Standing Council on Energy and Resources

Expert Panel

Review of the Limited Merits Review Regime

Interim Stage One Report and Consultation Papers 1 and 2

Submission

June 2012

AUSTRALIAN ENERGY REGULATOR

1 Introduction

This submission responds to the Expert Panel's Interim Stage One Report and its Consultation Papers of 30 March 2012 and 27 April 2012 concerning the review of the Limited Merits Review (**LMR**) regime in the *National Electricity Law* (**NEL**) and the *National Gas Law* (**NGL**).

This submission first sets out some background regarding regulatory determinations, review applications, the limited nature of the LMR regime and how the AER assists the Australian Competition Tribunal (**Tribunal**). It then identifies the AER's concerns with the LMR regime and proposes some changes to the LMR regime for the Expert Panel to consider.

Appendix A sets out brief answers to some of the questions posed in the Consultation Papers. Appendix B sets out an analysis of the application of the 'unreasonable' ground of review in the LMR regime to date.[1]

1.1 Summary of the AER's position

Utility regulation can only effectively be undertaken as an administrative process by a dedicated, independent and impartial primary decision-maker. As an administrative process, it is appropriate that it be overseen by judicial review and some form of limited merits review mechanism. Much has been said in support of this by stakeholders, including by the Ministerial Council on Energy (**MCE**) in its decision paper 'Review of Decision-Making in the Gas and Electricity Regulatory Frameworks'.[2] The AER supports this position.

In that decision paper the MCE also outlined the following policy objectives for the LMR regime that continue to be relevant, namely to:

- maximise accountability, regulatory certainty and the conditions for the decision-maker to make a correct initial decision
- achieve the best decisions possible
- ensure that all stakeholders' interests are taken into account, including those of service and network providers, and consumers
- minimise the risk of "gaming", time delays and cost.[3]

In the AER's view, the overarching objective of a merits review mechanism in these circumstances should be to provide an accessible administrative process to identify and correct errors that are material to an electricity network revenue and price determination or a gas pipeline access arrangement determination (**regulatory determinations**). A material error is an error that would make a regulatory determination 'unsafe', in the sense that it would jeopardise the ability of a regulatory determination to contribute to the achievement of the national electricity objective (**NEO**) or the national gas objective (**NGO**) and be consistent with the revenue and pricing principles (**RPP**) if left uncorrected.

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1 The AER has been assisted in the preparation of this submission by Frances Williams and Tami Grealy of Corrs Chambers Westgarth Lawyers.

2 Ministerial Council on Energy, *Review of Decision-making in the Gas and Electricity Regulatory Frameworks, Decision*, May 2006 (**MCE Decision**).

3 ibid., p. 3.

The AER considers the current LMR regime has failed to achieve this overarching objective and those objectives set out by the MCE. This failure arises from three key concerns.

1. **The general lack of participation by other stakeholders**

   There is a general lack of participation by stakeholders other than the regulated electricity network service provider or the regulated gas pipeline service provider (**regulated businesses**) such as users and consumers. This often leaves the AER, as the independent and impartial primary decision-maker, being the only party before the Tribunal that can make submissions to ensure that all relevant issues are canvassed, including those not in the interests of the regulated businesses.

2. **The 'unreasonable' ground of the review and the substitution of preferable decisions by the Tribunal**

   The scope of the 'unreasonable' ground of review is too wide. It correctly captures whether the AER may have misapplied the relevant law or rules. What it does allow, which no other ground of review allows, is for an applicant to dispute the AER's reasoning so that the Tribunal may substitute what it considers to be a preferable decision. Allowing for such disputes to take place is unnecessary because there are sufficient other grounds of review.

3. **The lack of an opportunity to consider the overall balance of a regulatory determination**

   The LMR regime permits the Tribunal to proceed on the incorrect assumption that correcting one part of a regulatory determination will necessarily result in total revenues or prices that are correct and that will contribute to the achievement of the NEO or the NGO and be consistent with the RPP. There is no real opportunity during a review to properly consider the overall balance of a regulatory determination.

1.2 Summary of proposed changes to the LMR regime

To address these concerns, the AER proposes the following changes to the LMR regime for the Expert Panel to consider.

1. **Default position that matters are to be remitted to the AER**

   The default position should be for a regulatory determination to be remitted back to the AER following the finding of an error by the Tribunal. The Tribunal should retain the ability to vary a regulatory determination if a simple correction is all that is required.

   In situations where a regulatory determination is remitted, it is appropriate that the AER have the power to both correct the error and to make any consequential amendments that it considers are necessary to ensure that the resulting total revenue or prices in a regulatory determination will contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

2. Remove the unreasonable ground of review

The unreasonable ground of review should be removed. Alternatively, it should be replaced with a ground of review that better captures the notion that 'the decision was not made in accordance with the law or the rules'.

3. Leave thresholds: 1 per cent of total revenue and a link to the NEO or the NGO and the RPP

The leave thresholds should be amended to require the Tribunal to refuse to grant an applicant leave to apply for the review of an individual alleged error if:

- the alleged error does not impact more than 1 per cent of the total revenue a regulated business may recover over the regulatory control period or access arrangement period and
- left uncorrected, the alleged error will not jeopardise the ability of the total revenue or prices in a regulatory determination to contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

2 Background

2.1 The overall balance of a regulatory determination

The purpose of a regulatory determination under the *National Electricity Rules* (**NER**) and the *National Gas Rules* (**NGR**) is to set the total revenues or prices that a regulated business may recover or charge.

Regulatory determinations are resource-intensive processes. They comprise a large number of smaller decisions or component parts that involve complex economic, financial, engineering, policy and legal considerations. A regulatory determination is also subject to an extensive, iterative and transparent consultation process that can take up to 12 months.[4] For example, a distribution determination for an electricity distribution network service provider (**DNSP**) comprises 21 separate constituent decisions.[5] Each constituent decision is subject to prescriptive requirements that involve the consideration of issues to which there is no one right answer.[6]

A regulatory determination, however, is more than just the sum of its constituent decisions or component parts. A regulatory determination also reflects the AER's regulatory judgment. That regulatory judgment applies an overall balance to a regulatory determination. That overall balance ensures that all of the parts of a regulatory determination work together to result in total revenue or prices that will contribute to the achievement of the NEO or the NGO and be consistent with the RPP.[7] In other words, to result in total revenue or prices that will contribute to achieving efficient investment in and operation of the relevant networks in the long term interests of consumers whilst providing a regulated business with a reasonable opportunity to recover at least its efficient costs and effective incentives to promote economic efficiency.[8]

For example, the AER applies its regulatory judgment to assess how the performance of a regulated business, against previous regulatory determinations and other comparable regulated businesses, should be used to determine forecast expenditure. In particular, where a regulated business has underspent its previous regulatory allowance and benchmarks favourably in comparison to its peers, the AER has used its regulatory judgment to apply a revealed cost approach to determine the forecast operating expenditure.[9]

The AER also applies its regulatory judgment to determine the reasonable level of scrutiny that different issues in a regulatory determination should receive. The number of issues involved in a regulatory determination means that it is neither practical nor reasonable for the AER to precisely scrutinise each issue.

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4 NER, rr 6.8–6.11, 6A.10–6A.14; NGR, Part 8, Divisions 7 and 8.

5 NER, cl 6.12.1.

6 See, for example, *Application by EnergyAustralia and Others (includes corrigendum dated 1 December 2009)* [2009] ACompT 8, [62].

7 The AER is required to make a regulatory determination in a manner that will or is likely to contribute to the achievement of the NEO or the NGO and to take into account the RPP when exercising its discretion: NEL, s 16; NGL, s 28.

8 NEL, ss 7 and 7A; NGL, ss 23 and 24.

9 For example, in determining the forecast operating expenditure allowance for a regulated business, the AER applies a 'base, step and trend' approach. This approach involves escalating an efficient base of expenditure by expected changes in the cost of operating and maintenance expenditure (labour and materials costs), and also by the expected change in the work being undertaken (network growth) adjusted for expected economies of scale. The AER accounts for other factors that are expected to increase the work being undertaken (such as additional activities caused by new regulatory obligations) by adding them to the forecast as step changes.

The overall balance of a regulatory determination means that the correction of an error should not automatically lead to a change in the total revenue or prices. Correcting an error should only lead to a change in the total revenue or prices where that is necessary to preserve that overall balance or to ensure that a regulatory determination will continue to contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

2.2 Review applications

An applicant (which in most cases has been a regulated business) is not required to consider the overall balance of a regulatory determination when it applies for review. An applicant may choose the issues it wishes to review without regard to the consequences those issues may have on the overall balance of a regulatory determination. On many occasions, a single issue chosen for review will be exposed to a greater level of scrutiny and demand for precision before the Tribunal that the AER considered practical or reasonable during the process of making the regulatory determination.

To apply for review, the 'leave thresholds' in the LMR regime only require the applicant to satisfy the Tribunal that:

- the application specifies one of the following grounds of review:
  - the AER made a material error of fact in its findings of fact (or errors of fact which in combination are material)
  - the exercise of the AER's discretion was incorrect, having regard to all the circumstances
  - the AER's decision was unreasonable, having regard to all the circumstances
- there is a serious issue to be heard and determined
- the amount that is specified in or derived from the issue exceeds the revenue threshold of the lesser of $5 million or 2 per cent of the average annual regulated revenue of a regulated business and
- the issue has been raised in the AER's decision-making process.[10]

In the AER's experience, it is easy for an applicant to satisfy these leave thresholds. To establish a 'serious issue', an applicant only needs to establish that there is a 'sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial'.[11] The effective revenue threshold is also usually $5 million, given the typical size of the annual regulated revenues of a regulated business. As shown in table 1.1 below, in most cases $5 million is less than 0.5 per cent of the total revenue of a regulated business over the regulatory control period or access arrangement period.

[10] NEL, ss 71C, 71E and 71F; NGL, ss 246, 248 and 249. Note the Tribunal determined that the revenue threshold is the aggregate amount across all grounds of review affecting revenue and is not to be considered separately for each ground of review: *Application by Energex Limited (No 4)* [2011] ACompT 4, [52].

[11] *Re: Application by ElectraNet Pty Ltd* [2008] ACompT 1, [39] and [42].

2.3 The scope of a review is on limited grounds

Once leave has been granted, the Tribunal's role is to identify error. If an error is established, the Tribunal steps into the AER's shoes and is able to perform all the functions and exercise all the powers of the AER.[12] The Tribunal must then determine whether to affirm, set aside, vary or remit the regulatory determination back to the AER.[13] In so doing, the LMR regime allows the Tribunal to determine what it considers to be the preferable decision.

What the Tribunal must affirm, set aside, vary or remit is the 'reviewable regulatory decision'. The definition of a reviewable regulatory decision in the NEL and the NGL refers to a regulatory determination.[14] Importantly, this definition does not refer to a part of a regulatory determination.

However, in the AER's experience, the limited nature of the LMR regime does not allow for an entire regulatory determination to be reviewed. An applicant must seek leave for specific grounds of review in its review application. The Tribunal has also adopted the view that the scope of a review and the relief it may provide is limited to those grounds of review specified for which leave has been granted. For example, in *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8, the Tribunal stated:

> It is quite clear that the merits review which the NEL permits under Subdiv 2 of Pt 6, Div 3A of the NEL is a limited merits review circumscribed by the provisions of that subdivision.
>
> The relief which the Tribunal is empowered to grant in respect of a review application is set out in s 71P of the NEL. That relief is relief directed to the reviewable regulatory decision in respect of which leave to apply for a review has been granted by the Tribunal. Although the relief is directed to the ultimate decision made by the AER, the basis upon which that relief might be granted is restricted to those grounds for review which have been the subject of leave granted by the Tribunal and which otherwise meet the requirements of s 71C of the NEL.[15]

It is also important to recognise that the LMR regime does allow the AER to raise:

- a matter not raised by the applicant or an intervener that relates to a ground for review
- a matter raised in support of a ground for review, raised by the applicant or an intervener and
- possible outcomes or effects on the decision being reviewed that may occur as a result of the Tribunal setting aside or varying the decision.[16]

As discussed in the next section, the AER's practice is to raise matters not raised by the applicant or an intervener that relates to or in support of a ground for review to ensure that all relevant issues are canvassed before the Tribunal. However, the AER has been unable to effectively raise possible outcomes or effects to overcome the limited scope of a review. This is discussed further in section 3.3 below.

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12 NEL, s 71P(3); NGL, s 259(3).

13 NEL, s 71P(2); NGL, s 259(2).

14 NEL, s 71A; NGL, s 244.

15 *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8, [58] and [59].

