in contrast to primary decision-makers operating within the relevant agency context, merits review tribunals can afford review by an independent and impartial external body, Justice Iain Ross has observed that "Impartiality is essential for the determination of just, predictable decisions and the acceptance of those decisions by the community".[158] Whether or not the tribunal can be regarded as independent will depend on a range of factors, including the identity of and appointment process for its membership, management structures, and the tribunal's approach to applying government policy.

[155] ARC, Better Decisions. viii

[156] ARC, Better Decisions at [2.11].

[157] ARC, Better Decisions at [2.31].

6 **Procedural advantages**: Providing, in general, a relatively inexpensive, informal and speedy form of review when compared with the formality of adversarial court processes on judicial review.

7 **Interpretation of legislation and soft law:** Clarifying the meaning of legislative provisions and agency guidelines and manuals.

8 **Reasons:** enhancing the quality of reasons for decisions.

9 **Identifying areas for law reform:** merits review tribunals can identify problems that should be addressed in law reform. Courts may be reluctant to perform this function because of separation of powers reasons.

As Chief Justice Gleeson noted upon the 30th anniversary of the AAT:

> *One of the characteristic features of the context in which modern administrative law functions is a change in emphasis from the duties of public officials to the rights of citizens. That change in emphasis means that the case for having the AAT, and for independent merits review of administrative decisions that are properly amenable to such review, is probably stronger now than it was in the early 1970s. That form of climate change powerfully affects the environment in which modern managers of the business of government operate. It is impossible to accept that it could be ignored by effective management. …*
>
> *Within the executive function, provision for independent and expert merits review of decisions of a kind appropriate for such review makes an important contribution to a government's apparatus of justification*.[159]

(c) Operation of external merits review tribunals

A notable and sometimes understated feature of tribunals is also their ability to be constituted by a panel of subject matter experts, rather than a judge sitting alone on judicial review. The Administrative Review Council notes in its *Better Decisions* report that this has the following benefits and can:

- enable the necessary subject matter expertise to be brought to bear by non-legal members (for example, decision-making involving complex technical, medical, economic, environmental, actuarial or scientific matters);
- assist with the resolution of large-scale or complex cases;
- enable a diversity of backgrounds, perspectives and expertise in the decision-making process;
- enable a sharing of responsibility for a decision and the associated work involved, which can lead to speedier decisions;
- aid assessment of the credibility of evidence and factual evaluation;

[159] Murray Gleeson, 'Outcome, Process and the Rule of Law' (Speech delivered at the Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2006). Published in (2006) 65(3) *Australian Journal of Public Administration* 5, 21, 25.

- assist the tribunal to take a more active or inquisitorial role in gathering or assessing evidence; and
- provide a useful forum, with appropriately-skilled members, for the resolution of significant or complex cases.

As creatures of statute, tribunals operate in many different ways, including with regard to:

- the degree of formality of tribunal proceedings, including the physical environment and the level of legal representation permitted;
- the style of proceedings, including the use of techniques such as decisions "on the papers", mediation, non-adversarial proceedings and adversarial hearings featuring cross-examination;
- the constitution of tribunals as either single members or panels, with panels often constituted by senior legal practitioners and / or a range of subject matter experts;
- the process for appointing tribunal members and their terms and conditions of appointment; and
- the costs associated with the proceedings.

A key finding of the Bland Committee Report was that "the code of procedure for the Tribunals should clearly spell out that they are not bound to follow adversary procedures. … [I]n most cases, the investigative or inquisitorial process would be most apposite."[160]

The Bland Committee's objective that an inquisitorial manner be adopted has not, however, been fully realised for a range of reasons, meaning that tribunals operate to varying degrees in a modified form of inquisitorial or less adversarial process.[161]

Tribunals are, however, able to tailor their procedures and practices to fit the type of features of the decision being reviewed. An adjudicative hearing in a tribunal which resembles an adversarial process may be appropriate for complex matters in which multiple stakeholders with legal representation are to make submissions, provided of course that the tribunal complies with any statutory objectives of remaining informal, flexible and able to inform itself on relevant matters.

[160] Commonwealth, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973) 33 at [172(j)].

[161] J Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20 *Federal Law Review* 252; Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006) 49–52; Robin Creyke, '"Inquisitorial" Practice in Australian Tribunals' (2006) 57 *Admin Review* 17, 20-22; Mark Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 231.

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Appendix 4

Limited Merits Review in the NEL and NGL

2008 merits review reforms

On 1 January 2008, amendments to the NEL and NER were made to establish an open access limited merits review regime for electricity distribution networks (*National Electricity (South Australia) (National Electricity Law – Miscellaneous Amendments) Amendment Act* (SA)). The key change resulting from the amendments was that the ACT was tasked with conducting merits review of reviewable regulatory decisions. These amendments were also incorporated into the NGL upon its introduction on 1 July 2008.

The introduction of the 2008 LMR regime followed a lengthy consultation process undertaken by the Ministerial Council on Energy (**MCE**) in 2005-2006.[162]

The 2008 LMR regime was intended to meet the following objectives stated by the MCE:

1 maximising accountability;

2 maximising regulatory certainty;

3 maximising the conditions for the AER to make a correct initial decision;

4 achieving the best decisions possible;

5 ensuring that all stakeholders' interests are taken into account;

6 minimising the risk of "gaming"; and

7 minimising time delays and cost.[163]

The rationale for the 2008 LMR regime as recorded in the second reading speech to the legislative amendments was as follows:

> *New merits review provisions have also been introduced to allow the review of the Australian Energy Regulator's decisions by regulated businesses and users and consumers, providing the appropriate checks and balances on the decision making process. …*
>
> *In short, this Bill will strengthen and improve the quality, timeliness and national character of the economic regulation of the National Electricity Market. In turn, this*

[162] Yarrow Report, 10.

[163] Council of Australian Governments Standing Council on Energy and Resources, Parliament of Australia, *Regulation Impact Statement: Limited Merits Review of Decision-Making in the Electricity and Gas Regulatory Frameworks* (2012) iii.

> *should lower the cost and complexity of regulation facing investors, enhance regulatory certainty and lower barriers to competition.*[164]

Given concerns over time delays, costs, regulatory uncertainty and the "risk of gaming", the merits review regime was an attenuated form of merits review as described in Part 1. That is, the ACT was not tasked with undertaking a de novo review to identify the correct or preferable decision. The regime had the following key features:

1 the ACT was conferred with the functions and powers of the original decision maker;

2 the applicant was required to seek leave from the ACT to bring a review;

3 the applicant was required to establish one or more of four grounds of review (error of fact, more than 1 error of fact, incorrect exercise of discretion, unreasonable decision);

4 a party other than the AER could not raise any matter that had not been raised in submissions to the AER before the reviewable regulatory decision was made;

5 the AER could raise a matter not raised by the applicant or an intervener that related to a ground for review, or a matter raised by an applicant or intervener in support of a ground of review, and could raise a possible outcome or effect that could occur as a consequence of the ACT varying or setting aside the determination;

6 a regulated network service provider or Minister of a participating jurisdiction could intervene in a review without leave of the ACT, and the ACT could grant leave to intervene to a user, consumer or a person or body who was a "reviewable regulatory process participant"; and

7 the ACT could not consider any matter other than "review related matter" (as defined in s 71R of the NEL and s 261 of the NGL).

2012 review of the previous review regime

(a) The Yarrow Report

At the time of its introduction, the 2008 LMR was scheduled for review after five years of operation. That review timetable was brought forward and the LMR was subject to detailed review in 2012, the end product of which was a report by Professor George Yarrow, the Hon Michael Egan, and Dr John Tamblyn.

[164] South Australia, *Parliamentary Debates*, Legislative Council, 16 October 2007, 883 (P Holloway, Minister for Police, Minister for Mineral Resources Development, Minister for Urban Development and Planning). (Second reading speech to the *National Electricity (South Australia) (National Electricity Law - Miscellaneous Amendments) Amendment Bill 2007* (SA)).

The Yarrow Report observed that the LMR regime was intended to:

> *facilitate the correction of a range of regulatory errors with significant adverse consequences, encourage the making of the best administrative decisions in all circumstances and encourage investment in gas and electricity and across those sectors by promoting confidence in the regulatory process.*[165]

The Yarrow Report observed that the LMR regime as introduced had fallen short of the initial policy expectations in some important and key respects, and it identified a number of weaknesses and deficiencies associated with the regime.[166] The Yarrow Report made various recommendations, not all of which were implemented by the 2013 amendments:

- That it be made clear by a policy statement that the aim of the merits review regime is to achieve preferable outcomes from the network regulation framework by ensuring that relevant decisions promote efficiency in investment, operation and use of networks, and are consistent with the revenue and pricing principles of the NEL and NGL, in ways that best serve the long term interests of consumers.
- Appeals should only be allowed/upheld if, on the basis of relevant evidence and substantiated reasoning, the review body is convinced that there exists a materially preferable decision. In cases involving adjustments, or potential adjustments, to an overall revenue/price determination, this necessarily implies that the review body is able to, and should, assess the merits of that overall revenue/price decision, examining any aspect of the decision that it considers would throw light on its merits.
- There should only be a single ground for appeal, which is that there are reasons for believing a relevant decision may be defective in that a materially preferable decision may exist, and hence that the primary regulator's decision does not promote efficiency for (alternatively, in ways that best serve) the long term interests of consumers (and, in that sense, is "wrong on the merits").
- The review body should adopt an investigative approach to reviews of the relevant decisions, and should be subject to specific duties, such as:
  - to decide whether a ground for review has been established, and, if so, to open a review;
  - to adopt the "record" of the primary decision maker as the starting point for its own review (and hence not undertake a de novo review);

[165] Yarrow Report, 10.

[166] Yarrow Report, 13.

- to supplement the record with evidence from its own investigations where considered appropriate;
- to invite all interested parties to give views;
- to assess whether a materially preferable decision is available; and
- if such a decision is available, to substitute a preferable decision, or to remit matters to the primary regulator for further consideration.

The Yarrow Report also recommended that the appeal functions of the ACT should be transferred to a new review body that is fully administrative in character, the Australian Energy Appeals Authority (**AEAA**). In making this recommendation, the Yarrow Report took the view that the ACT, with its court-like, quasi-judicial processes was not well-adapted to meet the policy objectives of the LMR regime under the NEL and NGL. On this point, the Yarrow Report noted the view of Ray Finkelstein QC who, commenting on the proposal for a wider form of merits review than LMR, said:

> *The Expert Panel at various points has raised issues about the appropriateness of the ACT, given its resources and personnel, to undertake comprehensive reviews of pricing decisions. In my view there are serious doubts about whether the [Tribunal] is the appropriate body to hear such pricing reviews. Hearings are presided over by a judge. A judge is neither by training nor background suited to making either the economic or policy decisions that would be involved. Judges resolve disputes by explaining legal principles and applying those principles to the facts. It may be preferable to use an internal review system or specialist external body, with an ability to refer questions of law to the Federal Court for determination.*[167]

These comments were directed at de novo merits review.

We discuss below in greater detail the current features of the LMR, noting where relevant the effect of the 2013 amendments which either did or did not give effect to the Yarrow Report recommendations.

Features of the current LMR regime

(a) Application for review

Under each of the NEL and NGL, an interested person may apply for a review of a reviewable regulatory decision with the Tribunal: s 71B NEL, s 245 NGL.

The application for review must be brought within 15 business days of the primary decision having been published: s 71D NEL, s 247 NGL.

The ACT does not have jurisdiction to review the decision the subject of the application unless it grants leave for the application to be brought. The ACT's discretion as to

[167] Yarrow Report, 50.

whether or not to grant leave for the application to be heard is conditioned on the following:

- there must be a serious issue to be heard: s 71E(a) NEL, s 248(a) NGL;
- there must be a prima facie case that a decision in the applicant's favour would, or would be likely to, result in a materially preferable decision: s 71E(b) NEL, s 248(b) NGL;
- the amount in issue must exceed the lesser of $5,000,000 or 2% of the average annual regulated revenue of the regulated network service provider: s 71F NEL, s 249 NGL;
- if the applicant did not make a submission following an invitation by the primary decision-maker to do so or made that submission late and, as a result, the primary decision maker did not consider its submission – leave must be refused: s 71G NEL, s 250 NGL; and
- if the applicant is a service provider, and it failed to comply with a request by the primary decision-maker for the purposes of making the decision, or conducted itself in a manner that resulted in the making primary decision being delayed, or misled, or attempted to mislead the primary decision maker on a matter relevant to its decision – leave must be refused: s 71H NEL, s 251 NGL.

Of these factors, the 2013 amendments introduced the condition that there must be a prima facie case that a decision in the applicant's favour would, or would be likely to, result in a materially preferable NEO/NGO decision. This was to give effect to the Yarrow Report's recommendation that "appeals should only be allowed/upheld if, on the basis of relevant evidence and substantiated reasoning, the review body is convinced that there exists a materially preferable decision". The requirement that the ACT's decision be "materially preferable" also gives effect to the policy that mere error is insufficient to enliven merits review. As will be seen below, this is also reflected in the manner in which the legislation directs the ACT to make its final decision if leave has been granted.

An application for review does not stay operation of a network revenue or pricing determination: s 71I NEL, s 252 NGL.

(b) Parties to a review

The parties to review include the applicant, the AER and any intervener: s 71N NEL, s 257 NGL. Third parties may therefore intervene in review proceedings. The following categories of persons have intervention rights:

- a service provider to whom the reviewable regulatory decision being reviewed applies, without leave: s 71J(a) NEL, s 253(a) NGL;
- the relevant Minister, without leave: s 71J(b) NEL, s 253(b) NGL;
- a person who made a submission or comment in relation to the making of the primary decision: s 71K NEL, s 254 NGL; and
- various consumer interest bodies: s 71L NEL, s 255 NGL.

(c) Grounds for review

The application for review is limited to four grounds:

1 the primary decision maker made a material error of fact: s 71C(1)(a) NEL, s 246(1)(a) NGL;

2 the primary decision maker made errors of fact which, together, were material: s 71C(1)(b) NEL, s 246(1)(b) NGL;

3 the exercise of the primary decision maker's discretion was incorrect: s 71C(1)(c) NEL, s 246(1)(c) NGL; and

4 the primary decision maker's decision was unreasonable: s 71C(1)(d) NEL, s 246(1)(d) NGL.

In addition to any of the four grounds to review, the applicant must also specify the manner in which the ACT's decision would be materially preferable to the decision under review: s 71C(1a) NEL, s 246(1a) NGL. This requirement was introduced by the 2013 amendments, again to satisfy the recommendation that "appeals should only be allowed/upheld if, on the basis of relevant evidence and substantiated reasoning, the review body is convinced that there exists a materially preferable decision".

On the other hand, it is clear that the Yarrow Report's recommendation that "there should only be a single ground for appeal, which is that there are reasons for believing a relevant decision may be defective in that a materially preferable decision may exist" was not implemented. The current LMR regime still requires the identification of one or more of the four classes of errors, and errors that do not fall within the four classes, no matter how material, will not enliven the ACT's jurisdiction to review the impugned decision.

An intervener may also raise any of the grounds of review in section 71C of the NEL or section 246 of the NGL (as the case may be): s 71M NEL, s 256 NGL. If the intervener does raise a ground of review that the applicant did not raise, the intervener must also specify the manner in which the Tribunal's decision would be materially preferable to the decision under review: s 71M(1a) NEL, s 256(1a) NGL. *Application by South Australian*

Council of Social Service Incorporated [2016] ACompT8 is an example of an application for leave for review being rejected on this basis.

The applicant has the onus to establish its ground of review: s 71C(2) NEL, s 246(2) NGL. The intervener has the onus to establish its ground of review: s 71M(2) NEL, s 256(2) NGL.

(d) Issues that may be raised before the ACT

An applicant or intervener is limited to the grounds on which it made a submission to the primary decision maker before the decision under review was made, meaning that it cannot introduce new issues than that which the primary decision maker had notice when making the primary decision: s 71O NEL, s 258 NGL. When the LMR was first introduced into the NEL and NGL, this feature was explained to have the policy purpose that:

> *Consistent with the current gas regime and the desire to make the original decision making process meaningful, arguments to make out a ground of review must be based upon submissions made previously to the Australian Energy Regulator.*

The limitation on issues therefore serves the purpose of incentivising the most detailed submissions to be made to the original decision maker as well as constraining the volume of new materials that might be raised on review.

There is a carve out to the limitation of the issues that may be raised before the ACT which allows the applicant or any intervener to raise any matter relevant to whether or not the ACT's decision will be a materially preferable decision, the relationship between the constituent components of the impugned decision, the revenue and pricing principles and the manner in which the impugned decision achieves the NEO or NGO as a whole: s 71O(2)(d) NEL, s 258A(3)(d) NGL.

(e) Materials that the ACT may and may not consider

Significantly, the ACT is limited in the materials which it may consider in reviewing the impugned decision.

In exercising its review jurisdiction, the ACT is limited to considering only "review related matters", which is defined exclusively to be:

- the application for review;
- a notice raising new grounds for review filed by an intervener; and
- the submissions made to the ACT by the parties to the review.

Subject to what is noted below, other than submissions generated by the parties appearing before ACT, no additional material is created for the ACT to consider.

Under the NEL, where the decision is a reviewable regulatory decision within the meaning of section 28ZJ, and under the NGL where the decision relates to an access arrangement decision (sections 116, 132, and 168), then review related matter also includes:

- the decision under review and reasons for it;
- any document, proposal or information required or allowed to be submitted as part of the process for making the decision;
- written submissions made to the AER prior to the decision being made;
- reports and materials relied on by the AER;
- draft of the decision that has been released for public consultation;
- any submission made on the draft decision;
- the transcript of any hearing conducted by the AER; and
- any other matter properly before the ACT in connection with the relevant proceedings.

Additional evidence may also be adduced in the following situations:

- if a ground of review has already been made out, then the ACT may allow such information that was publicly available or known to be available to the AER when it was making the original decision (as long as it was information that the AER would reasonably be expected to have considered when making the original decision);
- if a ground of review has already been made out, then the ACT may allow information that would assist the ACT on any aspect of the determination it has to make, but only if that evidence was not unreasonably withheld from the AER when it was making the original decision (as long as it was information that the AER would reasonably be expected to have considered when making the original decision);
- if a ground of review has already been made out, then the ACT may allow information that would assist it to determine whether it would come to a materially preferable decision.