16 NEL, s 71O(1); NGL s 258(1).

2.4 The AER assists the Tribunal

The AER actively and objectively assists the Tribunal. In doing so, the AER does not act as a protagonist. Instead, it acts to ensure that that all relevant issues are canvassed before and understood by the Tribunal. For example, the AER's usual practice is to make submissions to the Tribunal that:

- explain the Tribunal's functions and powers and the relevant procedures and processes[17]
- adduce evidence and present its view where it does not agree there is an error[18]
- promptly concede where it agrees there is an error, to minimise the time and expense incurred before the Tribunal[19]
- raise issues of public interest that it considers the Tribunal ought to be aware of.[20]

The detail and the scope of the submissions the AER makes depends on whether there is an effective contradictor present and the likelihood of all of the relevant issues being otherwise canvassed before the Tribunal.

As the independent and impartial primary decision-maker, the AER considers this to be the appropriate role for it given the relevant provisions in the NEL and the NGL and the obligation on it to act as a model litigant under the *Legal Services Directions* 2005 (**LSD**).[21]

The AER is the independent and impartial primary decision-maker

The AER does not act in the interests of any particular party. The AER needs to maintain its independence and impartiality in the event the Tribunal remits a regulatory determination to it to reconsider or remake.

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17 See, e.g., Transcript of Proceedings, Australian Competition Tribunal, No. ACT 6 of 2010, No. ACT 7 of 2010, No. ACT 8 of 2010, No. ACT 9 of 2010, No. ACT 10 of 2010, Melbourne, 10.18am, 20 June 2011, Day 1, pp. 2–47 (Ms Sloss SC for the AER explaining overall the scope of the Victorian merits review).

18 See, e.g., Transcript of Proceedings, Australian Competition Tribunal, No. ACT 6 of 2010, No. ACT 7 of 2010, No. ACT 8 of 2010, No. ACT 9 of 2010, No. ACT 10 of 2010, Melbourne, 9.25am, 4 July 2011, Day 6, pp. 400–415 (Mr Star for the AER explaining the AER's view on the indexation of the regulatory asset base ground of review); see also AER, Outline of Submissions on Indexation of the Regulatory Asset Base, 15 March 2011.

19 See, e.g., *Application by United Energy Distribution Pty Limited* [2012] ACompT 1, [387]–[391] in respect of the debt risk premium annualisation issue, [463]–[465] in respect of the Broadmeadows capital expenditure issue and [540]–[546] in respect of the efficiency carryover mechanism vegetation management issue.

20 See, e.g., Australian Competition Tribunal, No. ACT 6 of 2010, No. ACT 7 of 2010, No. ACT 8 of 2010, No. ACT 9 of 2010, No. ACT 10 of 2010, Melbourne, 9.25am, 24 June 2011, Day 4, pp. 235–263 (Ms Sloss SC for the AER explaining the AER's decision to make an adjustment to close out the previous regulator's (the Essential Services Commission of Victoria) S-factor incentive scheme); see also AER, *Outline of Submissions concerning the close out of the ESCV S-factor scheme*, 15 February 2011.

21 Generally, a primary decision-maker not acting as a protagonist before a merits review tribunal is consistent with the "*Hardiman*" principle expressed by the High Court in the case *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35 and 36. As to the application of the *Hardiman* principle by primary decision-makers before merits review tribunals, see: *Re New Broadcasting Ltd and Australian Broadcasting Tribunal* (1987) 12 ALD 1, 11 and 12; *Geographic Indications Committee v O'Connor* (2000) 32 AAR 169, [35] and [45] and *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 442, [27]–[37].

The relevant provisions in the NEL and the NGL

The NEL and the NGL provide that the AER is a party to a review.[22] As noted above, the NEL and the NGL also allow the AER to raise possible outcomes or effects on the decision being reviewed that may occur as a result of the Tribunal setting aside or varying the decision.[23]

Model litigant obligation

As a Commonwealth agency, the LSD places an obligation upon the AER to act as a model litigant. This obligation requires the AER to use its best endeavours to assist the Tribunal in making a decision and to act honestly and fairly in handling litigation.[24] This includes not requiring other parties in a proceeding to prove a matter that the AER knows to be true and not relying on technical defences unless the AER's interests would be prejudiced by the failure to comply with a particular requirement.[25]

22 NEL, s 71N(b); NGL, s 257(b).

23 NEL, s 71O(1); NGL, s 258(1).

24 LSD, Appendix B, [2] and [4]. Note 1 to paragraph 2 specifies that 'litigation' includes merits review before tribunals.

25 ibid., [2](e)(i) and [2](g).

3 Concerns

In the AER's view, the overarching objective of a merits review mechanism in these circumstances should be to provide an accessible administrative process to identify and correct errors that are material to a regulatory determination. A material error is an error that would make a regulatory determination 'unsafe', in the sense that it would jeopardise the ability of the regulatory determination to contribute to the achievement of the NEO or the NGO and be consistent with the RPP if left uncorrected. In other words, the total revenue or prices in a regulatory determination should only be adjusted if the overall balance between achieving efficient investment in and operation of the relevant networks in the long term interests of consumers and providing a regulated business with a reasonable opportunity to recover at least its efficient costs and effective incentives to promote economic efficiency is jeopardised.

The AER considers the LMR regime has failed to achieve this overarching objective and those objectives set out by the MCE. This failure arises from three key concerns:

1. the general lack of participation by other stakeholders
2. the scope of the unreasonable ground and the Tribunal's ability to substitute what it considers to be a preferable decision and
3. the lack of a real opportunity during a review to properly consider the overall balance of a regulatory determination.

3.1 The general lack of participation by other stakeholders

The LMR regime was clearly designed to allow stakeholders other than the regulated businesses, such as user and consumer groups, to participate in a review.[26] To date the level of participation of such stakeholders has been poor. Such stakeholders face significant practical difficulties that make participating in the process under the LMR regime prohibitive, including:

- high costs
- insufficient resources
- short timeframes for applying for leave and the making of submissions and
- a lack of access to sufficient information.

These practical difficulties largely arise because of the complexity of a regulatory determination and the formality of the Tribunal's processes. Applying for leave, making written and oral submissions or otherwise effectively partaking in the process generally requires a party to incur high costs in respect of sophisticated resources (legal and other). The compressed timeframes in the NEL and the NGL serve to further compound these difficulties.

This often leaves the AER, as the independent and impartial primary decision maker, being the only party before the Tribunal that can make submissions to ensure that all relevant issues are canvassed, including those not in the interests of the regulated businesses.

[26] See MCE Decision, pp. 16–20. See also the second reading speech accompanying the National Gas (South Australia) Bill (South Australia, House of Assembly, Debates, 9 April 2008, p. 2893 (Hon PF Conlon, Minister for Energy)).

The AER considers that the provisions that allow other stakeholders to participate and intervene in a review should be retained.[27] Ultimately, the poor participation of other stakeholders raises issues of resources and their participation during the AER's primary decision-making process. These issues fall outside the scope of the Expert Panel's review.

However, it should be recognised that the AER is better placed than the Tribunal to afford other stakeholders such as user and consumer groups an opportunity to participate. This is one of the benefits of remitting a regulatory determination to the AER.

3.2 The unreasonable ground of review and the substitution of preferable decisions

The scope of the 'unreasonable' ground of review is too wide. It correctly captures whether the AER may have misapplied the relevant law or rules. What it does allow, which no other ground of review allows, is for an applicant to dispute the AER's reasoning so that the Tribunal may substitute what it considers to be a preferable decision. Allowing for such disputes to take place is unnecessary because there are sufficient other grounds of review.

The concept of an unreasonable decision is already a recognised ground in judicial review. In judicial review, the ground of 'Wednesbury unreasonableness' provides an avenue of relief to an applicant in the event the AER's reasoning is 'so unreasonable that no reasonable [decision-maker] could ever have to come to it'.[28]

In rationalising the inclusion of the unreasonable ground of review in the LMR regime, the MCE originally stated:

> As to the second ground of review proposed in the discussion paper (error in the exercise of discretion), legal opinions commissioned by several stakeholders argue that the second ground should be recast, along the following lines: "that the decision is incorrect or is unreasonable having regard to all the circumstances". This is because the statute authorising the decision may or may not confer a discretion in the legal sense, and arguments about this issue are best avoided in a merits review process. There might be situations where the AER or other decision-maker misconceived or misapplied a statutory test that does not involve exercise of a statutory discretion, and if so, this would not be covered by the existing wording found in s.39(2)(a)(ii) of the GPAL. The MCE considers that there are valid reasons to recast the second ground of review proposed by SCO in the discussion paper, and intends to split that ground into two as follows: "that the exercise of the decision-maker's discretion was incorrect having regard to all the circumstances", and "that the decision-maker's decision was unreasonable having regard to all the circumstances.[29]

However, in determining whether a decision is unreasonable, the Tribunal has applied the following statement of the Full Federal Court:

> The concept of 'unreasonableness' imports want of reason. That is to say the particular discretion exercised by the [regulator] is not justified by reference to its stated reasons. There may be an error in logic or some discontinuity or non sequitur in the reasoning. It may be that the decision has an element of arbitrariness about it because there is an absence of reason to explain the discretionary choices made by the [regulator] in arriving at its conclusion.[30]

The scope of the unreasonable ground of review as applied by the Tribunal captures concerns broader than just than the legitimate concern in administrative review, namely where the AER may

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[27] NEL, ss 71L and 71N; NGL, ss 255 and 257.

[28] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 and 234.

[29] MCE Decision, p. 24.

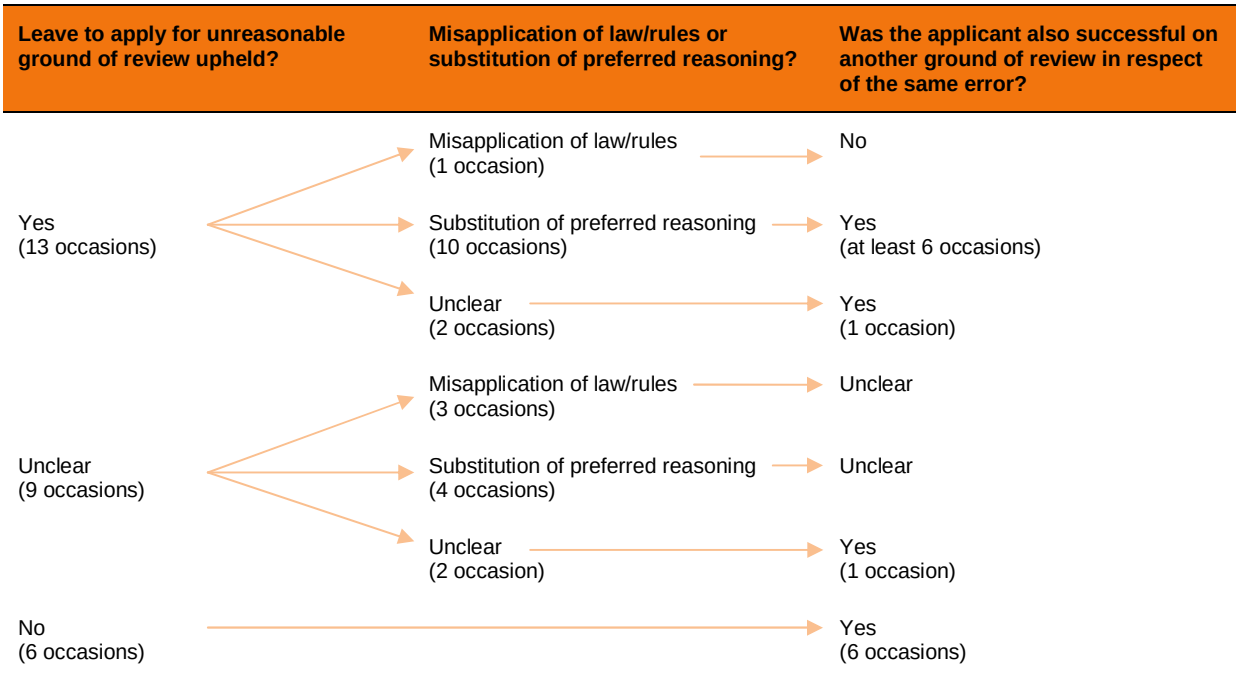
[30] *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33, [178]. The Tribunal applied this statement in *Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3, [65] and in *Application by EnergyAustralia and Others (includes corrigendum dated 1 December 2009)* [2009] ACompT 8, [66] and [67].

have 'misconceived or misapplied a statutory test that does not involve exercise of a statutory discretion'.

The unreasonable ground of review has provided a platform for an applicant to dispute what should be the preferred reasoning in a regulatory determination. This leads to disputes before the Tribunal about what should be the preferred decision. Essentially, disputes about what is a 'want of reason' or an 'error in logic' are matters of opinion to which reasonable minds can differ. This is especially so in the context of a regulatory determination, which involves complex economic, financial, engineering, policy and legal considerations to which there is no one right answer. While the Tribunal has also recognised that in many areas reasonable persons can come to opposite conclusions, and that the unreasonable ground of review is not a mandate for substitution of the Tribunal's preferred view,[31] the Tribunal has often used this ground to substitute the AER's reasons. As shown in Figure 1.1 below, in cases where the unreasonable ground of review was upheld, the Tribunal has substituted the AER's reasoning in at least 77 per cent of cases (at least 10 of 13 decisions). Instances where the AER was found to have misapplied the law or rules account for the minority of cases.

Figure 1.1 below illustrates the number of times the Tribunal has substituted the AER's reasoning or found that the AER has misapplied the relevant law and rules when it has upheld an unreasonable ground of review. It also shows that in a significant number of the cases where the unreasonable ground of review has been upheld, the regulated business has also obtained relief in respect of the same error under another ground of review. The fact that a regulated business often obtains concurrent relief through another ground of review squarely raises the question of what practical additional relief does the unreasonable ground of review provide.

Figure 1.1: summary of the unreasonable ground of review cases[32]



Source: Tribunal decisions; review applications

[31] *Application by ActewAGL Distribution* [2010] ACompT 4, [35]; *Application by United Energy Distribution Pty Limited* [2012] ACompT 1, [50].

[32] Appendix A to this submission sets out the analysis underlying Figure 1.1. This analysis is based on those review applications where the Tribunal upheld at least one unreasonable ground of review. In some cases the Tribunal does not clearly identify the particular ground that was upheld.

As a point of comparison, it is useful to consider the merits review regime that oversees the smart meter budget and charges decisions that the AER is required to make in Victoria.[33] AER decisions under this merits review regime are subject to merits review in the Tribunal on the grounds of bias or material error of fact but not on grounds of unreasonableness. On 26 April 2012, the Tribunal delivered its decision on SP AusNet's appeal of the AER's 2012–15 budget and charges smart meters determination.[34] The appeal concerned SP AusNet's claim, among other things, that the AER mis-described its total budget as being the costs of the communications technology it had employed, WiMAX. The Tribunal reasoned that there was no error of fact and stated:

> SP AusNet's case in relation to the AER's decision about increased costs proceeded on the basis that the AER had, in determining that "WiMAX costs" had increased substantially, fallen into error because the components of the AMI rollout that were directly and explicitly attributable to WiMAX had not increased in price dramatically. It became clear in the course of oral argument, as well as in written submissions, that SP AusNet and the AER were at something of cross purposes. It was put for the AER that, in determining that there had been substantial increases in "WiMAX costs" it had in fact determined that there had been a substantial increase in the costs of the AMI program, of which the WiMAX technology is a crucial component.
>
> It appears clear from the Final Determination that the AER did use the term WiMAX as a proxy for the AMI rollout. This is made clear in the context of the increase in costs where the AER said "SP AusNet's circumstances reveal that the internal estimates of expenditure required for the AMI roll-out have increased" before going on to describe the specific increases in "the estimated cost of WiMAX": Final Determination, pages 49-50. The "estimated cost of WiMAX" the AER described was, as SP AusNet submitted, the cost of the whole program.
>
> It is apparent that the AER did not make an error of fact in attributing to WiMAX the increases in costs for the whole program. What it did was describe the program as WiMAX on the basis that the choice of technology was crucial to the program structure and cost. This is clearly the case.[35]

If an unreasonable ground of review was available, it may have been open to SP AusNet to also claim that the mis-description of the total budget revealed an error in logic in the reasoning behind the AER's use of the term 'WiMAX'. However, as this case demonstrates, if the unreasonable ground is not available, the Tribunal can still scrutinise the steps and the logic in the AER's reasoning when considering whether there is a material error of fact. In this case, the material error of fact ground of review was a sufficient basis for SP AusNet to seek a remedy, although ultimately it did not succeed.[36]

3.3 The lack of an opportunity to consider the overall balance of a regulatory determination

The LMR regime permits the Tribunal to proceed on the incorrect assumption that correcting one part of a regulatory determination will necessarily result in total revenues or prices that are correct and that will contribute to the achievement of the NEO or the NGO and be consistent with the RPP. There is no real opportunity during a review to properly consider the overall balance of a regulatory determination.

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33 AER, *Final Determination, Victorian Advanced Metering Infrastructure Review, 2012–15 budget and charges applications*, October 2011. The merits review regime set out in sections 55 and 56 of the *Essential Services Commission Act 2001* (Vic) applies to the AER's smart meter budget and charges decision: *National Electricity (Victoria) Act 2005* (Vic) s 29.

34 *Appeal by SPI Electricity Pty Ltd* [2012] ACompT 11.

35 *Appeal by SPI Electricity Pty Ltd* [2012] ACompT 11, [119]–[121].

36 On 28 November 2011, SP AusNet also applied for judicial review of the AER's 2012–15 budget and charges smart meters determination. That appeal remains on foot at the time of this submission.

As noted above, the LMR regime allows the AER to raise the following types of 'related matters' during a review:

- a matter not raised by the applicant or an intervener that relates to a ground for review
- a matter raised in support of a ground for review, raised by the applicant or an intervener
- a possible outcome or effect on the reviewable regulatory decision being reviewed that it considers may occur as a consequence of the Tribunal making a determination setting aside or varying the reviewable regulatory decision.[37]

The MCE's intention in allowing the AER to raise these related matters was to allow a review application to operate as a broad 're-opener' of a regulatory determination. Relevantly, the MCE stated:

> Once proceedings are commenced, the original decision-maker will become a party to proceedings. The original decision-maker will be able to raise new grounds of review, that is, review will not be limited to only those grounds advanced by the applicant. This measure allows an application for review to operate as a broad "re-opener" if the original decision-maker so elects, notwithstanding the limited grounds of review put forward by the applicant.[38]

In theory, the ability to raise related matters (or as the MCE contemplated, new grounds of review to re-open other aspects of a regulatory determination) would allow the AER to raise the considerations or consequential amendments it considers necessary to ensure that the overall balance of a regulatory determination is preserved during a review. However, these provisions have not proven to be effective.

It is important to recognise that the AER routinely raises related matters that relate to or are in support of those grounds of review. The AER does so ensuring that all relevant issues are canvassed before the Tribunal.

However, the AER has not been able to raise the possible outcomes or effects that may occur as a consequence of a Tribunal's determination other than in theory or principle.[39] In the AER's experience, it is not possible to undertake the necessary work to identify all the relevant consequential changes to ensure that the overall balance of a regulatory determination is preserved within the timeframes contemplated by the LMR regime. To do so involves the AER having to pre-empt which grounds of review (and the basis upon which) the Tribunal may possibly uphold and how this might affect the overall balance of a regulatory determination. This is compounded where multiple parties and multiple grounds of review are heard together, as the AER would need to make multiple

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37 NEL, s 71O(1); NGL, s 258(1).

38 MCE Decision, p. 20. See also the second reading speech accompanying the National Gas (South Australia) Bill (South Australia, House of Assembly, Debates, 9 April 2008, p. 2893 (Hon PF Conlon, Minister for Energy)) and the second reading speech accompanying the National Electricity (South Australia) (National Electricity Law—Miscellaneous Amendments) Amendment Bill (South Australia, House of Assembly, Debates, 27 September 2007, p. 967 (Hon PF Conlon, Minister for Energy).

39 The AER has previously raised possible outcomes or effects under section 71O(1)(b) of the NEL in submissions to the Tribunal on:

- 2 September 2010 in *Application by Energex Limited (No 2)* [2010] ACompT 7, in respect of consequential changes to the market risk premium as a result of the Tribunal's gamma decision for Ergon Energy and ETSA Utilities and
- 15 March 2011 in *Application by United Energy Distribution Pty Limited* [2012] ACompT 1, in respect of consequential changes to the efficiency carryover amounts for Jemena Electricity Networks that would result from changing the operating expenditure allowance for the enterprise support functions issue.

assessments extending to all the permutations that the Tribunal might arrive at in terms of the grounds of review it might uphold.[40]

The case for remitting a regulatory determination to the AER

The point, however, is not that there needs to be a mechanism that provides an opportunity for the AER to broaden a review before the Tribunal. What is needed is a clear opportunity for the AER to undertake a reassessment of the implications that may flow from correcting an error on the overall balance of a regulatory determination. Practically, this can only be achieved if the regulatory determination is remitted to the AER. The AER recognises that the merits of remitting matters back to the AER have been canvassed by the MCE. Relevantly, the MCE stated:

> After consideration of the various issues involved, the MCE considers that the ACT should have all the powers and remedies available to it as set out in Model A in the discussion paper, on the basis that these powers are desirable for the ACT to possess in order that it can carry out merits review efficiently and effectively. If the ACT were obliged to send every matter back to the AER, AEMC or relevant Minister for re-determination, additional costs would be incurred by all parties and unnecessary delays caused, with the increased regulatory uncertainty that such delays involve. This would be so particularly where the "errors" to be corrected are relatively small, and the ACT is of the view that it is well suited and able to correct that "error" by substituting a new decision.[41]

The AER does not agree that the possible delays outweigh the benefits of remitting regulatory determinations back to the AER. Except for where there is agreement between all the parties regarding the correction of an error, the Tribunal's role ought to be confined to identifying error. It should also be limited to substituting the AER's decision for a correct decision only if the Tribunal is satisfied that '*the "errors" to be corrected are relatively small, and the [Tribunal] is of the view that it is well suited and able to correct that "error" by substituting a new decision*'.[42] In the AER's view, the Tribunal is not well suited to undertake a reassessment of all the relevant implications that may flow from correcting an error.

The default position should therefore be that the regulatory determination is remitted to the AER following the finding of an error by the Tribunal. In situations where matters are remitted, it is appropriate to limit the variations to those amendments required to address the error as found by the Tribunal. This would include any consequential amendments that the AER considers are necessary to ensure that the resulting total revenue or prices in a regulatory determination will contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

The current leave thresholds

It is important that there are effective limitations within a limited merits review mechanism to ensure that only alleged errors that are material to a regulatory determination can be brought before the Tribunal. Material errors are those that would leave a regulatory determination unsafe in the sense that it would jeopardise the ability of a regulatory determination to contribute to the achievement of the NEO or the NGO and be consistent with the RPP if left uncorrected.

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40 The Tribunal has also recognised the limitations on the AER's ability to raise related matters. In *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8, [61], the Tribunal stated (emphasis added):

> In addition, the AER is entitled to raise matters in accordance with s 71O(1) of the NEL. That is to say, the AER may raise a matter not raised by the applicant or an intervener that relates to a ground of review, or a matter raised in support of a ground of review, raised by the applicant or an intervener, or may raise a possible outcome or effect of a likely outcome in the course of a review. *However, the AER's entitlement to bring forward new material in a review application is very limited indeed*.

41 MCE Decision, pp. 25 and 26.

42 ibid., p. 26.

Under the LMR regime, there are two limitations that are ineffective in this regard.

First, the effective revenue threshold in order for the Tribunal to grant leave to apply is in most cases $5 million. This is too low. As shown in Table 1.1, the effective revenue threshold is disproportionately small to the size of revenues typically involved in a regulatory determination. Further, the Tribunal has determined that it is the combined revenue impact of all issues that are sought by an applicant to which the revenue threshold applies.[43] This undermines the MCE's intention to exclude claims being brought before the Tribunal that are relatively small or that do not meaningfully affect the regulatory determination.[44]

Table 1.1: Revenue thresholds under the LMR regime ($2010, million)

Regulated business		Total revenue	Average annual revenue	2 per cent of average annual revenue	Effective revenue threshold	Revenue threshold v total revenue
Electricity transmission network service providers						
TransGrid	NSW	3378.1	675.6	13.5	5.0	**0.1%**
Transend	TAS	900.0	180.0	3.6	3.6	**0.4%**
Energex	QLD	6388.9	1277.8	25.6	5.0	**0.1%**
Ergon Energy	QLD	5980.4	1196.1	23.9	5.0	**0.1%**
Electricity distribution network service providers						
AusGrid	NSW	8191.7	1638.3	32.8	5.0	**0.1%**
Endeavour Energy	NSW	4214.5	842.9	16.9	5.0	**0.1%**
Essential Energy	NSW	5326.3	1065.3	21.3	5.0	**0.1%**
Powercor Australia	VIC	2295.8	459.2	9.2	5.0	**0.2%**
SP AusNet	VIC	2270.9	454.2	9.1	5.0	**0.2%**
United Energy Distribution	VIC	1529.5	305.9	6.1	5.0	**0.3%**
CitiPower	VIC	1088.8	217.8	4.4	4.4	**0.4%**
Jemena Electricity Networks	VIC	915.8	183.2	3.7	3.7	**0.4%**
ETSA Utilities	SA	3198.5	639.7	12.8	5.0	**0.2%**
ActewAGL	ACT	739.8	148.0	3.0	3.0	**0.4%**
Gas transmission pipeline service providers						
Amadeus Gas Pipeline	NT	146.5	29.3	0.6	0.6	**0.4%**

[43] NEL, s 71F; NGL, 249. See also footnote 10 above.