Section 71R was substantially amended by the 2013 amendments. Under these amendments, the ACT must consult with network service users, prospective network service users, any relevant user or consumer association, and consumer interest groups that may have an interest in the determination: s 71R(1)(b). This gives effect to the

Yarrow Report's recommendation that the ACT "invite all interested parties to give views" on the decision under review.

The inclusion of sections 71R(3)(a) and 71R(5a) gives effect to the Yarrow Report's recommendation that the ACT should have the power "to supplement the record with evidence from its own investigations where considered appropriate".

(f) Powers of the ACT

The ACT has a duty to make a determination if it gives leave for the application to be brought: s 71P(1) NEL, s 259(1) NGL.

The ACT is given the power to:

- affirm the decision s 71P(2)(a) NEL, s 259(2)(a) NGL;
- vary the decision: s 71P(2)(b) NEL, s 259(2)(b) NGL; or
- set aside the decision and remit the matter: s 71P(2)(c) NEL, s 259(2)(c) NGL.

Importantly, the ACT's power to vary or set aside the decision is conditioned on the satisfaction of the Tribunal that the decision will be materially preferable: s 71P(2a)(c) NEL, s 259(4a)(c) NGL.

If the decision is particularly complex, then the ACT is obliged to remit the matter: s 71P(2a)(d) NEL, s 259(4a)(d) NGL.

Further, mere error is not sufficient to enliven the ACT's power to vary or set aside the decision under review. The ACT must consider the decision under review as a whole, it must consider how the constituent components of the reviewable regulatory decision interrelate with each other and take into account the relevant revenue and pricing principles: s 71P(2b) NEL, s 259(4b) NGL.

Indeed the NEL and NGL expressly provide that establishing a ground of review itself is not sufficient to vary or set aside the decision under review: s 71P(2b)(d)(i) NEL, s 259(4b)(d)(i) NGL.

This part of the LMR was particularly affected by the 2013 amendments. The amendments did the following:

- removed the ACT's power to set aside per se and required the ACT to set aside and remit;
- introduced the requirement that the ACT must be satisfied that its decision will result in a materially preferable NEO/NGO decision; and
- introduced the requirement that the decision under review must be considered as a whole.

The 2013 amendments therefore give effect to the policy and the Yarrow Report's recommendation that identified error should not invalidate the decision under review if there are other errors or areas for the application of discretion not subject to review that overall balance out such that the decision under review is in substance correct.

These amendments were made to address the mischief of "cherry picking" by an applicant who seeks to impugn a decision on the basis of one error or a limited number of errors despite the decision being overall one that achieves the NEO or NGO. The ACT is bound to follow the prescriptive requirements laid out in the statutory provisions identified immediately above and, as will be seen, it has done so.

Appendix 5
Summary Table : ACT decisions under the LMR regime

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
1	**ElectraNet**[2] (2008)	Easement transaction costs (RAB)	ElectraNet *(applicant)*	That the RAB should be adjusted to include easement transaction costs.	s 71C(1)(a), (b), (c), (d) (NEL)	$52.8m (This is the figure the applicants seek in respect of easement transaction costs: [3]).	Varied	The AER placed too much emphasis on certain evidence, ignored evidence to the contrary, misinterpreted evidence, and was guided incorrectly by principles that the AER misinterpreted as being legally binding. This lead the AER into error in concluding that the easement transaction costs were already included in the RAB: [137], [140]-[144], [157].
			Energy Consumers Coalition of South Australia (**ECCSA**) *(intervener)*	That the RAB not be adjusted to include easement transaction costs.	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue.* (Tribunal notes ECCSA contended the AER"s decision was unreasonable and involved incorrect exercise of	$52.8m	Rejected	*See above*

[1] It is often unclear from the Tribunal decision as to which grounds were sought, and which were determinative.

[2] *Re: Application by ElectraNet Pty Ltd (No 3)* [2008] ACompT 3 (application for review of AER decision made pursuant to s 71C of the NEL in relation to the determination of the regulatory asset base of ElectraNet). See also *Re: Application by ElectraNet Pty Ltd* [2008] ACompT 1 (decision granting leave to ElectraNet) and *Re: Application by ElectraNet Pty Ltd (No 2)* [2008] ACompT 2 (decision granting ECCSA leave to intervene).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
					discretion: [16])			
		Easement compensation costs (RAB)	ECCSA *(intervener)*	That easement compensation costs should not be included in RAB.	*See above*	$29.1m (figure AER accepted as applicant's easement transaction costs which the interveners contest: [4]).	Rejected	The AER's decision on compensation costs was not incorrect or unreasonable because the approach it adopted – the acceptance of the $29.1m as a proxy for the indexed historic costs of easement compensation – was consistent with the national electricity objective: [248].
2	**Energy Users' Association of Australia**[3] (2009)	Application for leave to apply in relation to the AER's transmission determinations for Transend and TransGrid	Energy Users' Association (*applicant)*	Not specified	Not specified	N/A (however the value threshold was not met under s 71F).	Leave refused	The Tribunal rejected the application on the basis that the value threshold requirements in s 71F had not been met.
3	**EnergyAustralia**[4] (2009)	Public Lighting[5]	EnergyAustralia (*applicant)*	That the exercise of discretion in determining the control mechanism for alternative services was incorrect and unreasonable: [65].	s 71C(1)(c)-(d) (NEL)	N/A	Remitted	The AER incorrectly exercised its discretion in failing to 'consider relevant matters' which were 'material to the determination': [30]. The AER's decision was unreasonable as it failed to specify a 'sufficiently clear or specific control mechanism for the determination of the charge for the residual capital value of the asset being replaced early': [81].

[3] *Application by Energy Users' Association of Australia* [2009] ACompT 3 (application for review of a transmission determination made by the AER in relation to Transend and TransGrid).

[4] *Application by EnergyAustralia and Others* (No 2) [2009] ACompT 9 (determinations), *Application by EnergyAustralia and Others* [2009] ACompT 8 (reasons).

[5] *Application by EnergyAustralia* [2009] ACompT 7 (this decision deals with public lighting, in respect of the above determination).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		Southern Sydney Regional Organisation of Councils (**SSROC**) *(intervener)*	Did not agree with certain concessions made by the AER, and sought to agitate matters otherwise 'agreed' between the AER and EnergyAustralia.	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	Other	The Tribunal agreed with SSROC that it was not unreasonable for the AER to determine maintenance charges on the basis of two bulk replacement programs. However, as the matter is to be remitted, further consideration can be given to the issue by the AER if necessary: [44]-[45]. The matter was remitted to the AER with direction to consider the SSROC's submissions due to "the need to afford a proper opportunity for the making of submissions on the issues by SSROC": [38].
	Time period used to estimate certain variables of the return on debt and equity (**Averaging Period**)	EnergyAustralia (*applicant)*	That the withholding of agreement by the AER as to the applicant's proposed averaging period was unreasonable and incorrect.	s 71C(1) *(specific grounds not identified)*	N/A	Varied	In the circumstances, the AER exercised its discretion incorrectly, or its decision was unreasonable: [103]. The Tribunal found that the yield curve provided by the AER was not a sufficient basis to lead it to the conclusion…that using the proposed averaging periods would lead to systematic ex ante overcompensation of firms relative to their efficient cost of capital: [99].
	Determination of benchmark rate for the cost of debt (**Debt risk premium**)	EnergyAustralia (*applicant)*	That the AER's determination of the debt risk premium by sole reference to Bloomberg fair value yields was in error - the AER should have used an average of the Bloomberg and CBASpectrum based estimates.	s 71C(1) *(specific grounds not identified)*	N/A	Rejected	'The Tribunal considers that…the AER carefully considered the arguments that had been put to it. It remained persuaded that the Bloomberg series provided more accurate estimates. Once that conclusion had been reached, it would have been an error to average the two series. [Therefore] the Tribunal is not persuaded that the Applicants have established any reviewable error': [121].
	Opex – step changes	EnergyAustralia (*applicant)*	That the AER made a number of errors in rejecting the applicant's step changes and that those step changes should be accepted.	s 71C(1) (NEL) *(specific grounds not identified)*	$151.3m (amount of step change opex disallowed: [126]).	Rejected	The AER sought quantification of the step changes from the application, and the applicant was provided with an opportunity to provide quantification to the AER but failed to do. As a result 'the AER was simply unable to determine a substitute amount on the basis of a current regulatory proposal': [197].

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
								The Tribunal rejected the applicant's contention that it would be 'unreasonable and illogical to approve the capex in relation to a project but to reject forecast opex in relation to it' as different clauses in the regime have different requirements – they are separately assessed and a deficiency in a DNSPs opex forecast is irrelevant to the approved capex: [198]. The Tribunal affirmed the decision to reject each of the step changes (other than Finance and Commercial Business Systems, which was conceded by the AER in submissions: [131]): [199].
		Opex – maintenance	EnergyAustralia (*applicant)*	That the AER wrongly rejected the applicant's maintenance opex costs on the basis of wrongly rejecting the applicant's assumptions, making adjustments that were inconsistent with the Rules, and in denying the applicant reasonable opportunity to make submissions in respect of a report relied upon by the AER: [246].	s 71C(1) (NEL) *(specific grounds not identified)*	$22.4m (being the amount the AER reduced EA's forecast maintenance costs: [254]).	Rejected	The Tribunal did not accept the applicant's contention that the AER is not permitted to depart from the applicant's regulatory proposal but only to amend it: [249]. They decided that '[o]nce the basis of [the applicant's] approach to the assessment of maintenance costs is rejected…then the approach undertaken by the AER is an appropriate way to proceed': [252]. They considered that the AER has powers to substitute an amount or value or methodology in order to properly perform its function: [251].
		Determination of pass through events (allows amounts to be passed through to users if event occurs)	EnergyAustralia (*applicant)*	Certain pass-through events should not have been rejected.	s 71C(1) (NEL) *(specific grounds not identified)*	N/A	Varied	AER also agreed that the decision was affected by error. The Tribunal noted it could not make orders by consent, however noted the concessions of the AER, and accepted the applicant's submission that there has been reviewable error in respect of the pass through decision: [260].
4	**Integral Energy**[6] (2009)	Averaging Period	Integral *(applicant)*	*See above (as per averaging period for EnergyAustralia)*	s 71C(1) *(specific grounds not identified)*	N/A	Varied	*See above (as per averaging period for EnergyAustralia)*

[6] *Application by EnergyAustralia and Others* (No 2) [2009] ACompT 9 (determinations), *Application by EnergyAustralia and Others* [2009] ACompT 8 (reasons).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
5	**Country Energy**[7] (2009)	Averaging Period	Country Energy *(applicant)*	*See above (as per averaging period for EnergyAustralia)*	s 71C(1) *(specific grounds not identified)*	N/A	Varied	*See above (as per averaging period for EnergyAustralia)*
		Debt risk premium	Country Energy *(applicant)*	*See above (as per debt risk premium for EnergyAustralia)*	s 71C(1) *(specific grounds not identified)*	N/A	Rejected	*See above (as per debt risk premium for EnergyAustralia)*
6	**TransGrid**[8] (2009)	Averaging period	TransGrid *(applicant)*	*See above (as per averaging period for EnergyAustralia)*	s 71C(1) *(specific grounds not identified)*	N/A	Varied	*See above (as per averaging period for EnergyAustralia)*
		Debt risk premium	TransGrid *(applicant)*	*See above (as per debt risk premium for EnergyAustralia)*	s 71C(1) *(specific grounds not identified)*	N/A	Rejected	*See above (as per debt risk premium for EnergyAustralia)*
		Defect maintenance opex provision	TransGrid *(applicant)*	That its forecast opex not be reduced by $13.5m.	s 71C(1) *(specific grounds not identified)*	$13.5m (the AER's reduction of TransGrid's forecast opex: [263]).	Remitted	The AER exercised its discretion incorrectly, or its decision was unreasonable in all the circumstances': [305]. The actions of the AER giving rise to this finding were its decisions to : (a) 'exclude defect maintenance in respect of new growth assets, (b) proceed on a basis that TransGrid would incur zero defect expenditure in respect of new growth assets, and (c) assume that the existing pool of ageing assets, that is, assets other than the new growth assets, would have the same level of defects as in the base period': [301].
7	**Transend**[9] (2009)	Averaging period	Transend (*applicant*)	*See above (as per averaging period for EnergyAustralia)*	s 71C(1) *(specific grounds not identified)*]	N/A	Varied	*See above (as per averaging period for EnergyAustralia)*

[7] *Application by EnergyAustralia and Others* (No 2) [2009] ACompT 9 (determinations), *Application by EnergyAustralia and Others* [2009] ACompT 8 (reasons).

[8] *Application by EnergyAustralia and Others* (No 2) [2009] ACompT 9 (determinations), *Application by EnergyAustralia and Others* [2009] ACompT 8 (reasons).

[9] *Application by EnergyAustralia and Others* (No 2) [2009] ACompT 9 (determinations), *Application by EnergyAustralia and Others* [2009] ACompT 8 (reasons).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		Debt risk premium	Transend (*applicant*)	*See above (as per debt risk premium for EnergyAustralia)*	s 71C(1) *(specific grounds not identified)*	N/A	Rejected	*See above (as per debt risk premium for EnergyAustralia)*
		Inflation methodology	Transend (*applicant*)	That the market conditions at the time it submitted its revised revenue proposal meant that the AER's methodology would lead to perverse results when combined with the prevailing risk free rate. Transend stated that this ground only arises if it does not establish the averaging period ground of review: [124].	s 71C(1) *(specific grounds not identified)*	N/A	Not determined	The Tribunal accepted that the inflation forecast determined by the AER does not arise for review, as the averaging period ground of review has been made out: [124]-[125].
		Various (Tribunal notes intervention in relation to Transend's application however issues are not stated)	Nyrstar *(intervener)*	N/A	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	N/A	Tribunal notes that Nyrstar Australia Pty Ltd was granted leave to intervene in relation to Transend's application, however the issues it intervened on are not clear: [2].
8	**ActewAGL Distribution**[10] (2010)	Debt risk premium	ActewAGL *(applicant)*	That the AER erred in using the CBASpectrum measure to measure the debt risk premium – an average of Bloomberg and CBASpectrum should have been used.	s 246(1)(d) (NGL) (The Tribunal notes that while the challenge to the AER's decision relied on all grounds, it is 'best considered' under unreasonablenes	N/A	Varied	It was unreasonable for the AER not to include certain types of bonds in its consideration: [47], [55], [63]. These bonds were: (1) bonds with less than 3 sources of data; (2) floating rate bonds; (3) bonds with a different credit rating: [44].

[10] *Application by ActewAGL Distribution* [2010] ACompT 4 (application for review of AER ActewAGL access arrangement decision made pursuant to r 64 NGR).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
					s: [37]).			
9	**ETSA Utilities**[11] (2010)	Valuation of easements (RAB)	ETSA (*applicant*)	That the opening RAB be adjusted to account for ETSA's calculation of easement value: [20].	s 71C(1)(a)-(d) (NEL)	N/A	Varied	AER acknowledged it was open to the Tribunal conclude it had incorrectly exercised its discretion in deciding not to consider the valuation of the relevant easements submitted by ETSA in detail: [23]. The Tribunal found that the AER's decision not to consider the valuation was an incorrect exercise of discretion because(1) 'the origin of the $6m figure showed it to be only a partial value of the relevant easement': [32]; and (2) ESCOSA's analysis was based upon a valuation methodology which it is claiming it no longer employs [32].
		Customer contributions	ETSA (*applicant*)	N/A	N/A	N/A	Withdrawn	N/A
		Gamma[12]	ETSA (*applicant*)	That the AER was in error in the methodology it adopted in determining the gamma constituent decision with respect to the distribution ratio, the value of theta and therefore the overall value of gamma.	s 71C(1)(a), (b) (NEL)	N/A	Varied	Distribution ratio: AER accepted the distribution ratio of 0.7 derived from Hathaway and Officer was a long-term distribution ratio. The AER acknowledged there was evidence submitted to the AER that identified the error and that the evidence was persuasive evidence justifying departure from the value of gamma, insofar as it relates to the distribution ratio, that was adopted by SORI: [37]. AER accepted open to Tribunal to adopt substitute of 0.7. Theta: Tribunal has not decided a substitute value but considered the AER erred in its conclusion that there was not persuasive evidence to justify a departure from the value of theta. The value needs to be re-examined with the benefit of further submission from the parties.

[11] *Application by ETSA Utilities* [2010] ACompT 5 (application for review of AER distribution determination in relation to ETSA Utilities).

[12] *Application by Energex Limited (Distribution Ratio (Gamma)) (No 3)* [2010] ACompT 9 (decision regarding distribution ratio and theta components of gamma); *Application by Energex Limited (Gamma)* (No 5) [2011] ACompT 9 (decision regarding gamma). See also *Application by Energex Limited (No 2)* [2010] ACompT 7 (decision which outlined background and found errors in distribution ratio and theta components); *Application by Energex Limited (No 4)* [2011] ACompT 4 (decision regarding meaning and effect of several provisions in the merits review regime).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
								The simple averaging adjustments made by the AER had no logic. The only value for which the AER could find confidence was the SFG report value of 0.35. Gamma overall: Taking the values of the distribution ratio and of theta that the Tribunal has concluded should be used, viz 0.7 and 0.35, respectively, the Tribunal determines that the value of gamma is 0.25.
			EnergyAustralia[13] (*intervener)*	AER erred in determining gamma value of 0.65. That EnergyAustralia had a sufficient interest and the manner in which the AER classifies public lighting services in EnergyAustralia's future distribution determination will be affected by this decision.	EnergyAustralia was a reviewable regulatory decision process participant and had a 'sufficient interest' under s 71K(2)(a). *Specific grounds were not discussed. s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	$136m: [13]	Application to intervene refused	EnergyAustralia did not establish that it had a 'sufficient interest' in the decisions being reviewed and therefore was not a reviewable regulatory decision process participant: [37]. Tribunal did not accept that the decisions already made by the AER (or the Tribunal's decisions) will directly bear on the interests of EnergyAustralia: [34].
10	**Ergon Energy**[14] (2010)	Gamma[15]	Ergon (*applicant*)	*See above (as per Gamma for ETSA Utilities)*	s 71C(1)(a), (b) (NEL)	N/A	Varied	*See above (as per Gamma for ETSA Utilities)*

[13] *In the matter of Energex Limited* [2010] ACompT 3 (application by EnergyAustralia to intervene).

[14] *Application by Ergon Energy Corporation Limited* [2010] ACompT 6 (application for review of AER distribution determination in relation to Ergon Energy).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		EnergyAustralia [16] (*intervener)*	*See above (as per EnergyAustralia's intervention with respect to Gamma for ETSA Utilities)*	*See above (as per EnergyAustralia's intervention with respect to Gamma for ETSA Utilities)*	$136m: [13]	Application to intervene refused	*See above (as per EnergyAustralia's intervention with respect to Gamma for ETSA Utilities)*
	Customer service costs[17]	Ergon (*applicant*)	That the AER made errors of fact in giving consideration to certain documents in light of Ergon's admittedly flawed allocation of expenditure between control services and therefore misinterpreted the material provided to it, and made an incorrect exercise in discretion and was unreasonable in refusing to accept Ergon's forecast: [44]-[45]. That AER's discretion was unreasonable in refusing to accept Ergon Energy's forecasts: [46].	71C(1)(a)-(d) (NEL) (the Tribunal considered that the essential issue related to error of fact): [46]	N/A	Rejected	The Tribunal concluded that the AER was correct that it could have consideration to the documents provided to it regardless of the murky nature of the relationship between the documents: [48].
	Labour costs escalators[18]	Ergon (*applicant*)	Ergon's approach to consideration of labour cost escalators, should be adopted. The approach focussed on three periods (divergent approaches proposed by Ergon AER in respect of each): (1) pre-	s 71C(1)(a), (b), (c) (NEL)	N/A	Varied in relation to period (1) and (2), and affirmed in	The Tribunal considered that the CPI figure which Ergon contended for the pre-regulatory period (2.3%) was appropriate. The AER made an error of fact, and the AER's exercise of discretion was incorrect: [39]. The Tribunal was satisfied that, in respect of the first

[15] *Application by Energex Limited (Distribution Ratio (Gamma)) (No 3)* [2010] ACompT 9 (decision regarding distribution ratio and theta components of gamma); *Application by Energex Limited (Gamma)* (No 5) [2011] ACompT 9 (decision regarding gamma). See also *Application by Energex Limited (No 2)* [2010] ACompT 7 (decision which outlined background and found errors in distribution ratio and theta components); *Application by Energex Limited (No 4)* [2011] ACompT 4 (decision regarding meaning and effect of several provisions in the merits review regime).

[16] *In the matter of Energex Limited* [2010] ACompT 3 (application by EnergyAustralia to intervene).

[17] *Application by Ergon Energy Corporation Limited (Customer Service Costs) (No 2)* [2010] ACompT 10 (these reasons relate to the same AER distribution determination above, but deal with customer service costs only).

[18] *Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 3)* [2010] ACompT 11 (this decision deals with labour costs escalators, in respect of the same AER distribution determination above). See also *Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 9)* [2011] ACompT 3 (these are further reasons for decisions in respect of labour cost escalators, following the receipt of joint submissions by the parties in relation to the Tribunal's prior decisions regarding labour cost escalators).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			regulatory control period (2009-2010); (2) first year of the regulatory control period (2010-2011); (3) remaining four years of regulatory period.			relation to (3): [41], [62].	regulatory period, the AER 'not investigating the circumstances in which the UCA had been negotiated but rather relying on its consultant's figure to arrive at the real escalator' amounted to an error of material fact, and an incorrect exercise of the discretion: [81] The Tribunal accepted the nominal figure of 4.5% derived from Ergon's UCA should be accepted and a CPI figure of 2.13% should be applied: [61]. In respect of the remaining four years, the Tribunal indicated that given the nature of forecasting there was no perfect figure. The rules require the AER to accept a forecast if satisfied it reasonably reflects the opex criteria – its decision to reject the forecast (based on outcomes of industrial wage negotiations) were therefore sound: [71].
	Non-system property capital expenditure[19]	Ergon (*applicant*)	That the AER's decision to remove the proposed cost of the Townsville and Rockhampton projects from proposed non-system capex forecast was an error.	s 71C(1) (NEL) *(specific grounds not identified)*	N/A	Varied	AER acknowledged it erred in exercising its discretion by not allowing any capex in respect of Townsville and Rockhampton and that the Tribunal should vary the amount to include the value of Ergon's business as usual proposals for those sites (but not the full amount): [7]. The AER did not see justification for taking different approaches at different sites. The Tribunal did not vary the decision as proposed by the AER, but was also not satisfied that the variation asked for by Ergon. It sought submissions from the AER on whether the Tribunal should accede to Ergon's estimates: [46]-[48]. Following submission from the AER (requested by the Tribunal), the Tribunal determined that it will accept

[19] *Application by Ergon Energy Corporation Limited (Non-system property capital expenditure) (No 4)* [2010] ACompT 12. See also *Application by Ergon Energy Corporation Limited (Non-System Property Capex) (No 8)* [2011] ACompT 2 (this latter decision on non-system property capex follows a request from the Tribunal for a submission by the AER on whether the Tribunal should accept Ergon's estimates of the costs of projects planned in Townsville and Rockhampton).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
							Ergon's cost estimates for the projects at Townsville and Rockhampton.[20]
	Service Target Performance Incentive Scheme[21]	Ergon (*applicant*)	That the AER set STPIS targets that were more onerous than MSS targets and that the AER did so on the assumption that Ergon Energy's forecast capex and opex would fund a level of reliability that would outperform its MSS targets, i.e. an assumption that Ergon was intending to outperform the MSS: [38].	s 71C(1) (NEL) *(specific grounds not identified)*	$26m reduction in Capex: [55]	Rejected	The Tribunal considered that the AER's interpretation that Ergon should not fail to meet the targets more than once every five years was reasonable: [40] – [55].
	Street Lighting Services[22]	Ergon (*applicant*)	That the AER was in error in characterising street lighting as Alternative Control Services: [6]-[7]. The AER contends that s 71O(2) precludes Ergon from raising the claims.	s 71C(1)(a), (b), (c), (d) (NEL)	N/A	Rejected	The Tribunal accepted that s 71O(2) of the NEL precluded Ergon from raising the claims made. The Tribunal accepted that a matter needed to be raised in submissions made leading up to and relevant to the regulatory decision to fulfil the purpose of limited merits review: [42].
	Other Costs[23]	Ergon (*applicant*)	That the decision of the AER that it was not satisfied that the inclusion of a component of other costs in a formula proposed by Ergon was an error.	s 71C(1) (NEL) *(specific grounds not identified)*	N/A	Varied	Tribunal found the AER made an error of fact in its findings of fact that Ergon's costs would not be efficiently incurred in delivering quoted services. The Tribunal noted explicitly it was not a question of the AER acting unreasonably or of it improperly exercising its discretion: [46]. The Tribunal also found that the AER made an error of

[20] See *Application by Ergon Energy Corporation Limited (Non-System Property Capex) (No 8)* [2011] ACompT 2 (this latter decision on non-system property capex follows a request from the Tribunal for a submission by the AER on whether the Tribunal should accept Ergon's estimates of the costs of projects planned in Townsville and Rockhampton).

[21] *Application by Ergon Energy Corporation Limited (Service Target Performance Incentive Scheme) (No 5)* [2010] ACompT 13 (in this decision, the Tribunal found no ground of review and directed the parties to confer and provide minutes of the appropriate determination to be made in light of the above reasons). See also *Application by Ergon Energy Corporation Limited (Service Target Performance Incentive Scheme) (No 10)* [2011] ACompT 7 (this subsequent matter follows the identification by the AER of an error in the course of identifying incentive rates).

[22] *Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)* [2010] ACompT 14.

[23] *Application by Ergon Energy Corporation Limited* [2010] ACompT 6 (application for review of AER distribution determination in relation to Ergon Energy). See also *Application by Ergon Energy Corporation Limited (Other Costs) (No 7)* [2011] ACompT 1.

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
								fact in finding that Ergon did not provide any information to support its contentions; sufficient information was provided: [47]. Tribunal received submissions from the parties agreeing to a proposed variation relating to quoted services supplied by Ergon. The Tribunal considered the proposed variation should be made.
11	**Energex Limited**[24] (2010)	Gamma	Energex (applicant)	*See above (as per Gamma for ETSA Utilities)*	s 71C(1)(a), (b) (NEL)	N/A	Varied	*See above (as per Gamma for ETSA Utilities)*
			EnergyAustralia [25] (*intervener)*	*See above (as per EnergyAustralia's intervention with respect to Gamma for ETSA Utilities)*	*See above (as per EnergyAustralia's intervention with respect to Gamma for ETSA Utilities)*	$136m: [13]	Application to intervene refused	*See above (as per EnergyAustralia's intervention with respect to Gamma for ETSA Utilities)*
12	**Jemena Gas Networks (NSW) Ltd**[26] (2011)	Gamma[27]	Jemena Gas Networks (**JGN**) *(applicant)*	Complaints raised are similar to those in application brought by Energex, Ergon, ETSA *(see above)*: [5].	Not specified.	N/A	Varied	The Tribunal took the view that in order to be consistent, it should follow the decision in *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9:[28] [92].

[24] *Application by Energex Limited (Distribution Ratio (Gamma)) (No 3)* [2010] ACompT 9 (decision regarding distribution ratio and theta components of gamma); *Application by Energex Limited (Gamma)* (No 5) [2011] ACompT 9 (decision regarding gamma). See also *Application by Energex Limited (No 2)* [2010] ACompT 7 (decision which outlined background and found errors in distribution ratio and theta components); *Application by Energex Limited (No 4)* [2011] ACompT 4 (decision regarding meaning and effect of several provisions in the merits review regime).

[25] *In the matter of Energex Limited* [2010] ACompT 3 (application by EnergyAustralia to intervene).

[26] *Application by Jemena Gas Networks (NSW) Ltd (No 3)* [2011] ACompT 6 (application for review of AER full access arrangement decision made pursuant to r 64 of the NGL); See also *Application by Jemena Gas Networks (NSW)* Ltd [2010] ACompT 8 (application for leave by JGN concerning AER full access arrangement decision in relation to JGN); *Application by Jemena Gas Networks (NSW) Ltd (No 4)* [2011] ACompT 8 (decision regarding whether Tribunal can make more than one determination) . The reasons in respect of the debt risk premium are provided in the case below.

[27] *Application by Jemena Gas Networks (NSW) Ltd (No 5)* [2011] ACompT 10.

[28] *Application by Energex Limited (Gamma)* (No 5) [2011] ACompT 9.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
	Debt risk premium[29]	JGN *(applicant)*	Consistent with the AGL decision, AER contended an average of the CBASpectrum and Bloomberg fair value curves should be used. JGN argued that reliance should be placed solely on the Bloomberg fair value curve: [14].	s 246(1) *(specific grounds not identified)* (the AER's methodology in issue is the same methodology in issue in the ActewAGL application[30], which the Tribunal found to be an unreasonable decision. Therefore, the AER 'accepts that its determination was in error' on the same grounds as that in ActewAGL): [11] – [12].	N/A	Varied	The AER accepted that its determination was in error as it broadly applied the same methodology it had in *ActewAGL*:[31] [13].In *ActewAGL*, the Tribunal considered it appropriate to average the yields provided by the CBASpectrum and Bloomberg curves because it had no satisfactory grounds on which to distinguish between the two curves: [54]. Here, the Tribunal concluded that the appropriate curve which the debt risk premium for JGN should be calculated is the Bloomberg fair value curve, which is a much better fit than the CBASpectrum curve. The CBASpectrum curve is so poor a fit to the data that "it would not even be appropriate to consider averaging it with the Bloomberg curve": [86].
	Capital base (mine subsidence)	JGN *(applicant)*	AER erred in refusing to add 'mine subsidence expenditure' to the RAB: [9]-[28].	s 246(1) *(specific grounds not identified)*	N/A	Remitted	AER applied an incorrect test, however it was not possible for the Tribunal to determine which of the claimed capital expenditure is in fact properly characterised as capital expenditure: [40].
	Capital base (deduction of WACC)	JGN *(applicant)*	The AER did not have the power to make an adjustment to remove the effect of the rate of return on an overestimation of capex: [51].	s 246(1) *(specific grounds not identified)*	N/A	Rejected	The Tribunal was convinced that neither the Minister, nor the AEMC intended that gas networks would be allowed to keep the return on capital of an over-estimation while electricity networks would not. The same approach was required for each. The Tribunal

[29] *Application by Jemena Gas Networks (NSW) Ltd (No 5)* [2011] ACompT 10 (this decision deals with debt risk premium).

[30] *Application by ActewAGL Distribution* [2010] ACompT 4.

[31] *Application by ActewAGL Distribution* [2010] ACompT 4.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
							concluded the omission of an express power to remove the rate of return was due to the rule makers seeking a simpler set of rules than in the NEL: [55].
	Terms of supply (liability and indemnity clauses)	JGN *(applicant)*	Reference services agreement: In adopting the reasonable service provider standard the AER incorrectly exercised its discretion or made a decision that was unreasonable: [73].	s 246(1)(c), (d) (NGL)	N/A	Varied	The AER conceded that it erred in its amendment of proposed cl 28.7 however left it to the Tribunal to determine how the clause should be reworked: [76]. Tribunal concluded that the inclusion of the additional retention of liability was unreasonable and is "unnecessary to meet the AER's objectives and is apt to cause confusion": [82].
		TRUenergy Pty Ltd (**TRUenergy**) *(intervener)*	AER's amendment to the liability and indemnity clauses of the RSA were appropriate: [74]. Each proposed(different) amendments to cl 28.7 of the RSA: [75].	*N/A – s 246 applies only to applications for review and s 256 (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above*	*See above*
		AGL Energy Limited, AGL Retail Limited, AGL Energy Sales and Marketing Limited (**AGL Entities**) *(intervener)*	*See above*	*See above*	*See above*	*See above*	*See above*

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
	Terms of supply (minimum billing period intervals)	TRUenergy *(intervener)*	References services agreement: AER erred by not specifying a monthly billing cycle, and therefore not preventing JGN from issuing invoices more frequently than monthly: [115]. AGL entities also submit the factual premise upon which the decision is based is incorrect: [116].	*See above*	N/A	Rejected	The Tribunal did not accept the premise upon which most of the interveners' challenge was based. Firstly it did not accept that JGN can issue invoices whenever it thinks appropriate and secondly, it does not accept that the billing pattern can be unreasonably short. The Tribunal considered that there was an implicit obligation on JGN to establish a tailored billing cycle for each client that is objectively reasonable in all the circumstances: [118].
		AGL Entities *(intervener)*	*See above*	*See above*	*See above*	*See above*	*See above*
	Terms of supply (security for payment)	TRUenergy *(intervener)*	References services agreement: AGL entities content the RSA should be amended to provide an objective standard which regulates the circumstances in which JGN may require a user to provide security etc. – the AER's decision failed to have regard to the users' submissions, is without reason and is not consistent with the NEO: [85]. TRUenergy contends the AER erred as it did not provide a measurable trigger on the basis of which JGN may request security or review the amount of security.	*See above*	N/A	Rejected	The Tribunal could not find fault with the AER's final decision. The AER was correct in deciding it would be appropriate for JGN to have an unqualified right to demand security: [105]. Each approach has advantages and disadvantages – no approach is correct. Further, no error was demonstrated: [107].
		AGL Entities *(intervener)*	*See above*	*See above*	*See above*	*See above*	*See above*
	Bulk Hot Water[32]	Madeleine Kingston *(consumer*	N/A	N/A	N/A	Leave refused.	N/A

[32] Note: it is not clear this issue was before the Tribunal, however based on submissions of this intervener it appears that this issue may have been before the Tribunal however that leave was refused. See also *Application by Jemena Gas Networks (NSW) Ltd* [2010] ACompT 8.

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			intervener)					
13	**Envestra Limited**[33] (2011) *(South Australia)*	Debt risk premium (**DRP**)	Envestra (*applicant*)	AER erred in applying a DRP of 3.81% to determine the rate of return: [4]. Envestra submitted DRP should be determined solely by reference to the Bloomberg value, rather than by reference to the Bloomberg value and APA bond value: [64].	s 246(1)(a), (b), (c), (d) (NGL)	N/A	Varied	The Tribunal determined that the AER's decision to reject the adoption of the EBV on the basis of the APA bond and the weighting chosen was a reviewable error under s 246(1)(c) and (d): [108]-[109]. The Tribunal found that the AER did not investigate or methodically analyse the validity bonds proposed by CEG: [91]-[94]. The Tribunal found that the AER's error did not constitute an error of fact because the AER did not rely on its conclusion about counterintuitive behaviour in deciding to reject the sole use of the EBV: [77].
		Market risk premium (**MRP**) (a parameter in the return on equity)	Envestra (*applicant*)	AER erred in determining the rate of return by applying a value for the MRP of 6%: [4]. The question was whether that value was reasonably open to the AER on the evidence before it.	*See above*	N/A	Rejected	The Tribunal concluded that it was "reasonably open" to the AER to determine an MRP of 6% and that the AER had not fallen into reviewable error: [146]. It was not sufficient for Envestra to persuade the Tribunal that 6.5% should be preferred – the unreasonableness of the AER's decision must be shown: [145]. The Tribunal also noted several other issues agitated by the parties and decided it was not necessary for the Tribunal to determine these issues as the issues did not materially influenced the AER's decision in such a way as to establish a ground of review: [147].
		Network management fee (**NMF**)	Envestra (*applicant*)	AER erred in deciding to not to approve Envestra's proposed NMF included in Envestra's revised operating expenditure forecasts: [4].	*See above*	N/A	Varied	Tribunal was persuaded that in respect of the finding that the NMF did not represent efficient opex, the AER made a material error of fact. The Tribunal noted that this was a complex factual finding flowing from two incorrect factual findings. The AER's conclusion was unreasonable in all the circumstances: [268]-[271].