[44] MCE Decision, p. 18.

Regulated business		Total revenue	Average annual revenue	2 per cent of average annual revenue	Effective revenue threshold	Revenue threshold v total revenue
Gas distribution pipeline service providers						
APT Allgas	QLD	333.9	66.8	1.3	1.3	**0.4%**
Envestra	QLD	320.1	64.0	1.3	1.3	**0.4%**
Jemena Gas Networks	NSW	2140.0	428.0	8.6	5.0	**0.2%**
ActewAGL	NSW	287.9	57.6	1.2	1.2	**0.4%**
Envestra	SA	1032.0	206.4	4.1	4.1	**0.4%**

Source: AER regulatory determinations

Second, the requirement that 'there is a serious issue to be heard and determined' simply requires that the applicant must prove a prima facie case, which has 'a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial'.[45] Whilst this requirement plays the important role of excluding frivolous claims, it says nothing about whether an alleged error is material.

Proposed leave thresholds

To ensure that only material errors may be brought for review, a more appropriate revenue threshold is 1 per cent of the total revenue of a regulated business over the relevant regulatory control period or access arrangement period for an individual issue. Table 1.2 shows what 1 per cent of the regulated businesses' total revenues are under their current regulatory determinations.

The requirement for there to be a serious issue to be heard and determined should be retained.

However, a new leave threshold should be introduced that requires a regulated business to establish that to not correct the alleged error would leave the regulatory determination unsafe in the sense that it would jeopardise its ability to contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

Table 1.2: Proposed 1 per cent of total revenue threshold ($2010, million)

Regulated business		Total revenue	1 per cent of total revenue
Electricity transmission network service providers			
TransGrid	NSW	3378.1	**33.8**
Transend	TAS	900.0	**9.0**
Energex	QLD	6388.9	**63.9**
Ergon Energy	QLD	5980.4	**59.8**

[45] See footnote 11 above.

Regulated business		Total revenue	1 per cent of total revenue
Electricity distribution network service providers			
AusGrid	NSW	8191.7	**81.9**
Endeavour Energy	NSW	4214.5	**42.1**
Essential Energy	NSW	5326.3	**53.3**
Powercor Australia	VIC	2295.8	**23.0**
SP AusNet	VIC	2270.9	**22.7**
United Energy Distribution	VIC	1529.5	**15.3**
CitiPower	VIC	1088.8	**10.9**
Jemena Electricity Networks	VIC	915.8	**9.2**
ETSA Utilities	SA	3198.5	**32.0**
ActewAGL	ACT	739.8	**7.4**
Gas transmission pipeline service providers			
Amadeus Gas Pipeline	NT	146.5	**1.5**
Gas distribution pipeline service providers			
APT Allgas	QLD	333.9	**3.3**
Envestra	QLD	320.1	**3.2**
Jemena Gas Networks	NSW	2140.0	**21.4**
ActewAGL	NSW	287.9	**2.9**
Envestra	SA	1032.0	**10.3**

Source: AER regulatory determinations

4 Proposed amendments to the NEL and the NGL

To address the concerns discussed in this submission, the AER proposes the following changes to the LMR regime for the Expert Panel to consider.

1. Default position that matters are to be remitted to the AER

The default position should be that a regulatory determination is remitted to the AER following the finding of an error by the Tribunal. The Tribunal should retain the ability to vary a regulatory determination if a simple correction is all that is required.

In situations where a regulatory determination is remitted, it is appropriate that the AER have the power to both correct the error and to make any consequential amendments that it considers are necessary to ensure that the resulting total revenue or prices in a regulatory determination will contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

This would provide a clear opportunity for the AER to undertake a reassessment of the implications that may flow from correcting error on the overall balance of a regulatory determination.

2. Remove the unreasonable ground of review

The unreasonable ground of review should be removed. Alternatively, it should be replaced with a ground of review that more accurately captures the notion that 'the decision was not made in accordance with the law or the rules'.

This would prevent applicants from bringing disputes on issues simply as to the reasoning and prevent the Tribunal from substituting the AER's reasoning and determining what it considers to be a preferable decision.

3. Leave thresholds: 1 per cent of total revenue and a link to the NEO or the NGO and the RPP

The leave thresholds should be amended to require the Tribunal to refuse to grant an applicant leave to apply for the review of an individual alleged error if:

- the alleged error does not impact more than 1 per cent of the total revenue a regulated business may recover over the regulatory control period or access arrangement period and
- left uncorrected, the alleged error will not jeopardise the ability of the total revenue or prices in a regulatory determination to contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

This would ensure that only errors that are material to the regulatory determination may be brought before the Tribunal.

Appendix A Select responses to questions in Consultation Papers 1 and 2

This Appendix sets out responses to some of the questions in the Expert Panel's Consultation Papers 1 and 2. No responses to the questions that concern comparisons between the LMR regime and other regimes have been provided. Given the legislative, evidentiary and context differences between the LMR regime and other regimes, and the differences in the associated regulatory decisions, the AER considers that there is limited utility in making such comparisons.

1.1 Policy intent

Consultation Paper 1

Question: *Is it reasonable for us to rely on the MCE's document Review of Decision-Making in the Gas and Electricity Regulatory Frameworks in identifying and interpreting the relevant policy intentions?*

Are there other factors that we should consider?

Response: Yes, it is reasonable to rely on the policy intentions expressed by the MCE in that document.

The other primary factors to consider are:

- the importance of ensuring there is the ability for either the Tribunal or the AER to preserve the overall balance of a regulatory determination following the correction of an error and
- the ability of the Tribunal to substitute what it considers to be a preferable decision.

These issues are further discussed in sections 3.2 and 3.3 of this submission.

Consultation Paper 2

Question: *Is it appropriate to supplement statements made in the MCE Decision document and interpretation based on overarching policy objectives with inferences that might be derived from the decisions themselves?*

Specifically, given that the SCO's Regulatory Impact Statement set out four options (Status Quo, Judicial Review only, Limited Merits Review, Full Merits Review), can the Panel reasonably use the choices made (first the reduction to two options, then the choice of Limited Merits Review) to make inferences about the relative weights to be given to the various criteria set out in the Decision document?

Response: It is a matter for the Expert Panel as to the weight it assigns to each criterion. However, notwithstanding the inferences that could be made as to the relative

weights assigned by the MCE in its decision document, the AER considers that each criterion is equally important.

1.2 The Panel's broad approach

Consultation Paper 1

Question: *Are there any further types of factors to which we should give particular attention in assessing performance?*

Response: Further factors to give particular attention include:

- the availability of judicial review and
- the timing of Tribunal decisions.

As to the availability of judicial review, it is relevant to pay particular attention to the fact that regulated businesses have at times made concurrent LMR regime and judicial review applications. For example in 2010:

- United Energy Distribution applied for review under the LMR regime and judicial review at the Federal Court in respect of an operating expenditure matter and an the application of an incentive scheme known as "S-factor". Following the Tribunal's decision in *Application by United Energy Distribution Pty Limited* [2012] ACompT 1, United Energy Distribution discontinued its judicial review application
- Ergon Energy applied for review under the LMR regime and judicial review at the Federal Court in respect of a street lighting issue and the assumed utilisation of imputation credits (gamma). Shortly thereafter Ergon Energy applied to the Federal Court for its judicial review application to be stayed pending the Tribunal's decision. The Tribunal's decision granted Ergon Energy relief in respect of gamma but not the street lighting issue: see *Application by Energex Limited (No 2)* [2010] ACompT 7 and *Application by Ergon Energy Corporation Limited (Street Lighting Services)* (No 6) [2010] ACompT 14. Ergon Energy then reinstated its judicial review application. In April 2012, the Federal Court dismissed its application: see *Ergon Energy Corporation Ltd v Australian Energy Regulator* [2012] FCA 393.

As to the timing of Tribunal decisions, this is greatly influenced by:

- the Tribunal's ability to case manage large matters with multiple parties and issues
- the availability of adequate resources for the Tribunal to deal with hearings in concurrent applications for review.

The Tribunal is required to hand down its decision within 3 months of leave being granted in respect of an application.[46] However, this timeframe can be extended and this has occurred on more than one occasion.[47] For example:

- in the NSW electricity reviews, which concerned three DNSPs, one transmission service provider and another transmission service provider operating in Tasmania (whose reviews were being done concurrently), two interveners (only one participated at the hearing) and numerous overlapping issues, the hearing was for 10 days with extended sitting days and within approximately 3 months of filing of the applications

- in the Victorian electricity reviews, which concerned five DNSPs and two interveners, and numerous overlapping topics, the hearing took 12 days with extended hours spread over five weeks and within approximately seven months of the filing of the applications

- in the Queensland/South Australia electricity reviews, which concerned three DNSPs, one major overlapping topic (the assumed utilisation of imputation credits or "gamma") and other topics by individual DNSPs, the hearing was split into two tranches with the first tranche within four months of the applications being filed and the second a couple of months later.

In each case, there was a further period between the hearing and the reasons being delivered, and often an additional period before the final determinations were made. Whilst there may be good reasons for extending the timeframe, on occasion the review process is extended significantly into the regulatory control period or an access arrangement period to which the regulatory determination on review relates.

This results in adjustments needing to occur across the remaining years of that regulatory control period or access arrangement period. A regulated business is largely indifferent to the impact of extending the review process for the reason that it will nearly always be able to recover its costs. For consumers, the extension of time means that any increase in revenue is to be recovered over a shorter timeframe which may result in a 'price spike'.

The timing of WACC decisions in the Tribunal causes ongoing issues with concurrent AER determination processes, often resulting in applications for review including these issues as a 'matter of course' pending a Tribunal decision on an issue. For example, the issue of gamma was reserved in respect of applications made by Energex, Ergon Energy and ETSA Utilities. While reserved, it was raised by all service providers as a ground of review in the five applications by the Victorian DNSPs.[48]

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46 NEL, s 71Q(1); NGL, s 260(1).

47 NEL, ss 71Q(2)–71Q(5); NGL, ss 260(2)–260(5).

48 *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9; raised again in *Application by United Energy Distribution Pty Limited* [2012] ACompT 1.

Consultation Paper 2

Questions: *In the appeals concerning the estimation of the parameter 'gamma', is it clear that the outcome at the end of the administrative process (gamma = 0.25) is more correct, or preferable to, the AER's original decision (gamma = 0.65)?*

In the appeals concerning the estimation of the debt premium, which we understand to be a constituent decision of the relevant reviewable decision (the cost of capital), is it clear that the adjusted cost of capital that emerged at the end of the administrative process (i.e. at completion of the appeals) is more correct, or preferable to, the AER's original decision?

Response: These are not necessarily more correct or preferable decisions. These are good examples of where the LMR regime does not afford a proper opportunity for the overall balance of a regulatory determination to be considered. The original decision in respect of gamma and the debt risk premium were determined as part of a broader WACC that was able to be said to contribute to the achievement of the NEO, NGO and consistent with the RPP. It cannot be said whether this is the case anymore. These issues are further discussed in sections 3.2 and 3.3 of this submission.

Question: *If the ACT acts as a regulator when substituting its decision for that of the AER, what is the case for saying that its decisions should be considered by the Panel in ways that are materially different from those on which the AER's decisions should be considered?*

Is the now extensive knowledge base on how administrative regulation works in practice – that discretions exist, that multiple agendas are not necessarily always absent, that language matters, that the 'character' of the regulator matters, that there is often no bright line boundary between policy decisions and 'administration' – relevant when considering the ACT's contributions to outcomes? If not, why not?

Response: The extensive knowledge base on how administrative regulation works in practice is relevant. In these circumstances, there are two reasons to consider the Tribunal's decisions, notwithstanding it does 'stand in the shoes of the AER', differently from those of the AER. First, the Tribunal has adopted the view that the scope of a review and the relief it may provide is limited to the grounds of review specified in a review application that it has granted leave for. Second, the Tribunal does not have the resources and capabilities that are available to the AER, especially given the timeframes set down for a review by the Tribunal and the three month target timeframe contemplated by the LMR regime.

This issue is further discussed in section 3.2 of this submission.

1.3 The cases to be considered

Consultation Paper 1

Questions: *Is it reasonable for the Panel to look first at all significant issues raised in ACT cases, or should we focus on a more limited sub-set of cases from the outset?*

Specifically, have ACT reviews of ministerial decisions in relation to gas pipeline coverage raised any issues of relevance to the Review which we should be aware of?

If consideration of all issues is appropriate, are there nevertheless sub-sets of cases that are more or less important in making an overall assessment of the performance of the regime? Can you assist us in identifying any such sub-sets of cases?

Specifically, bearing in mind time and resource constraints, should we concentrate our efforts chiefly on cases centred on determination of the weighted average cost of capital (WACC)?

Response: The Expert Panel should consider all of the cases that have arisen in the LMR regime for the reason that each case raises different issues and in some cases, builds on previous cases. However, if the Expert Panel is minded to consider a subset of the cases, in addition to those concerning WACC, it should also consider the cases that deal with the procedural issues that have been repeatedly raised with the Tribunal.