[33] *Application by Envestra Ltd (No 2)* [2012] ACompT 3 (access arrangement decision made pursuant to r 64 of the NGL). See also *Application by Envestra Limited* [2011] ACompT 13 (application for leave for review of AER full access arrangement decision concerning Envestra's SA gas distribution network).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		Unaccounted for gas (**UAG**) costs	Envestra (*applicant*)	AER erred in rejecting Envestra's proposed UAG volumes and in requiring a reduction in the UAG volumes forecast by Envestra: [4].	*See above*	N/A	Rejected	The Tribunal was not persuaded that the AER fell into reviewable error in respect of this issue: [354]. The AER's acceptance of the Wilson Cook analysis is "reasonable and is supported by the facts": [352].
14	**Envestra Limited**[34] (2011) *(Queensland)*	Debt risk premium (**DRP**)	Envestra (*applicant*)	AER erred in applying a value for the DRP of 3.81%.	s246(1)(a), (b), (c), (d) (NGL): [29]-[55].	N/A	Varied	The Tribunal's reasons largely mirror the reasons concerning debt risk premium and market risk premium in *Application by Envestra Ltd (No 2)* [2012] ACompT 3;[35] *Application by APT Allgas Energy Pty Limited (No 2)* [2012] ACompT 5.[36] The Tribunal considered it appropriate to adopt the course of delivering separate reasons and making separate orders because the applications concerned different gas distribution networks and, in one case, a different applicant: [1]. AER's decision to reject sole reliance on the EBV and to determine the DRP based on average of the APA Bond and the EBV amounts to reviewable error: [171].
		Market risk premium (**MRP**)	Envestra (*applicant*)	AER erred in determining the rate of return by applying a value for the MRP of 6%.	*See above*	N/A	Rejected	*See above*. The Tribunal found no error in the AER's decision on the MRP, which was "supported by a large body of evidence": [172].
15	**WA Gas Networks**[37] (2011)	Application for leave	WA Gas Networks (*applicant*)	Application for leave to apply for review in relation to gas distribution systems.	s 246(1)(a)-(d) (NGL)	N/A	Leave refused	Tribunal refused leave to apply for review in respect of Gas Distribution Systems because decisions by the ERA in relation to gas distribution systems are not

[34] *Application by Envestra Limited (No 2)* [2012] ACompT 4 (application for review of AER full access arrangement decision concerning Envestra's QLD gas distribution network). See also *Application by Envestra Limited* [2011] ACompT 12 (application for leave for review of AER full access arrangement decision concerning Envestra's QLD gas distribution network).

[35] *Application by Envestra Ltd (No 2)* [2012] ACompT 3.

[36] *Application by APT Allgas Energy Limited (No 2)* [2012] ACompT 5.

[37] *WA Gas Networks Pty Ltd (No 2)* [2011] ACompT 15 (decision to refuse the applicant leave to apply for review of ERA access arrangement decision in relation to WA Gas Networks pursuant to r 62 NGR in respect of the Mid-West and South-West Gas Distribution Systems).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
	(gas distribution systems)							reviewable regulatory decisions: [16]-[17].
16	**APT Allgas Energy Limited**[38] (2012)	Debt risk premium (**DRP**)	APT Allgas *(applicant)*	AER erred in determining the rate of return with a value for DRP of 3.64%. DRP should be determined solely by reference to the EBV of 18 bonds with maturities up to six years, whereas the AER submitted that it should be determined by reference to an average of a single ten year bond selected by it and the EBV: [66].	s246(1)(a)-(d) (NGL): [29]-[55], [110].	N/A	Varied	The Tribunal's reasons largely mirror the reasons concerning debt risk premium in *Application by Envestra Ltd (No 2)* [2012] ACompT 3;[39] *Application by APT Allgas Energy Limited (No 2)* [2012] ACompT 5.[40] As the parties are different, the Tribunal considered it appropriate to publish separate reasons for its order in this matter: [2].
17	**Alinta Sales**[41] (2012)	Distribution reference tariffs[42]	Alinta Sales (*applicant*)	ERA erred in performing or failing to perform its functions under regulation 7 of the Local Provisions by failing to take into account the possible impact of proposed B3 Service tariffs on users to whom gas is or might be delivered by means of a small delivery service, such as Alinta. If the ERA so erred, it should have taken into account the impact of the proposed reference tariffs on users' interests, or alternatively in any event, it failed to take that impact into account in a correct way:	s246(1)(a)-(d): [37] (Leave Decision).	N/A	Rejected	Tribunal was not persuaded that the ERA fell into reviewable error on any of the grounds specified in s 246(1): [87], [92]. The ERA Draft Decision referred to the impact of ATCO's proposed revision of the then existing tariffs on both small use customers and retailers: [58]-[59], and Alinta did not present any further material to expand upon the impact on it of having to bear that cost without it being passed through to small use customers: [64]. Tribunal did not consider that the ERA committed any error which falls within a ground of review relied upon by Alinta: [105]. The Tribunal noted that the ERA did refer to the possibility of smoothing the tariff path in its Final

[38] *Application by APT Allgas Energy Limited (No 2)* [2012] ACompT 5 (application for review of AER full access arrangement decision made pursuant to r 64 of the NGL). See also *Application by APT Allgas Energy Pty Ltd* [2011] ACompT 11 (decision to grant leave to apply for review of AER access arrangement decision in relation to APT Allgas Energy).

[39] *Application by Envestra Ltd (No 2)* [2012] ACompT 3..

[40] *Application by APT Allgas Energy Limited (No 2)* [2012] ACompT 5.

[41] *Application by Alinta Sales Pty Ltd (No 2)* [2012] ACompT 13 (decision to affirm ERA decision in relation to WA Gas Networks Pty Ltd Gas Distribution System, aka. ATCO. This matter was heard by the Tribunal at the same time as the application in Application by WA Gas Networks Pty Ltd (No 3) [2012] ACompT 12. This decision should be read with that decision); *Alinta Sales Pty Ltd* [2011] ACompT 16 (Leave Decision. Tribunal granted leave to apply for review of the ERA decision in relation to WA Gas Networks Pty Ltd Gas Distribution System).

[42] Gas Tariffs Regulations are made under s 26 of the ECA and cap the tariffs that may be offered by users/retailers to small use customers in three geographic regions in WA [25].

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				[32].				Decision, but not in the context of the possible impact upon Alinta – however, that possible impact was not a concern raised by Alinta in its submissions: [105]. The Tribunal did not accept that regulation 7 required the ERA to speculate about any number of possible scenarios: [99], [104].
			ATCO (formerly WA Gas Networks) (*intervener*)	Tribunal (or ERA if the matter is remitted) must fully understand the potential impact on the commercial interests of the ATCO and carefully consider the consequential orders which might be made in this matter: [44].	*N/A – s 246 applies only to applications for review and s 256 (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	N/A	Noted ATCOs submissions: [44]
18	**WA Gas Networks**[43] (2012)	Rate of return on capital (aka. Rule 87 Construction Issue)	ATCO (formerly WA Gas Networks) (**ATCO**) (*applicant)*	Challenged general approach taken by ERA to determine rate of return on capital: [24].	s 246(1)(NGL) *(specific grounds not identified)*	N/A	Rejected	The Tribunal found there was no reason to regard the differences between the NER and the NGR as a constructional aid which supports the contention of ATCO: [70].
		Market Risk Premium (**MRP**)	ATCO *(applicant)*	ERA's assessment of the MRP was not supported by the evidence as it took a long term historical view when the GFC justified a higher MRP: [26].	*See above*	N/A	Rejected	No error in adopting a value of 6% for the MRP: [95]. Tribunal was "taken to no materials that indicated whether any other Australian regulator has ever issued a finding on the MRP which assigns a different figure to different parts of the access arrangement period": [91]. The ERA considered considerable material which was not conclusive on the best estimate of MRP, and the ERA therefore had to exercise its discretion: [105]. See

[43] *Application by WA Gas Networks Pty Ltd (No 3)* [2012] ACompT 12 (application for review of ERA full access arrangement decision made pursuant to r 64 of the NGR); *WA Gas Networks Pty Ltd (No 1)* [2011] ACompT 14 (decision to grant WA Gas Networks leave to apply for review of ERA access arrangement decision in respect of the Mid-West and South-West Gas Distribution Network made pursuant to r 64 of the NGR).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
							generally: [86]-[108].
	Gamma	ATCO *(applicant)*	ATCO submitted the ERA made errors with respect to the distribution ratio and the value of theta leading to a considerable overstatement of the value for gamma: [26].	*See above*	N/A	Remitted	ERA had acknowledged that the value of gamma should be changed on the basis of the decision in *Energex (No 5)*: [124].
	Cost of Debt	ATCO *(applicant)*	ATCO submitted that the ERA made a number of errors including in not having regard to certain evidence of actual market conditions, and that the ERA wrongly rejected inclusion of specific allowance for pre-financing costs to ATCO: [26].	*See above*	N/A	Remitted	ERA fell into error in choosing a simple averaging approach when considering the various estimates for the DRP which the bond yield approach produced. It is in that averaging process where the ERA fell into error, and not in its development of the bond yield approach: [180]. The ERA's conclusion to adhere to the commonly fixed allowance for debt raising costs was "reasonably open to it", and not shown to involve an incorrect exercise of discretion or a decision which is unreasonable: [187E]-[187F]. The Tribunal was not persuaded of ATCO's contention that the ERA's conclusion does not reflect what a prudent service provider would do: [187D], and was not persuaded that the ERA committed reviewable error in respect of this issue: [187E].
	CPI Issues	ATCO *(applicant)*	ERA's approach to the escalation of costs to take account of inflation was in error as it understated the capital base and further capital expenditure: [28]-[30].	*See above*	N/A	Rejected	Tribunal was not persuaded that the ERA, by adopting the CPI measure of inflation to calculate the opening capital base, committed any reviewable error: [196]-[197]. The discretion exercised by the ERA in adjusting for inflation was not shown to be unreasonable or unsupportable: [202].
	Bridging Finance Issue	ATCO *(applicant)*	ERA failed to include as an operating expense the cost of establishing bridging	*See above*	N/A	Remitted	Tribunal found that the ERA made a factual error in reaching its conclusion. The Tribunal also acknowledged that there was a "particular

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			finance: [31]-[32].				concatenation of circumstances confronting ATCO when it sought the extensions" and the timing for the introduction of the new statutory regime meant that "there were a series of points at which the decision to seek the extension needed to be considered": [219].
	Working Capital Issue	ATCO *(applicant)*	ERA refused to include any provision for working capital and thus ATCO is not afford a reasonable opportunity to recover at least the efficient costs it incurs in providing the reference services: [33]-[34].	*See above*	N/A	Rejected	Tribunal affirmed the decision of the ERA: [233]. ERA's overall conclusion was reasonably available to and there was no particular factual finding which was shown to be erroneous: [232].
	Tariff Variation Mechanism Issue	ATCO *(applicant)*	ERA wrongly excluded from the tariff variation mechanism, provisions which would permit an adjustment to the tariff to take account of the amount of any unexpected capex due to government regulatory intervention: [35]-[36].	*s* 246(1)(a), (b), (c), (d): [234]. (the tribunal only accepted s 246(1)(c), (d) as being made out): [259]	N/A	Remitted	Tribunal was persuaded that the ERA's decision to exclude regulatory capex from ATCO's Amended Access Arrangement was wrong. The Tribunal found that ATCO successfully made out grounds s256(1)(c)-(d): [258]-[259].
	Template Haulage Terms Issues	ATCO *(applicant)*	ERA took an unjustified approach to the approval of the proposed template haulage contract: [37]-[38].	s 246(1)(c), (d): [261].	N/A	Remitted	The Tribunal considered individual clauses and was satisfied that particular decisions by the ERA "were the result of proper exercises of the ERA's discretion": [276], [325]. However, the Tribunal was satisfied that the ERA's decision to include clause 8.3(b) in the Approved Contract was unreasonable and the Tribunal varied the decision by substituting the phrase "the user acknowledges that it must use reasonable endeavours" with "the user must use reasonable endeavours": [327].

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
19	**United Energy Distribution**[44] (2012)	Public Lighting	Streetlight Group of Councils (**SGO**) *(intervener)*	That the AER's conclusions in respect of public lighting are erroneous: [100].	s 71C(1)(a), (b), (c), (d): [107]	N/A	Rejected	SGO did not made out any of its grounds of review. Therefore the Tribunal made no variations to the AER determination: [125].
			United Energy Distribution (**UED**) *(applicant)*	That the AER did not err in its determinations in respect of public lighting.	N/A	N/A	*See above*	*See above*
		Opex – related party costs	UED *(applicant)*	The applicant contests the AER's decision that an item in UED's audited regulatory accounts for the relevant period 'reflected all of the internal and related party costs incurred within the UED group': [131(a)]. The applicant contends that 'only some of those costs were incurred as part of the EUDH costs', while other costs were incurred directly by UED and should be included in UED's forecast opex for the relevant regulatory control period: [131(a)]. That the 'AER denied procedural fairness to UED during the substitution phase of the regulatory process': [131(b)]. In particular, 'the switch from the basis of assessment in the draft decision to the $8.264m…in the final decision on this point constituted a denial of procedural fairness': [131(b)].	s 71C(1)(a), (b), (c), (d): [174].	N/A	Rejected	The Tribunal is of the view that 'it is not now open to UED to raise on this review the detailed arguments and submissions which it put both orally and in writing to the Tribunal…none of which were put to the AER notwithstanding that ample opportunity was given to UED to enable it to do so': [191]. As the Tribunal is of the view that it is not now allowed to consider these things, it must make the assessment based on the evidence which was before the AER: [192]. It finds that the ground of review has not been made out for the following reasons: (a) 'the AER was justified in not being satisfied with UED's forecast opex in respect of internal and related party costs'; (b) it was therefore 'obliged to make its own assessment which it was satisfied reasonably reflected the operating expenditure criteria'; (c) 'the AER was justified in treating the Ernst & Young one page reconciliation document as a sound basis for assessment of all non-Jam costs': [194]. The Tribunal finds that the AER was not obliged to 'inform the UED that it proposed to use the Ernst & Young reconciliation in the way that it did. Nor was it obliged to provide a further opportunity to UED to explain the $14.8m in Appendix C-16. UED had been asked most directly to provide that explanation but it

[44] *Application by United Energy Distribution Pty Limited* [2012] ACompT 1 (application for review of AER distribution determination in relation to UED made pursuant to cl 6.11.1 of the NEL) (***Principal Reasons***). In *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8 (the Tribunal rejected all of the applications made by the remaining DNSPs for orders applying to each of them the reasoning in the principal decision in respect of the indexation of JEN's RAB for inflation).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
							failed to do so. This failure occurred in circumstances where earlier requests for information made by the AER…had not been satisfactorily answered': [197].
	Closeout of ESCV "S" factor scheme	UED *(applicant)*	The AER did not have power to 'implement the ESCV S Factor Scheme close out: [200], [230].	s 71C(1)(c), (d)	N/A	Varied	The Tribunal finds that the AER 'did not have the power to include within its final decision the methodology and consequential decision directed to the closing out of the ESCV S Factor Scheme': [247]. The Tribunal's conclusion was based on its interpretation that the relevant clauses in the NER do not permit 'carrying forward into the current regulatory control period 2011-2015 of the ESCV S factor scheme which was in operation only in respect of the State-based last ESCV price determination up to 31 December 2010': [241] – [242].
		Minister for Energy and Resources (VIC) (**Minister**) *(intervener)*	That the AER did have the power to implement the ESCV S Factor Scheme close out: [239].	N/A – *s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue.*	N/A	Rejected	*See above*
	Debt risk premium	UED *(applicant)*	The DNSPs challenged the 'AER's decision not to annualise the Bloomberg fair bond yield date (CRP annualisation ground): [387]	s 71C(1)(d): [387]	N/A	Varied	The AER and DNSPs agreed on a disposition of the DRP annualisation ground. The Tribunal proposed to give effect to that agreement when final orders were made: [388].
	RAB - indexation for inflation	UED *(applicant)*	DNSPs did not take issue with this at the time of the final decision: [338]. However they now contest the AER's adoption of	N/A	N/A	Granted liberty to apply	The Tribunal, upon an interpretation of the relevant provisions, found that 'cl 6.5.1(e)(3) requires the value of the RAB as at 1 January 2006 to be adjusted for

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			the ESCV methodology: [352].				actual inflation consistently with the method used for the indexation of the weighted average price cap during the 2006-2010 regulatory period': [372]. On this basis, cl 6.5.1 does not require the AER 'to escalate the RAB values in respect of the current regulatory control period up to 1 January 2011': [373].
	RAB – capitalised related party margins	Minister *(intervener)*	That the AER 'misunderstood and thus misapplied the requirements' of the NER: [250]. This amounted to an incorrect exercise of discretion, or an unreasonable decision: [250]. In particular, the AER was 'permitted to include in the RAB only those classes or categories of capex which, pursuant to the last ESCV price determination, had been permitted by the ESCV to be incurred' and further 'that those related party margins that the ESCV was able to identify as effectively increasing the cost to the DNSP of capital expenditure above the cost of providing the capital items should be disallowed': [269].	s 71C(1)(c), (d) (Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may be invoked by an intervener).	N/A	Rejected	The Tribunal finds that the proper interpretation of the relevant NER clauses confirms the AER's interpretation and decisions 'which it made as a consequence of applying that correct interpretation were reasonable in all the circumstances': [313]. These decisions were in regard to the 'inclusion of related party profit margins…in all of the DNSP's capital expenditure': [248].
		UED *(applicant)*	Decision not challenged	N/A	N/A	*See above*	*See above*
	RAB - depreciation	UED *(applicant)*	The Minister contests the decision of the AER to determine 'that the depreciation for establishing the RAB is to be based upon actual (rather than forecast) capital expenditure': [314].	s 71C(1)(c), (d) (Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may be invoked by an intervener).	N/A	Rejected	The Tribunal finds that the Minister has not made out either grounds for review: 'the AER applied the appropriate principles and the decision to which it came was perfectly open to it on the material before it. The mere fact that it may also have been open to the AER to choose the other available option does not render the choice which it actually made erroneous': [336].