In respect of the WACC cases, the issue of the Debt Risk Premium has featured in the majority of applications for review by regulated businesses under the LMR regime in both the NEL and the NGL (with the exception of the ElectraNet's review in 2008 and the Queensland and South Australian electricity reviews in 2010).

As to the procedural cases, it is useful to consider the development of issues through each of the applications, where the decisions of the Tribunal have provided clarification to the meaning of legislative provisions and the development of the AER's approach. For example, a number of cases have dealt with the provision of information to the AER as part of the regulatory process. This relates to both information which has been identified by the AER as deficient in some respect and the appropriate approach to decision making in the absence of sufficient information. Several decisions of the Tribunal evidence the development of the approach to these issues:

- The AER must make further enquiries where sufficient information has been provided that it would have "*necessitated at least further enquiry*".[49]
- However, there is an obligation to "*provide sufficient information to the AER*" to satisfy it that a proposal "*reasonably reflected the…criteria*".[50]

[49] *Application by Ergon Energy Corporation Limited* [2010] ACompT 6, [47].

- Where the AER has indicated in its draft decision that it was not satisfied with the information provided, it is a matter for the Network Service Provider to ensure those concerns are subsequently satisfactorily addressed.[51]

- However, the AER cannot require a level of detail that could be classified as "nit picking" as it imposes an unrealistic burden on a regulated business.[52]

In cases where the same matter is re-litigated, different results can arise at each review. Whilst the different results may be explainable by reason of the different information being available at the time of each review, the Expert Panel needs to be conscious of the desire for the LMR regime to appropriately balance consistency in decision making with decisions on the facts and circumstances in a particular case.

Consultation Paper 2

Question: *Can the Panel's consideration of the WACC cases be simplified on the basis that, although the cases were many, there were only a few, common issues that appeared repeatedly?*

Response: The Expert Panel's consideration of the WACC cases should not be simplified on the basis that there are common issues that have appeared repeatedly in these cases for the reason that each case raises different issues and in some cases, builds on previous cases.

1.4 Structural influences on the performance of the regime

Consultation Paper 1

Question: *Whether the structure of incentives is such that appeal to the ACT has become, or is becoming, the norm? Alternatively, is it more likely the that the numbers of appeals will fall, as interested parties become more familiar with the arrangements and there is less 'testing out' of the possibilities?*

Response: Applying for review of a regulatory determination appears to be the norm. The real driver for this is the ability of a regulated business to choose the issues it wishes to review. This is further discussed in section 2.2 of this submission. At this point it is also significant to note that a regulated business can seek to recover the costs it incurs in a review through regulated revenues given those costs are arguably incurred in the provision of regulated services.

It is difficult to say whether increasing familiarity with the regulatory regime will cause the number of reviews to fall. Increasing familiarity with the regulatory regime does not displace the ability of a regulated business to choose the issues

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50 *Application by Ergon Energy Corporation Limited (Customer Service Costs) (No 2)* [2010] ACompT 10, [65].

51 *Application by United Energy Distribution Pty Limited* [2012] ACompT 1, [197].

52 *Application by United Energy Distribution Pty Limited* [2012] ACompT 1, [507].

it wishes to review. This may also result in a more experienced regulated business being able to better choose the issues it seeks to review.

Question: *Are there incentives for NSPs to appeal irrespective of the actual merits of AER decisions, for example because, given the inevitable uncertainties in assessments, there is always a chance of incremental improvements in outcomes for NSPs?*

Response: Yes. A regulatory determination comprises a large number of smaller decisions which involve issues to which there can be no one right answer. Because a regulated business can seek to recover the costs it incurs in a review, there would appear to be a strong incentive for it to apply for review irrespective of the actual merits of a challenge to a regulatory determination.

These issues are further discussed in sections 2.1 and 2.2 of this submission.

Question: *Do incentives deriving from the structure of the regime inhibit the AER in any way in defending its decisions before the ACT? Specifically, is the AER impeded by the prospect that vigorous defence of a decision may be prejudicial to its fair re-consideration of the issue in the event that the ACT eventually decides to remit the matter back to the AER?*

Response: Yes. The AER is impeded by the prospect that a vigorous defence of a regulatory determination may be prejudicial to its fair reconsideration of the issue in the event the regulatory determination is remitted.

This issue is further discussed in section 2.4 of this submission.

Question: *Given the policy objectives, are the grounds for appeal appropriately specified in the law? Do they (a) require or (b) permit an unduly narrow focus by the Tribunal on reviewing and correcting detailed 'error'?*

Response: The scope of the review is practically set by the regulated business by the scope of its alleged grounds of review. Those grounds can be very narrowly focussed. Beyond this, the AER considers the scope of the review process is too narrow for the reasons discussed in the main body of this submission.

This issue is further discussed in section 2.3 of this submission.

Question: *Has the imposition of limits on the timing and on the ground for appeal been effective in containing costs and reaching timely decisions, whilst allowing for the correction of errors and achieving the desired, overall balance between consumers and NSPs?*

Response: In general, no. Whether costs are contained and decisions are made in a timely fashion differs in each Tribunal matter. However, it is clear that significant costs are required in order to properly participate in a Tribunal matter and that the timeliness of Tribunal decisions is greatly influenced by the Tribunal's ability to case manage large matters with multiple parties and issues and the availability of adequate resources for the Tribunal to deal with hearings in concurrent applications for review.

This is discussed further in section 3.1 of this submission.

Consultation Paper 2

Question: *What has been the relative contribution to the ACT case load to date of:*

- *The global financial crisis (GFC). In particular, is it likely that the debt premium appeals would have eventuated in the absence of the GFC? In more stable financial circumstances, would the estimation issues at stake have been sufficiently material to have satisfied the appeal thresholds?*

- *The absence of the potential for merits review of decisions made at the time of general WACC reviews? Would the number of WACC cases have been significantly reduced if the ACT had been able to review WACC issues holistically, following the AER reviews?*

Response: It is uncertain as to whether there would have been fewer debt risk premium (DRP) reviews in the absence of the GFC. Generally, the GFC has made the DRP more challenging to estimate and the difference in the DRPs being debated between NSPs, consumers and the regulator has increased in the presence of the GFC. However, prior to the GFC the DRP had long been a contentious regulatory issue. Prior to the GFC the debate largely centred on using either one of two published fair value curves (from Bloomberg and CBA Spectrum), either adjusted or unadjusted, and either one or the other or averaged.

If the financial circumstances were more stable, then the estimation issues at stake would have been sufficiently material to have satisfied the appeal thresholds (or leave thresholds). It is likely that WACC matters would continue to be reviewed because even relatively small changes in the WACC can have a material impact on a NSP's revenues, and so disputes over the WACC would likely meet the revenue threshold even without being grouped with other matters. For example, assuming a $1 billion asset base and 60% gearing, the dispute over the debt risk premium would only need to be in the order of 0.17% (for example, a debt risk premium of 4.20% vs. 4.37%) in order the meet the $5 million revenue threshold.

This is further discussed in section 3.3 of this submission.

Question: *What has been the relative contribution to the ACT case load to date of:*

- *The absence of the potential for merits review of decisions made at the time of general WACC reviews? Would the number of WACC cases have been significantly reduced if the ACT had been able to review WACC issues holistically, following the AER reviews?*

Yes in respect of gamma. No in respect of the DRP, market risk premium (MRP) or risk free rate averaging period reviews.

Gamma: Regulated businesses have sought review of the AER's position on gamma from the WACC review at the first available opportunity (the QLD / SA electricity distribution determination). However, the QLD / SA appeal process was not finalised until after the AER completed several more electricity and gas

determinations. This meant subsequent electricity and gas determinations were completed without the benefit of knowing the Tribunal's view on gamma. This meant that the AER's determination on gamma in the subsequent determinations was, in effect, a 'placeholder' position while the AER waited to find out the Tribunal's position on gamma. Regulated businesses reviewed these 'placeholder' determinations, with the AER conceding error in those determinations once the Tribunal's position on gamma was known.

If the WACC review had been reviewable the AER would have found out the Tribunal's position on gamma sooner. This would have reduced the number of 'placeholder' determinations the AER had to make and so reduced the number of determinations that needed to be corrected through the appeal process.

DRP: Under the current rules, it is only the term and the credit rating which is determined as part of the WACC review. No regulated business has reviewed these aspects of the DRP. Each DRP appeal has been on matters that fall outside the scope of the WACC review. However, this might change in the future as the AER's rule change proposal to the AEMC seeks to permit the AER to conduct a more holistic review of the DRP as part of the WACC review.

MRP: When the AER applied the MRP value from the WACC review, no regulated business has reviewed this decision. It is only when the AER lowered the MRP from that used in the WACC review that regulated businesses sought review. The AER's decision was upheld by the Tribunal. The AER's subsequent adoption of this same value was not appealed in the AER's most recent electricity distribution determination.

Risk free rate averaging period: This review occurred prior to the completion of the WACC review, and involved transitional rules.

Question: *Given the structure of the LMR regime, and assuming continued attachment to the capital asset pricing model for the purposes of estimating WACCs, can new areas of contention be expected to open up in consequence of the possible deficiencies of that model in tomorrow's contexts?*

Response: Yes. The LMR regime currently allows for the Tribunal to substitute the AER's reasoning and what it considers to be a preferable decision. The unreasonable ground of review allows for disputes over issues upon which reasonable minds can differ and there is no one right answer.

This issue is further discussed in section 3.2 of this submission.

Question: *Does the prospect that a common error might <u>only</u> be adjusted for those who appeal create incentives to appeal on a larger number of issues?*

Response: The Tribunal's decision of 5 April 2012 indicates that a regulated business is only entitled to relief for the grounds of review specified in its review application. This is likely to provide incentives for regulated businesses to ensure that their review applications are more complete rather than necessarily to seek review on a larger number of issues.

Question: *Are the differential allowances for costs of capital between appellants and non appellants implicit in the April 5 decisions of the ACT in line with the MCE's expectations in establishing the Limited Merits Review?*

Response: The MCE does not appear to have contemplated the possibility of differing results to common issues. However, this feature is not itself inconsistent with a merits review mechanism that is limited. Indeed, one feature of a merits review mechanism that is that a regulated business ought to choose the specific issues it seeks review over. The questionable outcome of having differential outcomes, however, could be resolved by remitting the regulatory determination to the AER as proposed in section 4 of this submission.

Question: *Is the structure of the LMR regime such that, when making decisions, the ACT is required to take account of factors other than those that would, in practice, have governed the decisions of the AER? Put metaphorically, when substituting its own decisions for those of the AER, does the ACT bring some distinctive footwear of its own? Is the answer clear from the existing law and regulations?*

Response: No. In making a determination, the Tribunal, like the AER, is restricted to making decisions in accordance with requirements of the relevant provisions of the NER or the NGR. These provisions generally set out the factors that must be taken into account in making a decision. One distinguishing point in addition to the relevant factors the Tribunal must take into account is that following the identification of an error, the Tribunal is not limited to the material that was previously before the AER at the time it made the regulatory determination.[53]

Questions: *Is the ACT able to take into account holistic considerations or is it required to consider the notion of 'error correction' in a less holistic way (e.g. if it is determined that there has been a material error in some aspect of the reasoning or analysis, must the ACT correct it or remit the matter to the AER without any requirement that it (the ACT) first assess the merits of the relevant, reviewable decision as a whole?)*

If there are no constraints on the ACT in this regard (because it is fully able to 'stand in the shoes' of the AER), has there nevertheless been a tendency toward narrow interpretation of the requirement to correct errors?

Response: As discussed in section 2.3 of this submission, the Tribunal has adopted a view that the scope of a review and the relief it may provide is limited to the grounds of review specified in a review application that it has granted leave for.[54]. To this end the Tribunal is not truly able to fully 'stand in the shoes' of the AER.

Questions: *The Panel has similar concerns about the interpretation of words such as 'decision' and 'fact', and the implication of such interpretations for outcomes. In relation to decisions, it seems that, in price control cases, the most important decision is the determination of the revenue allowance. Under the Australian arrangements, the AER is required to build this up from a number of 'building block' decisions but, even so, the level of disaggregation is constrained to some*

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53 NEL, s 71R(3); NGL, s 261(3).

54 See, e.g., *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8, [59]–[61].

extent. Thus, as the Panel reads the relevant rules, the AER is required to make a 'reviewable decision' in relation to the cost of capital as a whole, but not, say, in relation to the debt risk premium (the assessment of which is only a constituent part of a reviewable decision). On this basis it seems that all aspects of the cost of capital determination should be assessed whenever an appeal is made on the grounds of error in the determination of any one of the constituent parts. Similarly, the NER and NGR seem to imply that the reviewable decision in relation to capex is the decision about capex allowances as a whole, not the view taken on a particular project or part of a capex programme.