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		Minister *(intervener)*	Decision of AER not challenged	N/A	N/A	*See above*	*See above*
	Gamma	UED *(applicant)*	The applicants contest the AER's gamma decision.	71C(1) *(specific grounds not identified)*	N/A	Varied	The Tribunal made reference to the *Application by Energex Limited*[45] in which it determined the value of gamma at 0.25. The Tribunal states that the reasoning in that application is 'directly in point' and that it is likely the same reasoning would be adopted as in that determination. Therefore, the parties reached agreement in regards to the disposition of gamma, and the Tribunal is 'satisfied that it should proceed in accordance with the parties' agreement': [514] – [517].
20 **CitiPower Pty**[46] (2012)	Public Lighting	SGO *(intervener)*	*See above (as per Public Lighting in respect of United Energy)*	s 71C(1)(a), (b), (c), (d): [107]	N/A	Rejected	*See above (as per Public Lighting in respect of United Energy)*
		CitiPower (*applicant)*	*See above (as per Public Lighting in respect of United Energy)*	N/A	N/A	*See above*	*See above (as per Public Lighting in respect of United Energy)*
	RAB – capitalised related party margins	Minister *(intervener)*	*See above (as per RAB – capitalised related party margins in respect of United Energy)*	s 71C(1)(c), (d) (Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may be invoked by an intervener).	N/A	Rejected	*See above (as per RAB – capitalised related party margins in respect of United Energy)*

[45] *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9

[46] *Application by United Energy Distribution Pty Limited* [2012] ACompT 1 (application for review of AER distribution determination in relation to UED made pursuant to cl 6.11.1 of the NEL) (***Principal Reasons***). In *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8 (the Tribunal rejected all of the applications made by the remaining DNSPs for orders applying to each of them the reasoning in the principal decision in respect of the indexation of JEN's RAB for inflation).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		CitiPower *(applicant)*	*See above (as per RAB – capitalised related party margins in respect of United Energy)*	N/A	N/A	*See above*	*See above (as per RAB – capitalised related party margins in respect of United Energy)*
	RAB - depreciation	CitiPower *(applicant)*	*See above (as per RAB – depreciation in respect of United Energy)*	s 71C(1)(c), (d) (Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may be invoked by an intervener).	N/A	Rejected	*See above (as per RAB – depreciation in respect of United Energy)*
		Minister *(intervener)*	*See above (as per RAB – depreciation in respect of United Energy)*	N/A	N/A	*See above*	*See above*
	RAB - indexation for inflation	CitiPower *(applicant)*	*See above (as per RAB – indexation for inflation in respect of United Energy)*	N/A	N/A	Granted liberty to apply	*See above (as per RAB – indexation for inflation in respect of United Energy)*
	Debt Risk Premium	CitiPower *(applicant)*	*See above (as per Debt Risk Period in respect of United Energy)*	s 71C(1)(d): [387]	N/A	Varied	*See above (as per Debt Risk Period in respect of United Energy)*
	Gamma	CitiPower *(applicant)*	*See above (as per Gamma in respect of United Energy)*	71C(1) *(specific grounds not identified)*	N/A	Varied	*See above (as per Gamma in respect of United Energy)*
	Victorian Bushfire – Royal Commission nominated pass through event	CitiPower *(applicant)*	That an additional pass through event should be nominated in order for the implementation of the VBRC recommendations in order to cover additional costs: [568], [566].	71C(1) *(specific grounds not identified)*	N/A	Rejected	The AER's reasoning in rejecting the application for an additional nominated pass through event is 'reasonable and most compelling': [589]. In reaching its conclusion, the Tribunal found that the AER 'cannot be compelled to nominate an additional *pass through event* the scope of which is merely to repeat the coverage or scope of one

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
								of the *pass through events* specifically nominated in the definition of *pass through event*': [589]. Further, the Tribunal finds that it was open to the AER to dismiss the business uncertainty to the parties so as not to justify the nomination of an additional pass through event: [589].
		Vegetation management opex step change	CitiPower *(applicant)*	The applicants contest the AER's decision not to accept its proposed step change amounts. The applicants contend that the evidence used by the AER in reaching its conclusion was 'defective': [648].	s 71C(1)(d) (although there appears to be broad errors alleged – see [651] – the only ground which the Tribunal comments on is s 71C(1)(d)): [667].	N/A	Remitted	The Tribunal finds that 'the AER was justified in not being satisfied with the information which had been provided to it by' the applicants: [665]. However, the Nuttal Consulting assessment which the AER used in reaching its conclusions was defective: [666].
21	**Powercor Australia Limited**[47] (2012)	Public lighting	SGO *(intervener)*	*See above (as per Public Lighting in respect of United Energy)*	s 71C(1)(a), (b), (c), (d): [107]	N/A	Rejected	*See above (as per Public Lighting in respect of United Energy)*
			Powercor (*applicant)*	*See above (as per Public Lighting in respect of United Energy)*	N/A	N/A	*See above*	*See above (as per Public Lighting in respect of United Energy)*
		RAB – capitalised related party margins	Minister *(intervener)*	*See above (as per RAB – capitalised related party margins in respect of United Energy)*	s 71C(1)(c), (d) *Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may*	N/A	Rejected	*See above (as per RAB – capitalised related party margins in respect of United Energy)*

[47] *Application by United Energy Distribution Pty Limited* [2012] ACompT 1 (application for review of AER distribution determination in relation to UED made pursuant to cl 6.11.1 of the NEL) (***Principal Reasons***). In *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8 (the Tribunal rejected all of the applications made by the remaining DNSPs for orders applying to each of them the reasoning in the principal decision in respect of the indexation of JEN's RAB for inflation).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				be invoked by an intervener.			
		Powercor *(applicant)*	Decision not challenged	N/A	N/A	*See above*	*See above*
	RAB - depreciation	Powercor *(applicant)*	*See above (as per RAB – depreciation in respect of United Energy)*	s 71C(1)(c), (d) *Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may be invoked by an intervener.*	N/A	Rejected	*See above (as per RAB – depreciation in respect of United Energy)*
		Minister *(intervener)*	*See above (as per RAB – depreciation in respect of United Energy)*	N/A	N/A	*See above*	*See above*
	RAB – indexation for inflation	Powercor *(applicant)*	*See above (as per RAB – indexation for inflation in respect of United Energy)*	N/A	N/A	Granted liberty to apply	*See above (as per RAB – indexation for inflation in respect of United Energy)*
	Debt risk premium	Powercor *(applicant)*	*See above (as per Debt risk premium in respect of United Energy)*	s 71C(1)(d): [387]	N/A	Varied	*See above (as per Debt risk premium in respect of United Energy)*
	Gamma	Powercor *(applicant)*	*See above (as per Gamma in respect of United Energy)*	71C(1) *(specific grounds not identified)*	N/A	Varied	*See above (as per Gamma in respect of United Energy)*
	Efficiency carryover mechanism (vegetation	Powercor *(applicant)*	In relation to ECM adjustments, 'the AER erred by not making an adjustment for certain expenditure necessarily incurred by Powercor in 2008 and 2009 in respect	Not specified (the Tribunal notes that the parties have agreed that	N/A	Varied	Regarding ECM adjustments, the AER and Powercor have entered into an agreement. They agree that a ground of review has been established in respect of the ECM adjustment ground and that the agreed

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
	management opex)		of vegetation management in order to comply with its mandatory statutory line clearance obligations': [540]. Further, the AER erred in determining Powercor's total and annual revenue requirements for the 2011-2015 regulatory control period by 'bringing to account a negative amount said to reflect an accrued negative carryover arising in the 2001-2005 period under the ECM of the ORG applicable in that period': [541].	the applicant has established a ground of review in respect of the ECM adjustment ground): [544].			adjustments should be made: [544]. Regarding accrued negative carryover, the Tribunal will give effect to the parties agreed disposition depending on the Tribunal's resolution of this issue: [546].
	Victorian Bushfire – Royal Commission nominated pass through event	Powercor *(applicant)*	*See above (as per Bushfire pass through event in respect of CitiPower)*	71C(1) *(specific grounds not identified)*	N/A	Rejected	*See above (as per Bushfire pass through event in respect of CitiPower)*
	Vegetation management opex step change	Powercor *(applicant)*	*See above (as per Vegetation management opex step changes in respect of CitiPower)*	s 71C(1)(d) (while broad errors appear to be alleged ([651]) the Tribunal only comments on this ground): [667].	N/A	Remitted	*See above (as per Vegetation management opex step changes in respect of CitiPower)*.
	Accrued negative carryover	Powercor *(applicant)*	The applicant contests the AER's decision to include a negative amount reflecting a 2001-2005 accrued negative carry over in respect of Powercor's total and annual revenue requirements for the 2011-2015 regulatory control period: [610].	s 71C(1)(c), (d: [594]. Note, this is the grounds which the AER identified as being in issue in relation to this issue, however the Tribunal gives no further consideration to these grounds in	N/A	Varied	The Tribunal rejects the AER's position for the same reasons as those in respect of the ECSV closeout issue: [614]. The Tribunal finds that a correct interpretation of the relevant clause 'does not authorise a carryover into the current regulatory control period of these negative amounts in the case of Powercor': [615].

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				the reasons for this issue:[593] – [619].			
22 **Jemena Electricity Networks**[48] (2012)	Public lighting	SGO *(intervener)*	*See above (as per Public Lighting in respect of United Energy)*	s 71C(1)(a), (b), (c), (d): [107]	N/A	Rejected	*See above (as per Public Lighting in respect of United Energy)*
		Jemena (**JEN**) (*applicant)*	*See above (as per Public Lighting in respect of United Energy)*	N/A	N/A	*See above*	*See above (as per Public Lighting in respect of United Energy)*
	RAB – capitalised related party margins	Minister *(intervener)*	*See above (as per RAB – capitalised related party margins in respect of United Energy)*	s 71C(1)(c), (d) (Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may be invoked by an intervener).	N/A	Rejected	*See above (as per RAB – capitalised related party margins in respect of United Energy)*
		JEN *(applicant)*	Decision not challenged	N/A	N/A	*See above*	*See above*
	RAB - depreciation	Minister *(intervener)*	*See above (as per RAB – depreciation in respect of United Energy)*	s 71C(1)(c), (d) (Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may	N/A	Rejected	*See above (as per RAB – depreciation in respect of United Energy)*

[48] *Application by United Energy Distribution Pty Limited* [2012] ACompT 1 (application for review of AER distribution determination in relation to UED made pursuant to cl 6.11.1 of the NEL) (***Principal Reasons***). In *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8 (the Tribunal rejected all of the applications made by the remaining DNSPs for orders applying to each of them the reasoning in the principal decision in respect of the indexation of JEN's RAB for inflation).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				be invoked by an intervener).			
		JEN *(applicant)*	Decision of AER not challenged	N/A	N/A	*See above*	*See above*
	RAB - indexation for inflation	JEN *(applicant)*	JEN maintained its claim to index the 2006 opening RAB values by six and a half years inflation. It was, therefore, the only DSNP which thereafter persisted in a contention that the AER's approach was flawed': [344].	71C(1) *(specific grounds not identified)*	N/A	Remitted	The Tribunal accepts that the decision of the AER 'in respect of the escalation of the RAB of JEN was erroneous and unreasonable in all the circumstances': [384].
	Debt risk premium	JEN *(applicant)*	That is was 'unreasonable for the AER to use the yields from a bond issued by Australian Pipeline Trust (APT) (**the APT bond**) to estimate the Debt Risk Premium (**DRP**) for the JEN averaging period (JEN DRP methodology ground): [387].	s 71C(1)(d)	N/A	Varied	The Tribunal agrees with JEN that 'it was unreasonable for the AER to rejects its proposal to rely only on the Bloomberg FV curve and instead to incorporate also the yield from a single bond which it had not demonstrated in any way to be a relevant benchmark or comparator bond': [434]. The Tribunal further finds that JEN's approach, to rely on the Blomberg FV curve, was consistent with the NER 'as it provided for an appropriate representation of the relevant benchmark corporate bond rate': [440]. Further, it finds that 'it was unreasonable for the AER to adopt its novel approach to estimating the DRP': [441]. As such, the 'AER's use of the APT bond to estimate the DRP is therefore inconsistent with the requirements of the NER': [442].
	Capital expenditure	JEN *(applicant)*	Not specified	71C(1) *(specific grounds not identified)*	N/A	Varied	The Tribunal found that 'the AER erred in its decision to substitute zero capital expenditure for 2011 for the Broadmeadows project in place of the direct costs amount proposed by JEN: [671].
	Enterprise support function cost centres	JEN *(applicant)*	JEN contests the AER's decision to disallow four of 18 cost centres claimed by JEN which is related to the provision of enterprise support functions': [466].	s 71C(1)(a), (b), (c), (d)	N/A	Varied	The Tribunal found that the AER's decision involved errors of fact, and was unreasonable:[504]. The following reasons justified this finding: The Tribunal found that the ESF costs constituted

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
							corporate overhead costs, and that they would be incurred by Jemena Limited or others within the Jemena group 'and be subsequently allocated to JEN using the WOBCA methodology'. Further, 'once the WOBCA methodology was accepted by the AER, there was really no room for the AER to question further the proposition that the forecast opex did not have the requisite connection to the delivery of distribution services and the achievement of the *operating expenditure objectives*': [506]. The Tribunal further found that 'there was ample material before the AER for it to be satisfied that the forecast opex met the *operating expenditure criteria*': [507]. The Tribunal also found that the AER, in reasoning that 'it had over-compensated JEN in the area of those costs which it had allowed [and was therefore] entitled to be rough and ready in its disallowance of the disallowed ESF costs' had adopted an 'entirely irrational' approach: [508].
	Gamma	JEN *(applicant)*	*See above (as per Gamma in respect of United Energy)*	Not specified	N/A	Varied	*See above (as per Gamma in respect of United Energy)*
23 **SPI Electricity Pty Limited**[49] (2012)	Public lighting	SGO *(intervener)*	*See above (as per Public Lighting in respect of United Energy)*	s 71C(1)(a), (b), (c), (d): [107]	N/A	Rejected	*See above (as per Public Lighting in respect of United Energy)*
		SPI Electricity (**SP Ausnet**) *(applicant)*	*See above (as per Public Lighting in respect of United Energy)*	71C(1) *(specific grounds not identified)*	N/A	*See above*	*See above (as per Public Lighting in respect of United Energy)*

[49] *Application by United Energy Distribution Pty Limited* [2012] ACompT 1 (application for review of AER distribution determination in relation to UED made pursuant to cl 6.11.1 of the NEL) (***Principal Reasons***). In *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8 (the Tribunal rejected all of the applications made by the remaining DNSPs for orders applying to each of them the reasoning in the principal decision in respect of the indexation of JEN's RAB for inflation).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
	RAB – capitalised related party margins	Minister *(intervener)*	*See above (as per RAB – capitalised related party margins in respect of United Energy)*	s 71C(1)(c), (d) *Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may be invoked by an intervener.*	N/A	Rejected	*See above (as per RAB – capitalised related party margins in respect of United Energy)*
		SP Ausnet *(applicant)*	*See above (as per RAB – capitalised related party margins in respect of United Energy)*	N/A	N/A	*See above*	*See above*
	RAB - depreciation	Minister *(intervener)*	*See above (as per RAB – depreciation in respect of United Energy)*	s 71C(1)(c), (d) (Note: s 71M provides the basis for interveners to raise a ground of review. It provides that a ground under s 71C may be invoked by an intervener).	N/A	Rejected	*See above (as per RAB – depreciation in respect of United Energy)*
		SP Ausnet *(applicant)*	*See above (as per RAB – depreciation in respect of United Energy)*	N/A	N/A	*See above*	*See above*
	Debt risk premium	SP AusNet (*applicant*)	*See above (as per Debt risk premium in respect of United Energy)*	s 71C(1)(d): [387]	N/A	Varied	*See above (as per Debt risk premium in respect of United Energy)*
	Gamma	SP AusNet (*applicant*)	*See above (as per Gamma in respect of United Energy)*	71C(1) *(specific grounds not identified)*	N/A	Varied	*See above (as per Gamma in respect of United Energy)*

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		Materiality threshold for nominated pass through events	SP AusNet (*applicant*)	'SP AusNet seeks review of the AER's determination insofar as the setting of a materiality threshold for the nominated pass through events is concerned': [523]. The applicant's proposed materiality threshold was $250 000 for the nominated pass through events: [518].	s 71C(1)(c), (d)	N/A	Rejected	The Tribunal accepts the decision of the AER. Regardless of the interpretation given to the relevant clause, the Tribunal finds that the applicant 'has not established that the method chosen by the AER was a method arrived at by a process of reasoning and assessment which breached cl 6.12.3(f)': [528]. Further the Tribunal finds that the 'mere fact that other ways of defining the materiality threshold might have been reasonably open to the AER does not render the decision which it made unreasonable or liable to be set aside as an incorrect exercise of discretion': [529]. While the Tribunal comments that the approach chosen by the Tribunal in relation to the pass through events was not the best approach, they 'do not think that the actual exercise by the AER of its discretion was incorrect or that its decision was unreasonable in all the circumstances': [530].
		Insurance event	SP AusNet (*applicant*)	Confidential	s 71C(1)(c), (d)	N/A	Confidential	The Tribunal finds that the reasons for this issue are to be kept confidential between the AER and SP AusNet: [539].
		RAB – indexation for inflation	SP AusNet (*applicant*)	*See above (as per RAB – indexation for inflation in respect of United Energy)*	N/A	N/A	Granted liberty to apply	*See above (as per RAB – indexation for inflation in respect of United Energy)*
24	**DPNGP (WA) Transmission Pty Ltd**[50] (2012)	Rule 87 Construction	DBP *(applicant)*	DBP contended that ERA failed to properly apply rule 87 of the NGR in a number respects including that it was not applied commensurate to prevailing market conditions.	s 246(1)(a)-(d) *(NGL) (specific grounds not identified)*	N/A	Rejected	Tribunal rejected the Applicant's contention about the proper construction of r 87 [103], because "It is clearly inappropriate to follow slavishly the approach to the determination of rate of return under the NER": [100]. Tribunal adhered to its conclusion in *WAGN* (ATCO)[51]

[50] *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 (application for review of ERA access arrangement determination in respect of the Dampier to Bunbury Natural Gas Pipeline, pursuant to r 64 NGR). See also *Application by DBNGP (WA) Transmission Pty Ltd* [2012] ACompT 6 (application for leave by DBNGP); *Application by DBNGP (WA) Transmission Pty Ltd (No 2)* [2012] ACompT 10 (only concerned court dates). Note that the applicant is DBNGP (WA) Transmission Pty Ltd on its own behalf and on behalf of DBNGP (WA) Nominees Pty Ltd as trustee of the DBNGP WA Pipeline Trust, and DBNGP (WA) Nominees Pty Ltd as trustee of the DBNGP WA Pipeline Trust (together, **DBP**).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
							that the ERA did not misconstrue or misapply the rule" [57].
	Risk free rate	DBP *(applicant)*	DBP contended ERA was in error in its determination of the risk free rate of return as it wrongly used bonds with a five-year term to maturity and the method was not consistent with its measure of the MRP.	*See above*	N/A	Rejected	Tribunal affirmed ERA's decision in relation to the nominal risk free rate of return [138] on the basis that the "ERA committed no conceptual or empirical error in its choice of the length of the term to maturity" and that the ERA's approach was reasonable: [137].
	Market Risk Premium	DBP *(applicant)*	DBP submitted that the MRP should be 6.5%. The ERA had rejected this figure and used a value of 6%. DBP argued that the ERA was in error in the way it produced that value, as it was not commensurate with prevailing market conditions: [143].	*See above.*	N/A	Rejected	No error regarding MRP as the estimate was one that could be viewed as being commensurate with prevailing conditions in the market for equity funds: [161]-[162].
	Gamma	DBP *(applicant)*	DBP contended that the ERA's decision involved errors in adopting different values of cash dividends to estimate theta and the cost of equity, and in interpretation of the practice of market practitioners not making any adjustments for franking credits in valuing firms.	*See above.*	N/A	Rejected	No error on the part of the ERA in deciding that gamma should be 0.25, consistent with other regulatory and Tribunal decisions: [216]-[226].
	Inflation rate	DBP *(applicant)*	ERA's calculation of inflation rate by averaging over a 5 year period instead of a 10 year period was incorrect.	s 246(1)(c)-(d): [241].	N/A	Rejected.	No error in determining forecast inflation rate. There was a logical and reasonable basis for the ERA's decision to align the WACC period with the regulatory period and adopt a five year term: [252]-[253].
	Debt risk premium	DBP *(applicant)*	ERA's estimate of DRP by means of its bond-yield approach involved errors, and ERA should have adopted the estimate of DRP: [257].	s 246(1)(a)-(d) (NGL) *(specific grounds not identified)*	N/A	Remitted.	In respect of the DRP, the Tribunal agreed with the ERA's approach but remitted to the ERA regarding the ERA's choice of value for the DRP based on its averaging procedure was an incorrect exercise of

[51] See above: *Application by WA Gas Networks Pty Ltd (No 3)* [2012] ACompT 12.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
							discretion: [309]-[330].
	Debt raising costs	DBP *(applicant)*	DBP claimed that debt raising costs are additional to the DRP as part of the cost of debt. ENA erred as its reliance on certain reports was misplaced as being obsolete and other reports provided by DBP provided evidence in support of debt raising costs.	s 246(1)(a)-(b) (NGL)	N/A	Rejected	The matters raised did not go far enough to allow this matter to enable the Tribunal to conclude that the preference of the ERA involved an error of fact about the correct amount for debt raising costs: [328].
	Regulatory consistency	DBP *(applicant)*	DBP argued that error could be established by it having placed reliance on the decisions of other Australian regulators in its consideration of MRP, gamma and DRP as inputs into the WACC: [332].	s 246(1)(a)-(d) (NGL) *(specific grounds not identified)*	N/A	Rejected	Tribunal found ERA independently considered materials in reaching its conclusions and used independent judgment: [337].
	Rate of return (generally)	Electricity Generation Corporation trading as Verve Energy (**Verve**) *(intervener)*	The Tribunal noted that Verve [45] and BHP [44] intervened in relation to Rate of Return but did not specify the grounds, only stating that the decision takes into account their submissions: [52].	*N/A – s 246 applies only to applications for review and s 256 (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A.	*See above*	The Tribunal considered that the ERA had properly fulfilled its decision making functions and responsibilities in a consistent way: [334].
	Rate of return (generally)	BHP Billiton Nickel West (**BHP**) *(intervener)*	*See above*	*See above*	N/A	*See above*	The Tribunal simply noted that its reasons take into account the submissions of BHP and Verve without specifically identifying their complaint and the Tribunal's reasons in respect of those complaints: [52].
	Capital base – CPI rate	DBP *(applicant)*	That ERA incorrectly concluded that a national measure of inflation should be used in calculating capital base, amounts	s 246(1)(a)-(d) (NGL)	N/A	Rejected	No error of fact or incorrect exercise of discretion found – the use of the national measure provides consistency during a range of access arrangement periods and

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			to be added to revenue under the incentive mechanism and in the subsequent annual adjustment of reference tariffs: [341].				ensures that ERA is applying an inflator consistently: [360].
	Capital base – Project Management Retainer Fees	DBP *(applicant)*	That ERA erred in deciding a project management retainer fee was not conforming capex: [366].	s 246(1)(a)-(d) (NGL)	*See above*	Rejected	In respect of management retainer fees, there was no error on the part of the ERA in rejecting DBP's submissions as the decision amounts to a difference of opinion supported by a lack of evidence: [388] – [389].
	Capital base - Burrup Extension Pipeline Lease	DBP *(applicant)*	That ERA erred in in the value it ascribed to capex in respect of the Burrup Extension Lease and in determining that it should be treated as a pipeline asset for regulatory purposes in calculating depreciation: [405].	s 246(1)(a)-(d) (NGL)	*See above*	Remitted	In respect of the Burrup Extension Pipeline Issue, the Tribunal noted that the ERA has identified an error in its own calculation: [412], [417]. The Tribunal remitted the matter to the ERA for the purposes of making the correct calculations. The Tribunal otherwise found no reviewable error: [439], [464].
	Opex	DBP *(applicant)*	ERA erred in deciding that DBP's forecast regulatory expenses did not meet the criteria governing opex and that the forecast should be reduced: [466].	s 246(1)(a)-(d) (NGL)	$100,000: [466]	Rejected	The conclusion reached by the ERA was 'reasonably open to it on the information before it and it is not for the Tribunal to substitute a conclusion it might have reached on that information': [486].
	Reference services for which tariffs and terms and conditions must be specified	DBP *(applicant)*	ERA erred in deciding that proposed R1 reference service should be removed, and include, in including a revised definition of part haul service and in deciding that amendments were required to DBPs proposed terms: [490].	s 246(1)(a)-(d) (NGL)	N/A	Rejected	No error by the ERA in exercising its discretion concerning the proposed reference service. DPB failed to provide information, and if it did, ERA exercised its discretion not to consider it as what was provided was not responsive to the invitation of the ERA to provide that information: [554]-[556].
		Alinta Sales *(intervener)*	Supported ERA's amendments to remove from DBP's revised access arrangement its proposed R1 reference services and include other services as reference services.	*N/A – s 246 applies only to applications for review and s 256 (which applies to interveners) was not identified as a ground raised by*	N/A	Not considered	Noted the submissions of Verve and Alinta in regards to the construction of the legislation at [539]-[544], but determined it was not necessary to give detailed consideration to their submissions as there was no merit to the grounds of review: [539].

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				this intervener in relation to this issue			
		Verve *(intervener)*	*See above*	*See above*	*See above*	*See above*	The Tribunal agreed with the submission by Verve and Alinta to the effect that the terms and conditions on which a reference service is to be offered are inseparable from the nature of the service: [540].
		BHP *(intervener)*	*See above*	*See above*	*See above*	*See above*	The Tribunal noted BHP's submission that DBP's proposal to retain the R1 Service and not include the T1, P1 and B1 Services as reference services be rejected: [529].
		APT Parmelia (**APA Group**) *(intervener)*	ERA erred in incorporating in its s 64(1) access arrangement.	*See above*	N/A	Rejected	Accepted the APA Group's submissions regarding the issue of the efficient use of the MGSF: [584] The Tribunal also concluded that APA Group "did not advance hard information sufficient for the Tribunal to conclude that the ERA erred in incorporating in its s 64(1) access arrangement": [584]-[585].
	Terms and conditions	DBP *(applicant)*	ERA ought to have adopted certain, more stringent, behavioural limits in the terms and conditions applicable under a reference service.	s 246(1)(a)-(d) (NGL): [164], [160], [248], [319], [329]	N/A	Rejected	Tribunal found no merit in DBP's grounds of review: [588]-[589].
	Coverage of expansions to the pipeline	DBP *(applicant)*	Further expansions to the capacity of the DBNGP should automatically be covered by the Revised Access Arrangement, unless DBP demonstrates to the ERA's satisfaction that coverage is not consistent with the national gas objective .	*See above*	N/A	Rejected	The Tribunal found that the ERA's decision on extensions and expansions does not involve reviewable error: [618].

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
25	**SPI Electricity**[52] (2013)	Indexation of RAB for inflation	SPI Electricity (*applicant*)	SPI was dissatisfied with the Tribunal's rejection of the application made for orders applying to each of them the reasoning in the principal decision in respect of the indexation of JEN's RAB for inflation: [7], [8].	s 71C(1)(a)-(d) SP AusNet also relied on a procedural fairness ground	N/A	Remitted	Remitted to give effect to Full Federal Court decision and subsequent United decision: [9]-[15].
26	**APA GasNet Australia (Operations) Pty Ltd**[53] (2013)	Interval of delay – adjustment for determination being made late (ie after expiry of previous determination)	APA GasNet *(applicant)*	That adjustments made to reference tariffs to account for higher tariffs that were charged during the interval of delay should not have been made, and that adjustments made by the AER in any event contained calculation errors: [61].	s 246(1)(a)-(d) (NGL): [244] of *(No 2)*.	Approximately $6.5m: [22] of Leave Decision.	Remitted	The Tribunal was satisfied that the decision involved an error of fact, in that there was an interval of delay in respect of which the AER was required to make a decision in accordance with 92(3) of the NGR. The Tribunal was also satisfied there was no proper basis for the adjustment to the tariff calculation to account for over or under recovery of tariffs during that period: [89]. The AER accepted that it was not necessary to address whether the error was reviewable on the basis of that conclusion: [90].
		Opening Capital Base	APA GasNet *(applicant)*	Rule 77(2) makes express and exhaustive provisions for matters to be included in opening capital base and does not provide for the further adjustment made by the AER. The AER did not have regard to the fact that the relevant capital expenditure was incurred between 2008 and 2012: [105].	*See above*	Approximately $6.54m: [25] of Leave Decision.	Remitted	The AER was not entitled to make the adjustment to opening capital base for the previous access period. This amounted to an error of fact, incorrect exercise of discretion or an unreasonable decision, as it was an adjustment not authorised by the rule: [142].
		Depreciation and indexation	APA GasNet *(applicant)*	The AER misconstrued its task in reviewing the proposed depreciation	*See above*	Approximately $76: [28] of	Rejected	The Tribunal concluded that the depreciation methodology approved by the AER results in a stable

[52] *Application by SPI Electricity Pty Limited* [2013] ACompT 1 (this Order was made in place of paragraph 3 of the Tribunal's Orders made below, which Order was set aside by Order of the Full Court of the Federal Court on 17 January 2013) and *Application by SPI Electricity Pty Limited* [2012] ACompT 2 (Tribunal determined on a confidential basis a discrete issue raised by SPI in respect of the AER's final determination).

[53] Application by *Application by APA GasNet Australia (Operations) Pty Limited (No 2)* [2013] ACompT 8 (application for review of the full access arrangement decision made by the AER in relation to APA GasNet). See also *Application by APA GasNet Australia (Operations) Pty Limited* [2013] ACompT 4 (leave decision); *Application by APA GasNet Australia (Operations) Pty Limited (No 3)* [2013] ACompT 9 (this matter involved an application for an extension of time and an opportunity for APA GasNet to be heard about the appropriate form of order to be made by the Tribunal, since the parties did not agree upon the form of orders which the Tribunal should make to give effect to its decision.

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				schedule, and the AER's decision was based on insufficient evidence: [179].		Leave Decision.		tariff path and that the AER's conclusions with regard to alliance upon the Australian Ratings report do not disclose error: [224]-[226].
		Cost of equity	APA GasNet (*applicant*)	AER erred in several respects, including regarding the return on market portfolio of equities, prevailing yield, MRP: [61] of Leave Decision.	*See above*	Approximately $36.42m: [31] of Leave Decision.	Rejected	The Tribunal found that no grounds were established: "APA GasNet's complaint in reality concerns the result of the AER's investigations, and not the process" and "it was reasonably open to the AER to choose an MRP of 6 percent": [308].
27	**MultiNet Gas (DB No 1) and MultiNet Gas (DB No 2)**[54] (2013)	Opening capital base	MultiNet Gas *(applicant)*	The opening capital base should include confirming capex for 2012 of $75.688m (net): [19] of Leave Decision.	s 246(1)(a), (b), (c), (d) (NGL): [3] of Leave Decision.	"About $30m" (the Tribunal determines this amount as being the capital expenditure in 2012): [19] of Leave Decision.	Remitted	AER accepted that it made an error of fact in its finding on MultiNet's 2012 capex that was material to the making of the Access Arrangement decision. The Tribunal was satisfied that the grounds of review were made out: [8]-[9].
28	**ActewAGL Distribution**[55] (2014)	Application to withdraw application for leave to apply.	ActewAGL *(applicant)*	AER should have allowed cost pass through event.	s 71C (NEL) *(specific grounds not identified)*	N/A	Granted application to withdraw application for leave	Granted application to withdraw application for leave on the basis that ActewAGL and the AER accepted that the Final Determination is of no effect and the application is at an end, and the AER accepted that it is deemed to have accepted ActewAGL's application for a pass through: [21]-[23].
29	**Ausgrid**[56] (2016)	Opex	Ausgrid	AER placed too much emphasis on the EI	s 71C(1)(a), (b),	N/A[57]	Remitted	The Tribunal found there was no error in the AER

[54] *Application by Multinet Gas (DB No 1) Pty Ltd (No 2)* [2013] ACompT 6; see also *Application by Multinet Gas (DB No 1) Pty Ltd* [2013] ACompT 5 (application for leave).

[55] *Application by ActewAGL Distribution* [2014] ACompT 2 (application to withdraw an application for leave)

[56] Note: This matter involved applications from PIAC, Ausgrid, Essential, Endeavour, ActewAGL and JGN. Ergon, SA/Vic Distributors, PIAC and the Minister for Resources, Energy and Northern Australia intervened in the matter. The Minister's intervention was limited to making submission on the proper construction and application of relevant provisions of the NEL/NGL and NER/NGR. The primary reasons are contained in the "Ausgrid" decision - *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 – where reasons are contained in another decision, this is reflected in footnotes. See also *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2; *Application by*

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		(applicant)	model (an economic benchmarking mode) and as a result the AER's estimate of opex was too low.	(c), (d)			deciding it was not satisfied that the total of forecast opex reasonably reflected the opex criteria: [468]. The Tribunal found that the AER placed too much weight on the outcome of the EI model, which represented an exercise of the AER's discretion which was incorrect: [471]. Further, the Tribunal indicated that underlying that view was a series of concerns about the inputs into the EI model which could be described generally as errors of fact: [472]. The Tribunal further held that the AER's opex decision was not in accordance with the NET, in that it gave discordant weight to the benchmarking factor over the other opex factors: [480]-[418]; [495]-[496]. Ausgrid was also successful in its contention that the AER had been wrong to disregard the constraints imposed by EBAs on the ability of the business to adjust its costs: [436].
		PIAC *(intervener)*	AER's estimate of opex was too high.	*See above*	N/A	*See above*	*See above*
		Ergon *(intervener)*	AER used a flawed model to arrive at its estimates of opex: [136].	N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this	N/A	*See above*	*See above*

ActewAGL Distribution [2015] ACompT 3; *Application by Jemena Gas Networks (NSW) Limited* [2015] ACompT 4 (applications for leave). Note also that given the substantive overlap between parties, and the cross-interventions between parties, it is often not clear whether a party was making its submission as an intervener or as an applicant.

[57] Note: the total value for the NNSW applicants was approximately $5.7 billion for all topics.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				issue			
	Debt	Ausgrid *(applicant)*	That the AER made a series of errors including in respect of the benchmark efficient entity, concept of a regulated efficient entity, trailing average approach.	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	Tribunal held that the AER erred in its approach to the benchmark efficient entity (BEE) because the BEE referred to in the Rate of Return Objective is not a regulated entity (as contended by the AER) and the AER erred in adopting a 'one size fits all' approach: [907], [914], [916], [937]. In respect of the other issues raised by Ausgrid, regarding data source and credit ratings, no grounds of review were satisfied: [994]-[995].
		PIAC *(intervener)*	Transition should have commenced from 2015-16 rather than 2014-15.	*See above*	N/A	*See above*	*See above.* The Tribunal noted it did not determine PIAC's contentions regarding debt given that the Tribunal decided to remit the final decision to the AER for reconsideration, and given PIAC's contentions were premised on the AER's approach to the transition to the tailing average being maintained: [963].
		AusNet Services, Australian Gas Networks, CitiPower, Powercor, SAPN, United Energy (**VIC/SA Interveners**) *(intervener)*	Generally as per the Network applicants.	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above*	*See above*
		Ergon *(intervener)*	AER made an error of fact in finding that a simple trailing average should be preferred over a Post Tax Revenue Model weighted trailing average in estimating the	s 71M NEL applies. The ground under s 71C being invoked appears	N/A	Not determined	The Tribunal did not, in the circumstances, consider it desirable to address that issue. Ergon will have the opportunity to take it up, if so advised, if the point is maintained by the AER as in its Preliminary

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			return on debt.	to be s 71C(1)(a), (b) [998].			Determination in relation to Ergon: [1002].
	Gamma	Ausgrid *(applicant)*	Gamma should be 0.25, not 0.4 for various reasons including the estimate does not reflect the best estimate and is significantly above the upper bound for the value of imputation credits as indicated by tax statistics.	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	Tribunal held that the AER's figure for gamma was too high, given that the relevant upper bound for theta should be no more than the ATO statistical data (0.43): [1111]. The equity ownership and tax statistics approaches are no better than upper bounds. Market value studies must be relied on. AER's approach was "inconsistent with the concept of gamma in the Officer Framework for the WACC which underlies the Rules, and with the objective of ensuring a market rate of return on equity by making an adjustment to the revenue allowance for taxation to account for imputation credits": [1100]. The Tribunal directed that the AER use 0.25 as the figure for gamma: [1227].
		VIC/SA Interveners *(intervener)*	Generally as per Network Applicants.	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above*	*See above*
		Ergon *(intervener)*	Generally as per Network Applicants.	*See above*	N/A	*See above*	*See above*
	Equity	Ausgrid	Return on equity should have been higher and AER's approach in using the SL	s71C(1)(a), (b),	N/A	Rejected	Tribunal was not persuaded the AER's decision was unreasonable, or that its process of addressing that data