Is this a correct reading of the rules?

Is the ACT constrained to adopt another meaning of the word 'decision'?

Response: It is correct that a regulatory determination is built up by a number of building block decisions or component parts. However, each building block decision or component part is itself built up by many smaller decisions, findings of fact or exercises of discretion. Under the LMR regime, the grounds of review allow for a regulated business to allege error in respect of these smaller decisions, findings of fact or exercises of discretion that are contained within a reviewable regulatory decision, without regard to the overall balance of a regulatory determination.

This is further discussed in sections 2.1 and 2.2 of this submission.

Questions: *If the ACT finds an error in relation to a finding of a future fact by the AER, is that anything other than a euphemism for disagreeing with the AER's forecast?*

If not, how is a 'future fact' to be distinguished from a forecast?

Response: An error in relation a finding of a future fact is not necessarily an euphemism for disagreeing with the AER's forecast. Whilst the finding of facts may include opinions about the existence of future facts, the Tribunal has stated:

> It is clear, however, that the term "findings of fact" does not include the making of permitted choices between permitted methodologies. Nor will a finding of fact be in error because it was based on the use of one methodology rather than another.[55]

It is difficult to distinguish a future fact from a forecast. A forecast is necessarily the result of an assessment as to likely future facts, formed on the basis of expert opinion and evidence of current and historic facts.

Questions: *Is legal usage the 'master' of the meaning of relevant words in merits review?*

If it is, should it be, given the administrative/policy aims of the limited merits review regime and given the MCE's intentions?

Is language a significant barrier to participation in regulatory discourse (e.g. by network users and consumers)?

Response: The principles of statutory interpretation are fairly settled and the Tribunal, being subject to review by the Courts, is required to apply those rules lest it fall into

[55] *Application by Envestra Ltd (No 2)* [2012] ACompT 3 [27]-[31]

error of law itself. Such a framework is unavoidable if government wishes to provide for the legal enforceability of an economic regulatory regime over corporate business. The primary principle of construction can be simply stated as follows: Words in a statute are given their legal meaning, which is either their plain English or grammatical meaning unless the context of the statute indicates a special meaning, such as the meaning given in accounting, finance or economics.

The AER does not consider that the principles of construction are per se a barrier to the regime achieving its policy aims or stakeholder participation. The problems that arise in this respect are simply due to the length and complexity of the relevant regulatory rules and the multiplicity of considerations which the rules mandate. This is further discussed in section 3.1 of this submission.

1.5 The decisions/conduct of the ACT

Consultation Paper 1

Question: *Can the ACT legitimately conclude that some of the AER's calculations/estimations are incorrect but nevertheless substitute an equivalent Tribunal determination reaffirming the AER's relevant 'bottom line' number (e.g. for allowable revenues or an allowable cost of capital), based on its own judgment that, given the policy objective, such a determination remained appropriate?*

Response: Arguably it is open for the Tribunal to legitimately find that a ground of review has been established but that no adjustment should be made to the overall regulated revenues set out in a regulatory determination. However, this would only occur if the AER was able to raise such an adjustment as a possible outcome or effect that may occur as a result of the Tribunal setting aside or varying the regulatory determination.[56] As section 3.3 of this submission explains, the AER's ability to do so is very limited. The Tribunal cannot itself make such an adjustment itself.

Question: *Within the LMR framework, to what extent is the Tribunal empowered to take account of policy objectives in its judgments? Has it done so to date?*

Response: Yes. The Tribunal must make a determination in respect of any application for review where leave is granted.[57] In doing so the Tribunal 'may perform all the functions and exercise all of the powers of the AER'.[58] Therefore, to the extent that the NEL, the NGL, the NER or the NGR specifies that the AER may or must take into account policy objectives, the Tribunal may or must do so as well.

For example, the AER must take into account the RPP in exercising its discretion in making those parts of a regulatory determination that relate to regulated services.[59] The AER must also make a regulatory determination in a manner that

[56] NEL, s 71O(1)(b); NGL, s 258(1)(b).

[57] NEL, s 71P(1); NGL, s 259(1).

[58] NEL, s 71P(3); NGL, s 259(3).

[59] NEL, s 16(2)(a); NGL, s 28(2)(a).

will or is likely to contribute to the achievement of the NEO or the NGO as the case may be.[60]

From a procedural perspective, the Tribunal has had regard to the policy intent in the MCE papers on a number of occasions to assist in the interpretation of the relevant provisions in the NEL and the NGL, particularly those in respect of the granting of leave.[61]

For example, in relation to the interpretation of the financial threshold that an issue must exceed in order for leave to be granted,[62] the Tribunal (with Justice Finkelstein as the presidential member) considered that "the enacting history [of the NEL] shows quite clearly that the ordinary meaning of s 71F(2) is not the intended meaning". The policy intent set out in the MCE document resulted in a particular interpretation of the provision being adopted.[63]

Question: *Is the Tribunal adequately resourced to take other than a narrow approach to appeals? To what extent, if any, has the Tribunal sought to encourage the production of evidence, particularly by the AER, on matters wider than those initially brought to its attention?*

Response: It would appear that the Tribunal is only resourced to take a narrow approach to reviews. The Tribunal's resources are not comparable to those of the AER. During a review, the Tribunal relies heavily on the assistance of the AER and on the submissions of other parties. In particular, the following factors greatly influence the performance of the LMR regime:

- the Tribunal's ability to case manage large matters with multiple parties and issues
- the availability of adequate resources for the Tribunal to deal with hearings in concurrent applications for review
- the ability of the Tribunal to produce reasons and to make orders or directions within the statutory timeframes.

As to encouraging the production of evidence, particularly by the AER, on matters wider than those initially brought to its attention, the Tribunal has taken various approaches on finding that the AER made an error in a determination or access arrangement, including:

- varying the AER's decision following receipt of further information from the regulated business and a "report" from the AER[64]
- varying the AER's decision and commissioning further evidence by requiring a single expert report from an expert retained by one party to be relied upon in making the revised determination[65]

60 NEL, s 16(1); NGL, s 28(1).

61 NEL, ss 71E–71H; NGL, ss 248–251.

62 NEL, s 71F.

63 *Application by Energex Limited (No 4)* [2011] ACompT 4, [52].

64 *Application by Ergon Energy Corporation Limited (Other Costs) (No 7)* [2011] ACompT 1.

- varying the AER's decision based on the information provided during the review where the Tribunal considered it was not practical for the AER to remake its determination as there was insufficient time to develop an alternate methodology[66]

- remitting to the AER for re-determination subject to directions.[67]

Usually, the Tribunal will determine the approach to be adopted by reference to submissions from the parties and the subject matter.

In the 2010 Energex review, the Tribunal was prescriptive in outlining what the report that was directed to be commissioned in respect of gamma was to contain. The Tribunal stated (θ or theta is a component of gamma):[68]

> 146. In respect of θ, the Tribunal seeks a report that:
>
> - proposes an approach that correctly uses tax statistics studies and dividend drop-off studies;
> - reviews dividend drop-off studies from as many sources as possible to see whether confident use can be made of any of them; and
> - if possible, provides results from a newly-commissioned dividend drop-off study that is "state of the art".
>
> 147. To achieve the last of these, the Tribunal proposes, and subject to submissions as to appropriate directions by the parties, to direct that the AER seek a re-estimation by SFG of the parameters without the constraint that the study replicates the Beggs and Skeels (2006) study. The AER should seek expert statistical or econometric advice to review the approach prior to the estimation proceeding. The new study should employ the approach that is agreed upon by SFG and the AER as best in the circumstances. Consideration should be given to any possible enhancements to the data set.
>
> 148. The Tribunal would expect that, unless compelling reasons to the contrary are adduced:
>
> - the dependent variable will be the share price drop-off ratio, rather than the drop-off itself;
> - special dividends will not be removed from the data set; and
> - any filtering will be based on economic reasoning rather than removal of statistical outliers per se.
>
> 149. The Tribunal has found some deficiencies in its understanding of the foundations of the task facing it, and the AER, in determining the appropriate value of gamma. These issues have not been explored so far because they have not arisen between the parties, who appear to be in agreement about how the Rules should be interpreted regarding the treatment of corporate income tax. They may be matters that the Tribunal will take up in its further decision in these matters; or they may best be left until the next WACC review. Indeed, they may go to the basis for the Rules themselves.

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65 *Application by Energex Limited (Distribution ratio (Gamma)) (No 2)* [2010] ACompT 7.

66 *Application by APT Allgas Energy Limited (No 2)* [2012] ACompT 5, [118].

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

68 *Application by Energex Limited (Distribution ratio (Gamma)) (No 2)* [2010] ACompT 7, [146]–[150].

150. The Tribunal would be assisted in its consideration of the issues before it if the AER were to provide relevant extrinsic material explaining:

(a) the rationale for including the gamma component in the formula for calculating the estimated cost of corporate income tax; and

(b) how it relates to the rest of the building blocks, especially the rate of return (cl 6.4.3(a) and cl 6.5.2(b) of the Rules).

Question: *On what basis does the ACT decide when, if an appeal is upheld, to remit matters back to the AER?*

Response: Section 71P of the NEL and section 259 of the NGL both provide that the Tribunal:

> In deciding whether to remit a matter back to the AER to make the decision again must have regard to the nature and relative complexities of –
>
> (a) the reviewable regulatory decision; and
>
> (b) the matter the subject of the review.

In the APT Allgas Energy gas review, the Tribunal considered whether to remit a matter and considered some of the relevant factors:[69]

116. In this matter, for the reasons given, the AER was obliged to do the best it could on the information available. Having determined that the AER fell into reviewable error, the Tribunal may set aside or vary the Access Arrangement Decision, or it may remit the matter to the AER to make the decision again: s 259(2). If the Tribunal sets aside or varies the decision, it may perform all of the functions and exercise all of the powers of the AER: s 259(3). If the Tribunal considers remitting the matter, it must have regard to the nature and relative complexities of the Access Arrangement Decision, and the matter the subject of the review: s 259(4).

117. The Tribunal has decided to vary the Access Arrangement Decision by substituting for the DRP value determined by the AER a DRP value of 4.37% based upon the EBV.

118. The Tribunal has taken into account that the AER, in the course of considering any proposed access arrangement or its revision, is obliged to address a multitude of issues and ultimately, it is only those few selected by the regulated entity which may come before the Tribunal; the majority of the issues resolved by the AER are resolved to the satisfaction of the regulated entity. That is the case in this matter. The Tribunal is reluctant to remit the matter to the AER to make the decision again, even constrained by any directions or recommendations of the Tribunal. In this matter, as the Tribunal has noted, there will be no real opportunity for the AER to develop a coherent alternative methodology to determine the DRP in the time available, so the AER would be forced to make the best decision it could on the material available if the matter were remitted to it. The more substantial task of developing an alternative methodology would be time consuming and complex, and necessarily be one which to a degree at least would not be specific to the parties but affect other regulated entities.

119. The Tribunal has also taken into account that the AER regarded the EBV as having sufficient reliability to give it substantial weight. In making the decision about whether to discount it in some way, the material available to the AER gave it no clear economic path to follow.

[69] *Application by APT Allgas Energy Limited (No 2)* [2012] ACompT 5, [116]–[120].

> 120. Allgas provided to the AER strong evidence in support of the EBV, in particular by its response to the May 23 letter. The view of Dr Hird of CEG was that that material did not demonstrate any basis for the substitution of an alternative estimate for the EBV. As noted, the AER itself accepted the relevance of the EBV. Whilst the Tribunal accepts that the AER properly considered the reliability of the EBV, it has reached the view on the available material that there is no reason shown from the available material why the use of the EBV should not be adopted in this particular matter. There is no viable alternative methodology at present, other than making a decision on all the material. The observations of the Tribunal in ActewAGL at [74]-[78] suggest also that, on the existing material, it is appropriate to vary the decision in the manner indicated.

It is also apparent that the Tribunal considers whether it has the resources to undertake required remodelling in deciding whether to remit a matter to the AER. In the recent Victorian reviews, submissions were made by CitiPower and Powercor Australia that the Tribunal should itself deal with the remodelling issues rather than remitting the matter back to the AER. The following exchange occurred at the hearing on 27 March 2012 between Justice Foster and Mr Charles Scerri QC (on behalf of the AER):[70]

> MR SCERRI: .....there's a question of relief. I think it was Mr Lockhart who said that there was a variation as opposed to a remitter. My understanding is that in the UED matter, it was actually a remitter on the S Factor. So there's an issue obviously before the tribunal as to how to deal with these. I was instructed that to do – calculations will need to be done to recalculate the tables.
>
> HIS HONOUR: I've assumed that
>
> MR SCERRI: Yes.
>
> HIS HONOUR: which is why we've, at the moment, at least, thought it was better for the AER to do that than for us to do it.
>
> MR SCERRI: Yes. Well, we're content to do that. If – sometimes the tribunal has done it itself. That's been after
>
> HIS HONOUR: Well, that's too complicated.
>
> MR SCERRI: Yes. And I think we're written to the applicant saying, "We will do that". In doing that, we will consult with them to make sure there are no
>
> HIS HONOUR: I've assumed that.