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		(applicant)	CAPM model as a foundation model rather than using a multi-model approach was flawed. The adjustment to the SL CAPM equity beta was in error, the AER's conclusion on the MRP unduly weighted historical average express returns, and the estimate for return on equity was not reasonable.	(c), (d)			involved any error of the character to make its outcome unreasonable: [808]-[809]. AER's approach of using the SL CAPM model as its foundation model does not reflect any misunderstanding of the Rules or any fundamental misapplication of them: [726]. While it is possible to argue an alternative model is more suitable, the Tribunal is not of firm view that a different model should have been chosen by the AER: [735]. The Tribunal was not satisfied that the AER's estimate of equity beta was understated and held that the AER's estimation of the MRP was not erroneous: [800].
		PIAC *(intervener)*	AER erred in selecting a point value of the equity beta of 0.7 from the range 0.4-0.7.	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	Rejected	Tribunal addressed PIAC's ground of review in relation to return on equity "in conjunction with" considering the grounds of review of the Network Applicants: [700]. The Tribunal did "not consider that the PIAC contentions demonstrate error on the part of the AER": [768].
		VIC/SA Interveners *(intervener)*	Broadly supported contentions of the applicants. Also contended in broad terms that the AER's foundation model approach is based on erroneous propositions.	*See above*	N/A	Rejected	*See above*
		Ergon *(intervener)*	Broadly as per applicants. Also contended AER made an error of fact in finding that applying the SL CAPM as the foundation model would lead to a	*See above*	N/A	Rejected	*See above*

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				rate of return that meets the rate of return objective when evidence suggested otherwise.				
		EBSS	Ausgrid *(applicant)*	AER incorrectly suspended the operation of the EBSS for 2015-19 for Ausgrid and Endeavour; and the AER incorrectly adjusted the provisions expense reported in the NNSW's reported opex.	s 71C(1)(a), (b), (c), (d)	N/A	Rejected	Tribunal not satisfied that any ground of review exists: [628]. Tribunal did not accept NNSW's characterisation of what the AER has done and did not consider that the AER made any error of fact: [596]-[611].
		Metering Services Opex	Ausgrid *(applicant)*	Ausgrid sought to establish AER had erred by concluding Type 5 meters are not more expensive to operate and maintain than Type 6 meters and that it was inappropriate to use an average year rather than a single year as a measure of metering service opex costs.	s 71C(1)(a), (b), (c), (d)	N/A	Rejected	Tribunal did not consider the AER was in error. The AER did not make an error of fact or make an unreasonable decision. The difference in meters was insignificant: [1153].
		X-Factor (smoothing factor for allowed revenues in the regulatory period)	Ausgrid *(applicant)*	Revenue reduction resulting from x-factor does not promote efficient investment and gives rise to pricing volatility.	s 71C(1)(a), (b), (c), (d)	N/A – see above (opex)	Not determined	No determination was made. Tribunal concluded that, in the circumstances, it did not need to determine whether the assertions by NNSW were correct. The Tribunal noted that when the AER re-determines the opex allowances, it will have to make a fresh decision on the x-factor and the Tribunal was anxious to not inhibit the AER in exercising its decision in that regard: [538].
30	**Endeavour Energy**[58] (2016)	Opex	Endeavour *(applicant)*	*See above (as per Opex in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Opex in respect of Ausgrid)*
			PIAC	*See above (as per Opex in respect of*	*See above*	N/A	*See above*	*See above*

[58] Note: This matter involved applications from PIAC, Ausgrid, Essential, Endeavour, ActewAGL and JGN. Ergon, SA/Vic Distributors, PIAC and the Minister for Resources, Energy and Northern Australia intervened in the matter. The Minister's intervention was limited to making submission on the proper construction and application of relevant provisions of the NEL/NGL and NER/NGR. The primary reasons are contained in the "Ausgrid" decision - *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 – where reasons are contained in another decision, this is reflected in footnotes. See also *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2; *Application by ActewAGL Distribution* [2015] ACompT 3; *Application by Jemena Gas Networks (NSW) Limited* [2015] ACompT 4 (applications for leave).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		(intervener)	*Ausgrid)*				
		Ergon *(intervener)*	AER used a flawed model to arrive at its estimates of opex: [136].	*N*/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue	N/A	*See above*	*See above*
	Debt	Endeavour *(applicant)*	*See above (as per Debt in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Debt in respect of Ausgrid)*
		PIAC *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*See above*	N/A	*See above*	*See above (as per Debt in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above*	*See above (as per Debt in respect of Ausgrid)*
		Ergon *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	s 71M NEL applies. The ground under s 71C being invoked appears	N/A	Not determined	*See above (as per Debt in respect of Ausgrid)*

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				to be s 71C(1)(a), (b) [998].			
	Gamma	Endeavour *(applicant)*	*See above (as per Gamma in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Gamma in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Gamma in respect of Ausgrid)*	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above*	*See above (as per Gamma in respect of Ausgrid)*
		Ergon *(intervener)*	*See above (as per Gamma in respect of Ausgrid)*	*See above*	N/A	*See above*	*See above (as per Gamma in respect of Ausgrid)*
	Equity	Endeavour *(applicant)*	*See above (as per Equity in respect of Ausgrid)*	s71C(1)(a), (b), (c), (d)	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
		PIAC *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			VIC/SA Interveners *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
			Ergon *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
		EBSS	Endeavour *(applicant)*	*See above (as per EBSS in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Rejected	*See above (as per EBSS in respect of Ausgrid)*
		X-Factor	Endeavour *(applicant)*	*See above (as per X-Factor in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A – see above (opex)	Not determined	*See above (as per X-Factor in respect of Ausgrid)*
31	**Essential Energy**[59] (2016)	Opex	Endeavour *(applicant)*	*See above (as per Opex in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Opex in respect of Ausgrid)*
			PIAC *(intervener)*	*See above (as per Opex in respect of Ausgrid)*	*See above*	N/A	*See above*	*See above*
			Ergon *(intervener)*	AER used a flawed model to arrive at its estimates of opex: [136].	*N*/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this	N/A	*See above*	*See above*

[59] Note: This matter involved applications from PIAC, Ausgrid, Essential, Endeavour, ActewAGL and JGN. Ergon, SA/Vic Distributors, PIAC and the Minister for Resources, Energy and Northern Australia intervened in the matter. The Minister's intervention was limited to making submission on the proper construction and application of relevant provisions of the NEL/NGL and NER/NGR. The primary reasons are contained in the "Ausgrid" decision - *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 – where reasons are contained in another decision, this is reflected in footnotes. See also *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2; *Application by ActewAGL Distribution* [2015] ACompT 3; *Application by Jemena Gas Networks (NSW) Limited* [2015] ACompT 4 (applications for leave).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				issue			
	Debt	Endeavour *(applicant)*	*See above (as per Debt in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Debt in respect of Ausgrid)*
		PIAC *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*See above*	N/A	*See above*	*See above (as per Debt in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above*	*See above (as per Debt in respect of Ausgrid)*
		Ergon *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	s 71M NEL applies. The ground under s 71C being invoked appears to be s 71C(1)(a), (b) [998].	N/A	Not determined	*See above (as per Debt in respect of Ausgrid)*
	Gamma	Endeavour *(applicant)*	*See above (as per Gamma in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Gamma in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Gamma in respect of Ausgrid)*	*N/A – s71C applies only to applications for review and s71M (which applies to*	N/A	*See above*	*See above (as per Gamma in respect of Ausgrid)*

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				interveners) was not identified as a ground raised by this intervener in relation to this issue			
		Ergon *(intervener)*	*See above (as per Gamma in respect of Ausgrid)*	*See above*	N/A	*See above*	*See above (as per Gamma in respect of Ausgrid)*
	Equity	Endeavour *(applicant)*	*See above (as per Equity in respect of Ausgrid)*	s71C(1)(a), (b), (c), (d)	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
		PIAC *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
		Ergon *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
	EBSS	Endeavour *(applicant)*	*See above (as per EBSS in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Rejected	*See above (as per EBSS in respect of Ausgrid)*

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		X-Factor	Endeavour *(applicant)*	*See above (as per X-Factor in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A – see above (opex)	Not determined	*See above (as per X-Factor in respect of Ausgrid)*
32	**PIAC (re: Ausgrid)**[60] (2016)	Opex	PIAC *(applicant)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*	N/A	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*
			Ausgrid *(intervener)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*	N/A[61]	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*
		Debt	PIAC *(applicant)*	*See above (as per Debt in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	*See above (as per Debt in respect of Ausgrid)*	*See above (as per Debt in respect of Ausgrid)*
			Ausgrid *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*See above*	N/A	*See above (as per Debt in respect of Ausgrid)*	*See above (as per Debt in respect of Ausgrid)*
		Equity	PIAC *(applicant)*	*See above (as per Equity in respect of*	*N/A – s 71C applies only to*	N/A	*See above (as per*	*See above (as per Equity in respect of Ausgrid)*

[60] Note: This matter involved applications from PIAC, Ausgrid, Essential, Endeavour, ActewAGL and JGN. Ergon, SA/Vic Distributors, PIAC and the Minister for Resources, Energy and Northern Australia intervened in the matter. The Minister's intervention was limited to making submission on the proper construction and application of relevant provisions of the NEL/NGL and NER/NGR. The primary reasons are contained in the "Ausgrid" decision - *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 – where reasons are contained in another decision, this is reflected in footnotes. See also *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2; *Application by ActewAGL Distribution* [2015] ACompT 3; *Application by Jemena Gas Networks (NSW) Limited* [2015] ACompT 4 (applications for leave).

[61] Note: the total value for the NNSW applicants was approximately $5.7 billion for all topics.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			Ausgrid)	*applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*		*Equity in respect of Ausgrid)*	
		Ausgrid *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	s71C(1)(a), (b), (c), (d)	N/A	*See above (as per Equity in respect of Ausgrid)*	*See above (as per Equity in respect of Ausgrid)*
33 **PIAC (re: Endeavour Energy)**[62] (2016)	Opex	PIAC *(applicant)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*	N/A	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*
		Endeavour *(intervener)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*	N/A[63]	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*
	Debt	PIAC *(applicant)*	*See above (as per Debt in respect of*	s71C(1)(a), (b),	N/A	*See above*	*See above (as per Debt in respect of Ausgrid)*

[62] Note: This matter involved applications from PIAC, Ausgrid, Essential, Endeavour, ActewAGL and JGN. Ergon, SA/Vic Distributors, PIAC and the Minister for Resources, Energy and Northern Australia intervened in the matter. The Minister's intervention was limited to making submission on the proper construction and application of relevant provisions of the NEL/NGL and NER/NGR. The primary reasons are contained in the "Ausgrid" decision - *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 – where reasons are contained in another decision, this is reflected in footnotes. See also *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2; *Application by ActewAGL Distribution* [2015] ACompT 3; *Application by Jemena Gas Networks (NSW) Limited* [2015] ACompT 4 (applications for leave).

[63] Note: the total value for the NNSW applicants was approximately $5.7 billion for all topics.

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				Ausgrid)	(c), (d)		*(as per Debt in respect of Ausgrid)*	
			Endeavour *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*See above*	N/A	*See above (as per Debt in respect of Ausgrid)*	*See above (as per Debt in respect of Ausgrid)*
		Equity	PIAC *(applicant)*	*See above (as per Equity in respect of Ausgrid)*	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above (as per Equity in respect of Ausgrid)*	*See above (as per Equity in respect of Ausgrid)*
			Endeavour *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	*See above (as per Equity in respect of Ausgrid)*	*See above (as per Equity in respect of Ausgrid)*
34	**PIAC (re: Essential**	Opex	PIAC *(applicant)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of*	*See above (as per Opex in respect of*	*See above (as per Opex in*	*See above (as per Opex in respect of Ausgrid)*

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
Energy)[64] (2016)				*Ausgrid)*	*Ausgrid)*	*respect of Ausgrid)*	
		Essential *(intervener)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*	*See above (as per Opex in respect of Ausgrid)*
	Debt	PIAC *(applicant)*	*See above (as per Debt in respect of Ausgrid)*	s71C(1)(a), (b), (c), (d)	N/A	*See above (as per Debt in respect of Ausgrid)*	*See above (as per Debt in respect of Ausgrid)*
		Essential *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*See above*	N/A	*See above (as per Debt in respect of Ausgrid)*	*See above (as per Debt in respect of Ausgrid)*
	Equity	PIAC *(applicant)*	*See above (as per Equity in respect of Ausgrid)*	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this*	N/A	*See above (as per Equity in respect of Ausgrid)*	*See above (as per Equity in respect of Ausgrid)*

[64] Note: This matter involved applications from PIAC, Ausgrid, Essential, Endeavour, ActewAGL and JGN. Ergon, SA/Vic Distributors, PIAC and the Minister for Resources, Energy and Northern Australia intervened in the matter. The Minister's intervention was limited to making submission on the proper construction and application of relevant provisions of the NEL/NGL and NER/NGR. The primary reasons are contained in the "Ausgrid" decision - *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 – where reasons are contained in another decision, this is reflected in footnotes. See also *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2; *Application by ActewAGL Distribution* [2015] ACompT 3; *Application by Jemena Gas Networks (NSW) Limited* [2015] ACompT 4 (applications for leave).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
					issue			
			Essential *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	s71C(1)(a), (b), (c), (d)	N/A	*See above (as per Equity in respect of Ausgrid)*	*See above (as per Equity in respect of Ausgrid)*
35	**ActewAGL Distribution**[65] (2016)	Opex	ActewAGL *(applicant)*	*See above (as per Opex in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	$130.6m (this amount is the difference between the applicant's proposed opex of $371.2m ($2013-14) for the 2014-19 period and the AER's determination of the applicant's opex allowance at $240.6m ($2013-14): [22(1)].	Remitted	*See above (as per Opex in respect of Ausgrid)* In addition: the Tribunal set aside and remitted the final decision in relation to opex for ActewAGL for "in essence the same reasons as apply to Networks NSW": [30], [37]. The Tribunal found there was no error in the AER deciding it was not satisfied that the total of forecast opex reasonably reflected the opex criteria: [28]-[29].
			Ergon *(intervener)*	AER used a flawed model to arrive at its estimates of opex: [136].	*N*/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a	N/A	*See above*	*See above*

[65] See generally *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1. See also *Application by ActewAGL Distribution* [2016] ACompT 4.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				ground raised by this intervener in relation to this issue			
	Debt	ActewAGL *(applicant)*	*See above (as per Debt in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Debt in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above*	*See above (as per Debt in respect of Ausgrid)*
		Ergon *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	s 71M NEL applies. The ground under s 71C being invoked appears to be s 71C(1)(a), (b) [998].	N/A	Not determined	*See above (as per Debt in respect of Ausgrid)*
	Gamma	ActewAGL *(applicant)*	*See above (as per Gamma in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Gamma in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Gamma in respect of Ausgrid)*	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was*	N/A	*See above*	*See above (as per Gamma in respect of Ausgrid)*

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				not identified as a ground raised by this intervener in relation to this issue			
		Ergon *(intervener)*	*See above (as per Gamma in respect of Ausgrid)*	*See above*	N/A	*See above*	*See above (as per Gamma in respect of Ausgrid)*
	Equity	ActewAGL *(applicant)*	*See above (as per Equity in respect of Ausgrid)*	s71C(1)(a), (b), (c), (d)	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
		Ergon *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
	Metering services opex	ActewAGL *(applicant)*	AER erred in determining the base annual metering opex amount in assuming incorrectly the historical metering opex.	s71C(1)(a), (b), (c), (d)	N/A	Not determined	Tribunal decided it did not need to address this issue because the Tribunal proposes to set aside the ActewAGL final decision. In such circumstances, the error which is acknowledged can be corrected by the AER when making its revised determination: [71].
	Classification of metering services	ActewAGL *(applicant)*	ActewAGL alleged an error in a table of the final decision. At the time of the application for leave, the AER acknowledged the error and had undertaken to correct it by adopting ActewAGL's proposed formulation. The dispute is whether it is appropriate for the Tribunal to proceed to determine the error exists: [73]-[75].	s71C(1)(a), (b), (c), (d)	$4.9m (difference between the applicant's proposed allowance $15.7m and the amount the AER set $10.8m: [57].	Not determined	Tribunal decided it did not need to address this issue because the Tribunal proposes to set aside the ActewAGL final decision. In such circumstances, the error which is acknowledged can be corrected by the AER when making its revised determination: [71].

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		Service Target Performance Incentive Scheme (**STPIS**) (quality incentive scheme)	ActewAGL *(applicant)*	AER erred in deciding to apply its then existing STPIS to ActewAGL for the subsequent regulatory control period without modifying the applicable performance targets for the reliability of supply element of that STPIS was in error (r 6.6.2(a), 6.2.2).	s71C(1)(a), (b), (c), (d)	N/A	Remitted	Tribunal decided that it did not need to address the individual contentions regarding the STPIS. As the Tribunal concluded that the opex fixed by the AER was in error, the STPIS determination is also flawed: [52]-[53]. Given that the ActewAGL Final Decision was remitted to the AER, the Tribunal considered that STPIS also be set aside and remitted: [54].
36	**Jemena Gas Networks**[66] (2016)	Debt	Jemena Gas Networks (**JGN**) *(applicant)*	AER's decision to apply its transition methodology to both the base rate and DRP components was inappropriate and that it should only have applied the transition method to the base rate. It was not appropriate to include the DRP in the transition as it was not appropriate to undercompensate for the efficient return on debt. JGN also contended that the averaging periods for 2016-17 and successive years should be nominated by it annually throughout the access arrangement, rather than fixed by the AER in its Final Decision.	s71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Debt in respect of Ausgrid)* Tribunal was also not satisfied that JGN's contention regarding averaging period demonstrated any ground of review – the AER's approach accorded with the NGR requiring the annual return on debt to be determined through automatic application of a formula specified and accords a balance between flexibility and certainty in a sensible way, and would promote efficient investment decisions: [87].
			VIC/SA Interveners *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this*	N/A	*See above*	*See above (as per Debt in respect of Ausgrid)*

[66] See *Application by Jemena Gas Networks (NSW) Ltd* [2016] ACompT 5. See also *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				issue			
		Ergon *(intervener)*	*See above (as per Debt in respect of Ausgrid)*	s 71M NEL applies. The ground under s 71C being invoked appears to be s 71C(1)(a), (b) [998].	N/A	Not determined	*See above (as per Debt in respect of Ausgrid)*
	Gamma	JGN *(applicant)*	*See above (as per Gamma in respect of Ausgrid)*	s 71C(1)(a), (b), (c), (d)	N/A	Remitted	*See above (as per Gamma in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Gamma in respect of Ausgrid)*	*N/A – s71C applies only to applications for review and s71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	*See above*	*See above (as per Gamma in respect of Ausgrid)*
		Ergon *(intervener)*	*See above (as per Gamma in respect of Ausgrid)*	*See above*	N/A	*See above*	*See above (as per Gamma in respect of Ausgrid)*
	Equity	JGN *(applicant)*	*See above (as per Equity in respect of Ausgrid)*	s71C(1)(a), (b), (c), (d)	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
		VIC/SA Interveners *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		Ergon *(intervener)*	*See above (as per Equity in respect of Ausgrid)*	*See above*	N/A	Rejected	*See above (as per Equity in respect of Ausgrid)*
	Market expansion capital (**ME Capex**)	JGN *(applicant)*	Numerous errors were made by the AER in the ME capex decision itself and the steps taken by the AER in arriving at that decision, and that ultimately the ME capex forecast amount approved by the AER was too low: [97]-[98].	s71C(1)(a), (b), (c), (d)	N/A	Remitted (but no error found)	No reviewable error in the AER's decision not to approve the ME capex forecast produced through the use of the JGN model [165] because it was not an incorrect exercise of discretion for the AER to raise each of its concerns with a service providers' Revised Proposal, nor does the absence of any material which may have been provided by JGN in response to those concerns amount to a deficiency in the RRM: [162]. It was also not unreasonable for the AER to exercise its discretion to make a substitute decision on the basis of legitimate concerns raised by the material provided by JGN to the AER: [164]. Tribunal noted that due to the potentially limited evidence presented by JGN in support of its model and the focus by the parties on the AER's ME capex forecast, the Tribunal is not currently in a position to consider the relative merits of the AER model and the JGN model: [186]. Given the JGN final decision was set aside, it was appropriate for the AER to reconsider its ME Capex decision on remittal: [186].
		Ergon *(intervener)*	Ergon had raised a discrete issue as to capex concerning the appropriate transition path.	*N/A – s 71C applies only to applications for review and s 71M (which applies to interveners) was not identified as a ground raised by this intervener in relation to this issue*	N/A	Not determined	Given that this was not a matter raised by JGN (the applicant), the Tribunal considered it was a matter more appropriate for Ergon to raise in relation to the AER Ergon Final determination: [188].