In the end, the Tribunal remitted all matters to the AER to be varied or re-decided in accordance with the directions and reasons of the Tribunal.[71]

Similarly, in respect of public lighting in the NSW electricity reviews, the Tribunal stated:

> The resources available to the Tribunal, and the need to afford a proper opportunity for the making of submissions on the issues by the EA and SSROC, also favour remitting the matter to the AER.[72]

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70 Hearing by the Tribunal on 27 March 2012 of submissions culminating in the reasons in *Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 8.

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

72 *Application by EnergyAustralia* [2009] ACompT 7, [38].

Question: *How does the ACT approach expert evidence? Are expert witnesses normally subject to oral examination, or does the Tribunal tend to rely exclusively on written reports?*

Response: The ability of the Tribunal to receive expert evidence is governed by section 71R of the NEL and section 261 of the NGL. Significantly, the Tribunal must not consider any matter "other than review related matter", namely the material that was before the AER in making a regulatory determination, in determining whether a ground of review has been established.[73] If a ground of review has been established, the Tribunal may allow new information or material if it would assist on any aspect of the determination to be made.[74]

The Tribunal has in a number of matters received new evidence or material which is not 'review related matter' on the basis that it is in "escrow" or not to be looked at except if he Tribunal finds a ground of review has been established.[75] While this is not entirely consistent with the language of the relevant provisions, this reflects a pragmatic approach adopted by the Tribunal to avoid further hearings (if possible).

Prior to a ground of review being established, the Tribunal should not receive new oral evidence from an expert as that would go beyond what is "review related matter". Once a ground of review is established, further evidence from an expert could be received, including oral evidence. To date, the Tribunal has relied on written reports from experts and has not sought any oral evidence.

Question: *To what extent, when substituting its own determination for a determination of the AER, does the Tribunal tend to develop its own reasoning, without reference to expert evidence?*

Response: The Tribunal's decisions are subject to the ADJR Act. The Tribunal usually gives detailed reasons for its decision, including evaluating any evidence properly presented to it during the review. The Tribunal's reasons may include an evaluation of competing expert evidence.

An example is the decisions of the Tribunal dealing with gamma. The first decision regarding gamma required a detailed consideration of the competing expert evidence which had been presented to the AER as part of the regulatory process.[76] Following the finding of a ground of review, a further expert report was directed to consider specific issues and the AER was directed to report on relevant context and the rationale for the specific WACC parameter.[77]

Consultation Paper 2

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73 NEL, ss 71R(1) and 71R(6); NGL, ss 261(1) and 261(6).

74 NEL, s 71R(3); NGL, s 261(3). Strictly, the provision of new information or material is subject to it having been unreasonably withheld from the AER. However, given the information or material is new, this is often not the case or otherwise difficult to establish.

75 For example *Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3, [110]; *Application by EnergyAustralia and Others* [2009] ACompT 8, [316(e)].

76 *Application by Energex Limited (Distribution ratio (Gamma)) (No 2)* [2010] ACompT 7.

77 *Application by Energex Limited (Distribution Ratio (Gamma)) (No 3)* [2010] ACompT 9.

Question: *Have protracted proceedings materially damaged any participants in the appeals process, or significantly increased the risk of material damage?*

Response: The only negative impact of protracted proceedings is that any increase in revenue that results from a Tribunal determination is to be recovered from consumers over the remaining years of a regulatory control period or access arrangement period.

This is further discussed in the response to the question in section 1.2 of this Appendix A.

1.6 The decisions/conduct of the AER

Consultation Paper 1

Question: *What might be the relative contributions of (a) the particular specification of the WACC estimation methodology in the rules and (b) the propensity of the AER to make material errors of methodology and computation that require correction?*

Response: As noted in section 2.4 of this submission, there have been instances where the AER has conceded that it had made errors. Those include errors concerning the determination of the WACC.[78]

On the other hand, the prescriptive nature of the WACC provisions in the NER is a major contributor to the complexity of the AER's task in determining the WACC and the number of review applications made by regulated businesses regarding the WACC. This is particularly the case in relation to the debt risk premium. Since 2009, the Tribunal has considered the debt risk premium methodology 5 times in 10 proceedings.[79] The NER prescribes that in estimating the debt risk premium, the AER must refer to a benchmark corporate bond rate, which in practice bears little resemblance to what would be an efficient cost of debt for electricity networks.

Also, the AER made a decision as part of the WACC review[80] to set a benchmark yield to maturity of 10 years. The use of the framework of 10 year benchmark corporate bond rate in estimating the debt risk premium has created difficulty in the conditions during and after the global financial crisis where the market for long dated bonds was significantly limited.

The WACC provisions in the NGR are less prescriptive and do not require the use of a benchmark corporate bond rate. However, mainly for consistency

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78 For example, the AER conceded it made a factual error in relation to gamma: *Application by Energex Limited (No 2)* [2010] ACompT 7) and a computation error in estimating the debt risk premium: *Application by United Energy Distribution Pty Limited* [2012] ACompT 1.

79 *Application by EnergyAustralia and Others (includes corrigendum dated 1 December 2009)* [2009] ACompT 8; *Application by ActewAGL Distribution* [2010] ACompT 4; *Application by Jemena Gas Networks (NSW) Ltd (No 5)* [2011] ACompT 10; *Application by United Energy Distribution Pty Limited* [2012] ACompT 1; *Application by Envestra Limited (No 2)* [2012] ACompT 3.

80 AER, *Electricity transmission and distribution network service providers: Statement of the revised WACC parameters (transmission) and Statement of regulatory intent on the revised WACC parameters (distribution)*, May 2009.

reasons, the AER has also applied the framework of 10 year benchmark corporate bond rate in estimating the DRP for gas networks.

Given the difficulty in applying this framework in the recent market conditions, the AER's decisions on the debt risk premium have been particularly susceptible to review.

Question: *To what extent has the design and administration of the LMR regime been a contributing factor? Have those 'limitations' that have been embedded in the LMR regime with a view to reducing the costs and increasing the timeliness of reaching final decisions unintentionally encouraged an undue number of appeals on the minutiae of WACC methodology and estimation?*

Response: The design of the LMR regime, in so far as it allows a regulated business to set the review agenda by choosing the issues it wishes to review, is certainly a contributing factor to the incidence of reviews regarding the minutiae of WACC methodology issues.

This issue is further discussed at sections 2.2, 2.3 and 3.3 of this submission.

Question: *Whether the aspects of the AER determinations subsequently appealed did or did not fall within the range of expert views obtained by or submitted to the AER?*

Response: The aspects of regulatory determinations that have been reviewed have always fallen within the range of experts' views that were before the AER. The AER makes a regulatory determination on the basis of the competing interests and views that are presented to it and is also informed by both its significant internal expertise and the consultants it engages.

Questions: *Are we correct in our preliminary understanding of the relevant power, and of its implications? If not, why not?*

Has the AER sought to exercise the relevant power?

Are there significant barriers to the AER attempting to widen the ACT's deliberations in this way?

Response: There are significant barriers to the AER attempting to widen the ACT's deliberations in this way. The AER has also exercised this power to raise related matters. This is further discussed in sections 2.3 and 3.3 of this submission.

Questions: *What is the record in relation to AER appeals against ACT decisions? What types of decisions have been appealed in this way, for example?*

Specifically, has the AER ever challenged, or contemplated challenge to, an ACT decision to settle a technical economic or financial matter itself, rather than to remit it to the AER?

Response: The AER has only ever once applied to the Federal Court for judicial review of a Tribunal decision. That application involved an alleged misapplication of the NER and a denial of procedural fairness to the AER following the Tribunal's Victorian electricity merits review decision of 6 January 2012. However, that application

was discontinued shortly after the Tribunal released its further reasons on 6 April 2012.

As a matter of course, immediately following the Tribunal handing down a decision, the AER analyses the Tribunal's reasons to determine whether there are any grounds of review and if it is in the public interest to seek judicial review of that decision.

Consultation Paper 2

Question: *The Panel seeks further views on why the AER's s.71O(1) powers have not been actively used, and whether, given the nature of the appeals made and the MCE's intentions, this represents a significant performance weakness of the regime.*

Response: Yes, this is a significant performance weakness of the LMR regime. In practice the AER has not been able to use section 71O(1) as was originally envisaged by the MCE. This is further discussed at section 3.3 of this submission.

1.7 The participation of network users and energy consumers or their representative bodies in the appeals process

Consultation Paper 1

Questions: *Do the costs of participation appear prohibitively high in relation to the perceived potential benefits?*

If so, what are the chief features of the structure and/or administration of the LMR regime that contribute to such relatively high costs?

If costs are a major issue, have cost-mitigating strategies been adopted or contemplated by consumer bodies, such as seeking the pro bono support of sympathetic experts in the legal process?

Are the time periods for lodging appeals, making interventions, submitting opinions, etc, too compressed when viewed in the light of resource constraints on user and consumer organisations?

Response: Yes. It certainly appears that network users and energy consumers face significant practical difficulties that make participating in the process under the LMR regime prohibitive, including:

- high costs
- insufficient resources
- short timeframes for applying for leave and the making of submissions
- a lack of access to sufficient information.

These practical difficulties largely arise because of the complexity of the regulatory determinations and the formality of the Tribunal's processes. Applying for leave, making written and oral submissions or otherwise effectively partaking in the process generally requires a party to incur high costs in respect of sophisticated resources (legal and other). The compressed timeframes in the NEL and the NGL serve to further compound these difficulties.

Even where network users or energy consumers have overcome these practical difficulties, the scope of the leave to intervene is limited as discussed in section 3.1 of this submission. This is because the Tribunal's ability to grant leave to intervene is limited by specific circumstances set out in the NEL and the NGL.[81] This includes consideration as to whether:

- the issue sought to be intervened on has been raised previously in submissions to the AER
- the information or material is better presented by an intervener rather than another party to the review and

[81] NEL, s 71L; NGL, s 255.

- the interests of the consumer intervener are affected by the regulatory decision being reviewed.[82]

Leave to intervene may also be granted to a person or body has made a submission during the regulatory process.[83] The relevant State or Territory Minister also has a general right to intervene. However, the Minister or a person or body may only raise matters or issues that were previously raised in its submission to the AER.[84]

An example of an intervener being able to present material is when the Southern Sydney Regional Organisation of Councils (**SSROC**) was granted leave in the NSW reviews in respect of public lighting (and related WACC issues).[85] SSROC was able to present the perspective of the Regional Councils, which the AER was unable to do. Some of their arguments were accepted by the Tribunal. Other examples include the Energy Consumers Coalition of South Australia in the ElectraNet review and the Street Light Group of Councils in the Victorian reviews.[86]

Conversely, the Tribunal refused to grant leave to the Energy Users' Association of Australia to apply for a review in the NSW electricity reviews for the reason that their application did not meet the financial thresholds in section 71F of the NEL.[87] The Tribunal also refused to grant leave to an individual consumer in the Jemena Gas Networks review on the basis that the consumer's interests were not affected by the regulatory determination, on the basis that the consumer lived in Victoria and not New South Wales.[88]

The Tribunal has, in granting leave under section 71L of the NEL, also restricted an intervener's participation to narrow points in contention.[89] This is because the real issue is whether a network user or an energy consumer is able to effectively assist in the resolution of the issues being considered by the Tribunal. Apart from the Victorian Minister, SSROC is the only example of an intervener assisting the Tribunal and having some influence on the reasoning of the Tribunal.[90]

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82 NEL, ss 71O(2), 71L(3)(b) and 71L(3)(c); NGL, ss 258(2), 255(3)(b) and 255(3)(c).

83 NEL, s 71K; NGL, s 254.

84 NEL, s 71O(2); NGL s 258(2).

85 *Application by EnergyAustralia and Others (No 2)* [2009] ACompT 9.

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

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

88 *Application by Jemena Gas Networks (NSW) Ltd* [2010] ACompT 8.

89 *Application by ElectraNet Pty Limited No 2* [2008] ACompT 2.

90 For example, see *Application by EnergyAustralia* [2009] ACompT 7, [44] where the Tribunal agreed with the submission made by SSROC.

Consultation Paper 2

Question: *There also appears to be some variation in views about the most appropriate role for network users and representatives of energy consumers in the appeals process. Responses thus far indicate that network users and consumers do not think that the LMR regime has been working well for them, and at least some of the problems encountered are related to issues discussed above. For example, if the hire of barristers is necessary to play an effective role, that may significantly increase the costs of participation for consumer organisations.*

If such problems exist (and no submission has yet claimed that they don't), would the Panel be correct in concluding, at the end of Stage One of the Review, that this is an aspect of outcomes where MCE intentions in introducing the LMR regime have not been realised?