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
37	**ATCO Gas Australia Pty Ltd**[67] (2016)	Equity	ATCO Gas *(applicant)*	In solely relying on the SL CAPM model, the ERA made an error in rejecting the FFM to calculate the return on equity: [621]-[623].	246(1)(a)-(d) (NGL): [36]-[48]	Not assessed: [691]	Rejected	The FFM is not universally accepted as providing a "better" model for the explanation of equity returns: [665], [682], [683].
		Gamma	ATCO Gas *(applicant)*	ERA erred in adopting a value of theta of 0.4: [17].	*See above*	*N/A*	Remitted	The Tribunal applied the reasons in the *PIAC and Ausgrid* decision. The ERA erred in adopting the alternative figure of 0.4. ERA had accepted that it made a reviewable error in light of the *PIAC and Ausgrid decision*: [684-687].
		Opex	ATCO Gas *(applicant)*	ERA erred in failing to include in the forecast opex, costs relating to the current access arrangement review process: [461].	*See above*	$1.4m (opex costs the applicant seeks to be included: [461].	Rejected	No error in concluding that a prudent service provider acting efficiently would not have incurred the preparation costs: [516-517].
		Capex	ATCO Gas *(applicant)*	ERA was in error in not approving forecast sustaining capex relating to three projects (r 76(a) and (b), 79(2) NGR): [50].	*See above*	N/A	Rejected	No error – it was open to the ERA to conclude that the risk ranking was "immediate" and to decide not to approve forecast sustaining capex for those projects: [220], [307], [320].
		Amount of depreciation and approach to calculation	ATCO Gas *(applicant)*	ERA was in error in determining ATCO's depreciation schedule (under r 89 NGR) due to other grounds of review which impact the depreciation allowance: [322]-[324].	*See above*	"Some $17m" (the alleged revenue effect of the ERA decision): [330].	Rejected	No error in relying on comparisons over a shorter horizon: [458]. ERA was correct in determining that ATCO's approach was inconsistent with rule 89(1)(a) of the NGR and so it did not err in rejecting ATCO's proposal: [460].
		Tariff mechanism	ATCO Gas *(applicant)*	ERA erred in using ATCO's forecast revenue and in rejecting a cost pass through event in respect of certain	*See above*	N/A	Rejected	No error in rejecting ATCO's proposed cost pass through event: [619]-[620].

[67] *Application by ATCO Gas Australia Pty Ltd* [2016] ACompT 10. Application for merits review of access arrangement decision by the ERA. See also *Application by ATCO Gas Australia Pty Ltd* [2015] ACompT 7 (application for leave).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				regulatory costs and licence fees: [519]-[520].				
38	**South Australia Council of Social Service Incorporated**[68] (2015)	Opex (application for leave to apply for review of SAPN decision)	SACOSS *(applicant)*	AER erred by failing to properly assess whether SAPN's 'corporate and other operating costs' were efficient costs: [2].	*N/A* *s 71C was not discussed here.* *Key question was in relation to s 71O(2)(c) – whether SACOSS should be granted leave to apply for review*	N/A	Leave refused	SACOSS did not raise the matter in a submission to the AER before the reviewable regulatory decision was made: [34]-[41]. As a consequence of s 71O(2)(c) there is no serious issue to be heard and determined as to whether a ground of review exists under s 71C of the NEL.
		Equity beta[69]	SACOSS *(applicant)*	That the AER's erred in giving insufficient weight to and did not have proper regard to (i) countervailing factor identified by SACES; (ii) an alternative possible estimate of equity beta: [63(a)]. Further, that it unreasonably arrived	N/A	N/A	N/A	Withdrawn
39	**South Australia Power Networks**[70] *(To be determined – heard 2016)*	Gamma	SA Power Networks (*applicant*)	AER erred in adopting a value of gamma of 0.4 instead of 0.25 for various reasons including that the construction and application of the NER with respect of the phrase "value of imputation credits" was incorrect.	s 71C(1)(a)-(d): [37] – [45].	$85.2m ('the impact of the errors in the Gamma Decision in isolation… over the regulatory period':	*To be determined*	*To be determined*

[68] *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8.

[69] ACT 12 of 2015 (application for review of AER distribution determination by the AER in relation to SA Power Networks pursuant to cl 6.11.1 of the NEL).

[70] ACT 11 of 2015 (application for leave for review of AER distribution determination in relation to SA Power Networks). Note, the South Australian Minister for Mineral Resources and Energy intervened in this application.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
					[199(a)]		
	Equity	SA Power Networks (*applicant*)	AER erred in adopting a return on equity of 7.5% for various reasons including in concluding that the SL CAPM was superior to other models, and with respect to the figures for MRP and equity beta.	s 71C(1)(a)-(d): [78] – [93].	$245.3m based on an allowed rate of return of 7.09% or $266.7m based on an allowed rate of return of 7.43% ([199(b)])	N/A	Withdrawn
	Debt	SA Power Networks (*applicant*)	AER erred in adopting a return on debt of 5.28% for various reasons, including that the AER erred in determining that the AER's transition would result in a return on debt allowance for each regulatory year that is commensurate with the efficient debt financing costs of a benchmark efficient entity with a similar degree of risk to SAPN.	s 71C(1)(a)-(d):[94]-[103].	$1.3m based on an allowed rate of return of 7.09% or $75.3m based on an allowed rate of return of 7.43%:[199(b)]	*To be determined*	*To be determined*
	Forecast inflation	SA Power Networks (*applicant*)	AER erred in adopting a forecast of inflation of 2.50% instead of 2.06% for various reasons.	s 71C(1)(a)-(d): [126]-[133].	Approximately $65.1m ('the impact of the errors in the Forecast Inflation Decision in isolation… over the regulatory period': [199(c)]	*To be determined*	*To be determined*

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
	Forecast bushfire safety capital expenditure	SA Power Networks (*applicant*)	AER erred in not approving SA Power Networks' proposed forecast bushfire safety capital expenditure of $40.6m, where $30.5m of that forecast capex relates to the grounds of review.	s 71C(1)(a)-(d): [142]-[155].	Approximately $3.7m ('the impact of the errors in the Bushfire Mitigation Capex Decision… over the regulatory period': [199(d)].	*To be determined*	*To be determined*
	Opex for increased asset inspections in bushfire risk areas	SA Power Networks (*applicant*)	AER erred in not approving SA Power Networks' proposed forecast opex step change for increased asset inspections in bushfire risk areas of $12.9m where $11.9m of that forecast opex relates to the ground of review.	s 71C(1)(a)-(d): [164]-[165].	Approximately $12.9m ('the impact of the errors in the Asset Inspections Decision… over the regulatory period': [199(e)]	N/A	Withdrawn
	Opex for no access poles inspections	SA Power Networks (*applicant*)	AER erred in not approving SA Power Networks' proposed forecast opex step change for no access poles inspections of $21.8m.	s 71C(1)(a(d): [183]-[184].	Approximately $23.4m ('the impact of the errors in the No Access Poles Inspection Decision… over the regulatory period': [199(f)].	N/A	Withdrawn

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
		Forecast labour cost escalation	SA Power Networks (*applicant*)	AER erred in not approving SA Power Networks' forecast labour cost escalation rates based on its Enterprise Bargaining Agreement outcomes for the first two regulatory years and instead to adopt an average of BIS Shrapnel and Deloitte Access Economics' utilities sector labour price growth forecasts.	s 71C(1)(a)-(d): [194]-[197].	Approximately $20.0m ('the impact of the errors in the Forecast Labour Cost Escalation Decision… over the regulatory period': [199(g)].	*To be determined*	*To be determined*
40	**United Energy Distribution Pty Ltd**[71] *(To be heard November 2016)*	Gamma	United Energy (*applicant*)	AER erred in not approving United Energy's proposed value of gamma of 0.25 and instead adopting a value of gamma of 0.4.	s 71C(1)(a)-(d): [44]-[61].	$36.98m (applicant submits this is the amount required to correct the AER's error): [107(a)(i)].	*To be determined*	*To be determined*
		Forecast inflation	United Energy (*applicant*)	AER erred in finding that 2.32% should be applied as the forecast inflation estimate.	s 71C(1)(a)-(d): [95]-[100].	$27.09m or $2.01m (depending on methodology): [107(a)(ii)].	*To be determined*	*To be determined*
41	**AusNet Electricity Services Pty Ltd**[72]	Gamma	AusNet Electricity Services Pty Ltd (*applicant*)	The applicant contests the AER's decision to reject the applicant's proposed gamma of 0.25, instead adopting a gamma of 0.4, was: [45].	s 71C(1)(a)-(d)	$46.4m (the amount "specified in or derived	*To be determined*	*To be determined*

[71] ACT 3 of 2016 (application for leave for review of AER distribution determination). Note, the Victorian Minister for Energy, Environment and Climate Change intervened in this application.

[72] ACT 8 of 2016 (application for review of AER distribution determination made in relation to AusNet under cl 11.60.04 of the NEL). Note, the Victorian Minister for Energy, Environment and Climate Change intervened in this application.

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
(To be heard November 2016)					from" the decision to adopt a value of gamma of o.4': [66] – [69].		
	Return on debt	AusNet Electricity Services Pty Ltd (*applicant*)	The applicant contests the AER's decision to estimate the return debt 'from a simple average of the yields charted, at 10 years, by the yield curves published by the Bloomberg Valuation Service (**BVAL Curve**) and the Reserve Bank of Australia (**RBA Curve**) for BBB rated bonds issued in Australia or overseas by Australian Companies': [77].	*See above*	$16.1m (this is the amount "specified in or derived from" the decision to estimate the return on [the applicant's] debt from a simple average of the yields charted at 10 years by the BVAL and RBA Curves': [88]-[89].	*To be determined*	*To be determined*
	Forecast opex – self-insurance costs	AusNet Electricity Services Pty Ltd (*applicant*)	The applicant contests the AER's forecast of 'the cost of [the applicant's] self-insurance from the cost of self-insured events that had occurred in the base year of 2014': [97].	*See above*	$8.5m (the amount "specified in or derived from" the decision to forecast the cost of [the applicant's] self-insurance from the cost of the self-insurance that occurred in	*To be determined*	*To be determined*

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
						the base year of 2014': [104]]		
42	**Jemena Electricity Networks**[73] *(To be heard November 2016)*	Gamma	Jemena Electricity Networks (**JEN**) (*applicant*)	The applicant contests the AER decision to reject the applicant's proposed gamma of 0.25, instead adopting a gamma of 0.4 is erroneous: [37] – [38].	s 71C(1)(a)-(d)	$27.6m (this amount as being 'the impact of the errors in the Gamma Decision in isolation… over the regulatory period': [84(a)].	*To be determined*	*To be determined*
		Return of debt	Jemena Electricity Networks (**JEN**) (*applicant*)	The applicant contests the AER's decision to reject the applicant's return of debt for the first year of the 2016-20 regulatory control period. Further, it contests its decision to accept the applicant's proposal to move to a trailing average approach only on the basis that there be a 10 year transition from the previous methodology to the trailing average approach: [63].	*See above*	$79.8m ('the impact of the errors in the Rate on Debt Decision…over the regulatory period': [84(b)].	*To be determined*	*To be determined*
43	**ActewAGL Distribution**[74] *(To be heard November 2016)*	Return on debt	ActewAGL (*applicant*)	The applicant contests the AER's decision to reject its proposal that the 'return of debt should be estimated using the trailing average approach, with no period of transition'. Instead, the AER maintained	s 246(1)(a)-(d)	$33.42m (the impact for the period of the AER's errors): [235.1].	*To be determined*	*To be determined*

[73] ACT 7 of 2016 (application for review of AER distribution determination made in relation the Jemena pursuant to cl 11.60.4(c) of the NEL). Note, the Victorian Minister for Energy, Environment and Climate Change intervened in this application.

[74] ACT 6 of 2016 (application for review of AER full access decision in relation to ActewAGL made pursuant to r 64 of the NGR).

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
				the AER Transition: [79], [89].				
		Gamma	ActewAGL (*applicant*)	The applicant contests the AER's decision to reject its proposed gamma of 0.25, instead adopting a gamma of 0.4: [134].	*See above*	$3.02m (the impact for the period of the AER's errors): [235.2].	*To be determined*	*To be determined*
		Forecast inflation	ActewAGL (*applicant*)	The applicant contests the forecasting methodology adopted by the AER in calculating forecast inflation: [186], [177].	*See above*	$3.33m (the impact for the period of the AER's errors): [235.3].	*To be determined*	*To be determined*
44	**Powercor Australia Ltd**[75] *(To be heard November 2016)*	Gamma	Powercor (*applicant*)	The applicant contests the AER's decision to reject its proposed gamma of 0.25, instead adopting a gamma of 0.4: [64].	s 71C(1)(a)-(d)	$59.4m (the impact for the period of the AER's errors): [158.1].	*To be determined*	*To be determined*
		Labour price growth rates	Powercor (*applicant*)	The applicant contests the AER's decision to reject it proposed labour price growth rate for 2016 which is based on its existing EAs. Instead it adopted 'labour price growth rates for each of the 2016 – 2020 regulatory years based on forecasts of the rate of change in the Victorian EGWW WPI': [116].	*See above*	$18.9m (the impact for the period of the AER's errors): [158.2].	*To be determined*	*To be determined*
45	**CitiPower Pty Ltd**[76]	Gamma	CitiPower (*applicant*)	The applicant contests the AER's decision to reject its proposed gamma of 0.25,	s 71C(1)(a)-(d)	$33.6m (the impact for the	*To be determined*	*To be determined*

[75] ACT 5 of 2016 (application for review of AER distribution determination in relation to Powercor made pursuant to cl 6.11.1 and 11.60.4 of the NER). Note, the Victorian Minister for Energy, Environment and Climate Change intervened in this application.

[76] ACT 4 of 2016 (application for review of AER distribution determination in relation to CitiPower made pursuant to cl 6.11.1 and 11.60.4 of the NER). Note, the Victorian Minister for Energy, Environment and Climate Change intervened in this application.

	Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
	(To be heard November 2016)			instead adopting a gamma of 0.4: [64].		period of the AER's errors): [158.1].		
		Labour price growth rates	CitiPower (*applicant*)	The applicant contests the AER's decision to reject it proposed labour price growth rate for 2016 which is based on its existing EAs. Instead it adopted 'labour price growth rates for each of the 2016 – 2020 regulatory years based on forecasts of the rate of change in the Victorian EGWW WPI': [116].	*See above*	$7.6m (this is the amount of the impact for the period of the AER's errors): [158.2].	*To be determined*	*To be determined*
46	**DBNGP (WA) Transmission Pty Ltd**[77] *(Application for leave and review filed July 2016 – yet to be determined)*	Return on equity	DBNGP (*applicant*)	That applicant contests the ERA's decision to 'not approve its proposed return on equity, or the approach for deriving that return on equity'. The applicant contests the return on equity of 6.98% that the ERA determined and the SL-CAPM that it used in reaching its conclusion: Annexure 1, [17].	s 246(1)(a)-(d)	$181.48m (the amount needed to correct the AER's error): [81(a)].	*To be determined.*	*To be determined*
		Gamma	DBNGP (*applicant*)	The applicant contests the ERA's rejection of the applicant's proposed gamma of 0.25, instead adopting a gamma of 0.4: Annexure 2, [12]-[13].	*See above*	$16.74m (the amount needed to correct the AER's error: [81(f)].	*To be determined*	*To be determined*
		Subsequent costs (non turbine reactive maintenance)	DBNGP (*applicant*)	The applicant contests the ERA's decision that the $6.31m of Non Turbine Reactive Maintenance expenditure did not meet the criteria for conforming capital expenditure, and therefore its decision to not approve	*See above*	$6.31m (the allowance the applicant submits is required):	*To be determined*	*To be determined*

[77] ACT 9 of 2016 (application for review of the ERA decision to give effect to its proposed revisions to an access arrangement for the Dampier to Bunbury Natural Gas Pipeline, pursuant to r 64 of the NGR).

Application	Issue	Party	Complaint	Ground of review[1]	Value	Outcome	Reasons
			its inclusion in the opening capital base for the relevant arrangement period, : Annexure 3 [23], [27].		[81(j)].		
	Definition of P1 Reference service	DBNGP (*applicant*)	The Applicant contests the ERA's decision to reject the proposal in relation to reference services, and to retain the definition of 'Part Haul' service: [81(o)].	*See above*	N/A: [81(o)].	*To be determined*	*To be determined*