Response: Yes. This is further discussed in section 3.1 of this submission.

Question: *The Panel's initial view is that the AER has not been expected to act as a consumer 'advocate' or 'champion', in effect bargaining with regulated companies on behalf of energy consumers (as happens, sometimes explicitly and sometimes implicitly, in some other jurisdictions). Is this right?*

Response: Yes. This is further discussed in section 2.4 of this submission.

Questions: *Given the NEO and NGO, is the AER expected, when exercising those discretions afforded it under the rules, to give priority to the long term interests of consumers in its decision making?*

Or is the AER expected to arbitrate in some way to balance the interests of consumers, users and network service providers?

Response: The AER must make a regulatory determination that will contribute to the achievement of the NEO or the NGO. The NEO and the NGO ultimately refer to the long term interests of consumers. However, it must also ensure that a regulatory determination is consistent with the RPP. Among other things, the RPP require that a regulated business is provided with a reasonable opportunity to recover at least its efficient costs. The regulatory determination therefore reflects a balance between these competing considerations.

Appendix B

Table B.1: Summary of the unreasonable ground of review cases

Decision	Subject matter of error(s) found by the Tribunal	Unreasonable ground of review established?	Error of material fact(s) or incorrect exercise of discretion also established?	Misapplication of law/rules or substitution of the reasoning	Notes
Application by APT Allgas Energy Limited (No 2) [2012] ACompT 5	Debt risk premium	Yes	Yes	Substitution of reasoning	–
Application by Envestra Limited (No 2) [2012] ACompT 4	Debt risk premium	Yes	Yes	Substitution of reasoning	–
Application by Envestra Limited (No 2) [2012] ACompT 3	Network management fee	Yes	Yes	Substitution of reasoning	–
Application by Energex Limited (No 2) [2010] ACompT 7	Treatment of distribution ratio	No	Yes	Ground not discussed	–
	Franking credit utilisation rate	No	Yes	Ground not discussed	–
Ergon Energy Corporation Limited [2010] ACompT 6 - (Other Costs)	The AER made an error of material fact in removing the other 'one-off' costs component from the control mechanisms formula	No	Yes	Ground not discussed	–
	Labour cost escalators	No	Yes	Ground not discussed	–
Application by ETSA Utilities [2010] ACompT 5	AER did not considering in detail the valuation submitted by ETSA Utilities	No	Yes	Ground not discussed	–
Application by ElectraNet Pty Limited (No 3) [2008] ACompT 3	Easement transaction costs	Unclear	Yes	Ground not discussed	–

Decision	Subject matter of error(s) found by the Tribunal	Unreasonable ground of review established?	Error of material fact(s) or incorrect exercise of discretion also established?	Misapplication of law/rules or substitution of the reasoning	Notes
Jemena Gas Network (NSW) [2011] ACompT 10	Debt risk premium	Unclear	Unclear	Substitution of reasoning	AER inference
	Fair value curves	Unclear	Unclear	Substitution of reasoning	AER inference
	Gamma	Unclear	Unclear	Substitution of reasoning	AER inference
Jemena Gas Networks (NSW) [2011] ACompT 6	Mine subsidence costs	Unclear	Unclear	Misapplication of rules	AER inference
	Liability for negligence in Reference Services Agreement	Yes	No	Substitution of reasoning	–
EnergyAustralia & Ors [2009] ACompT 8	Averaging period	Yes	Yes	Substitution of reasoning	–
	Matters qualified for 'pass through'	Yes	Yes	Unclear	–
	Reducing TransGrid's forecast opex by reducing its forecast defect maintenance for new growth assets	Yes	Yes	Substitution of reasoning	–
Application by EnergyAustralia [2009] ACompT 7	Public lighting.	No	Yes	Ground not discussed	–
Application by United Energy Distribution & Ors [2012] ACompT 1	S-factor scheme	Unclear	Unclear	Misapplication of rules	AER inference
	Regulatory asset base	Yes	Unclear	Substitution of reasoning	AER inference
	Debt risk premium (annualisation)	Yes	No	Misapplication of rules	–
	Debt risk premium (APT bonds)	Yes	No	Unclear	–
	Enterprise support function (ESF)	Yes	Yes	Substitution of reasoning	–
	Gamma (γ) value.	Unclear	Unclear	Substitution of reasoning	AER inference
	Insurance event definition	Unclear	Unclear	Ground not discussed	–
	Efficiency carryover mechanism adjustments	Unclear	Unclear	Misapplication of rules	AER inference
	Powercor's work program	Yes	No	Substitution of reasoning	–
ActewAGL Distribution [2010] ACompT 4	Debt risk premium: indices the AER used for comparative purposes	Yes	Unclear	Substitution of reasoning	–

Table B.2: Analysis of the unreasonable ground of review cases

Decision	Error(s) found by the Tribunal	Unreasonable ground found?	Error of fact(s) or incorrect exercise of discretion also found re this error?	Reasons underlying unreasonable ground on review	Misapplication of law/rules or substitution of the Tribunal's reasoning	Notes
Application by APT Allgas Energy Limited (No 2) [2012] ACompT 5	AER determination of the DRP based on an average of the APA bond and the EBV amounted to reviewable error [121].	Yes. Adopting a rate of return for the DRP based upon the simple averaging of the EBV and the APA bond was 'unreasonable' because the consequences of its error were obviously of significant magnitude [110].	Yes, incorrect exercise of discretion. The Tribunal also found it was an incorrect exercise of the AER's discretion in selecting the rate of return for the DRP without considering the increased bond sample proposed by Allgas [110].	The Tribunal 'has reached the view on the available material that there is no reason shown from the available material why the use of the EBV should not be adopted in this particular matter.' [120]	Substitution of reasoning	–
Application by Envestra Limited (No 2) [2012] ACompT 4	AER determination of the DRP based on an average of the APA bond and the EBV amounted to reviewable error: [171].	Yes. Adopting a rate of return for the DRP based upon the simple averaging of the EBV and the APA bond was 'unreasonable' because the consequences of its error were obviously of significant magnitude [111]	Yes 246(1)(c). The Tribunal also found it was an incorrect exercise of the AER's discretion in selecting the rate of return for the DRP without considering the increased bond sample proposed by Envestra [111].	The Tribunal 'has reached the view on the available material that there is no reason shown from the available material why the use of the EBV should not be adopted in this particular matter' [126].	Substitution of reasoning	–
Application by Envestra Limited (No 2) [2012] ACompT 3	AER's conclusion that the NMF was not an efficient cost involved reviewable error: [357].	Yes. Having regard to all the evidence, the AER's conclusion (that the NMF did not represent efficient operating expenditure) was said to be unreasonable [270] [271].	Yes. 246(1)(a), (b) The Tribunal noted the 'AER has either made an error or errors of fact material to its decision, or the decision was unreasonable in all the circumstances' [271]. Reasons set out in [261], [264] and [265].	The evidence before the Tribunal suggested that the payment of the NMF allowed Envestra to have access to a provider of operations and management services that allowed it to reduce its overall operating expenditure, and there was no evidence to suggest that the NMF was outside of normal industry practice. Therefore the AER conclusion that the NMF was not an efficient cost fell into reviewable error [357].	Substitution of reasoning	–

Decision	Error(s) found by the Tribunal	Unreasonable ground found?	Error of fact(s) or incorrect exercise of discretion also found re this error?	Reasons underlying unreasonable ground on review	Misapplication of law/rules or substitution of the Tribunal's reasoning	Notes
Application by Energex Limited (No 2) [2010] ACompT 7	AER erred in its treatment of the distribution ratio [145].	No.	Yes, the Tribunal found that an error of fact occurred in the making of the distribution ratio [52].	–	Ground not discussed	–
	The AER erred in its treatment of the franking credit utilisation rate [145].	No.	The Tribunal found that the AER had made a material error of fact, and exercised its discretion incorrectly in relation to the utilisation rate [66].	–	Ground not discussed	
Ergon Energy Corporation Limited [2010] ACompT 6	The AER made an error of material fact in removing the other 'one-off' costs component from the control mechanisms formula [2].	No.	Yes, the Tribunal found that the AER made errors of fact [2].	–	Ground not discussed	–
Ergon Energy Corporation Limited (Labour Cost Escalators) (No 3) [2010] ACompT 11	AER erred in its decision not to base labour cost escalators on rates of increase negotiated in a 2008-2011 Union Collective Agreement [41, 58].	No.	Yes. The Tribunal found the AER made a material error of fact as well as incorrectly exercising its discretion [41], [58].	–	Ground not discussed	–
Application by ETSA Utilities [2010] ACompT 5	AER incorrectly exercised its discretion by not considering in detail the valuation submitted by ETSA [32].	No.	Yes. ETSA submitted that 'errors of fact were made [19]' and 'the AER exercised its discretion incorrectly and made an unreasonable decision in relation to the value of easements.' The error expressly found was in the exercise of discretion [32].	–	Ground not discussed	–

Decision	Error(s) found by the Tribunal	Unreasonable ground found?	Error of fact(s) or incorrect exercise of discretion also found re this error?	Reasons underlying unreasonable ground on review	Misapplication of law/rules or substitution of the Tribunal's reasoning	Notes
Re Application by ElectraNet Pty Limited (No 3) [2008] ACompT 3	The AER made an error of fact by not being persuaded that easement transaction costs were not included in the Regulatory Asset Base (RAB).	Unclear. While it was common ground that the 'single fundamental issue' to be decided was whether the AER's consideration of ElectraNet's RAB in relation to easements was incorrect or unreasonable [6], the Tribunal did not discuss unreasonableness in its decision but instead found that the AER had erred in the 'manner identified' [258].	Yes, the Tribunal determined that the AER made a finding of fact which was in error [137].	–	Ground not discussed	–
Re Jemena Gas Network (NSW) Ltd (No 5) [2011] ACompT 10	The AER used an incorrect methodology to calculate the applicable debt risk premium (DRP).	Unclear The Tribunal relied on a previous decision on DRP (*Re Application by ActewAGL Distribution* [2010] ACompT 4) (see e.g. [78]) in which it found the AER's methodology to be unreasonable (see [2010] ACompT 4 at [37]). Based on the Tribunal's decision in ActewAGL, the AER accepted that its determination was in error.	Unclear The Tribunal did not specify applicable s 246(1) ground(s). However, it followed its reasoning on DRP in the ActewAGL case, in which it found that the AER had erred under the unreasonableness ground, and ruled out the other grounds (see the ActewAGL case discussion in the ACT section).	In the ActewAGL case, which the Tribunal followed, the Tribunal found that the AER had erred under the unreasonableness ground.	Substitution of reasoning	AER inference
	Issue of whether reliance should be placed solely on the Bloomberg fair value curve or an average of Bloomberg and CBASpectrum,	Unclear	Unclear	The Tribunal appeared to prefer the opinion of Jemena's expert to that of the AER's. [23-90]	Substitution of reasoning	AER inference

Decision	Error(s) found by the Tribunal	Unreasonable ground found?	Error of fact(s) or incorrect exercise of discretion also found re this error?	Reasons underlying unreasonable ground on review	Misapplication of law/rules or substitution of the Tribunal's reasoning	Notes
	AER's decision on the value of imputation credits (gamma) in the proposed rate of return [91].	Unclear. The Tribunal relied on its previous decision in *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9.	Unclear	In the Energex case, the unreasonable ground was not discussed. The AER submits that the value of gamma is a matter of economic opinion, on which reasonable minds can (and clearly do) differ.	Substitution of reasoning.	AER inference
Re Jemena Gas Networks (NSW) [2011] ACompT 6	AER erred in failing to treat mine subsidence costs as capital expenditure.	Unclear. NGL s 246(1) ground(s) not specified re this error, but Tribunal noted that the AER had applied an 'incorrect test' [40].	Unclear: the Tribunal did not specify applicable s 246(1) ground(s).	The Tribunal found that the AER had misapplied the law in the sense that 'it applied an incorrect test' [40].	Misapplication of law/rules.	AER inference
	AER erred in including liability for negligence in Reference Services Agreement.	Yes. Inclusion of this liability 'unreasonable': [82].	No.	No legal or factual error was found. The Tribunal considered that the retention of this liability was (in its view) 'unnecessary to meet the AER's objectives' [82].	Substitution of reasoning	–
EnergyAustralia & Ors [2009] ACompT 8	The AER's decision not to agree to a proposed averaging period was unreasonable: it did not have sufficient reason to believe that this period would produce an unbiased estimate of Commonwealth Government Securities rates.	Yes: [104, 107].	Yes, the Tribunal's finding in respect of this matter was that 'the AER exercised its decision incorrectly, *or* its decision in this respect was unreasonable, for the purposes of establishing a ground of review under s 71C(1)(c) *and* (d)' (emphasis added): [107].		Substitution of reasoning	–

Decision	Error(s) found by the Tribunal	Unreasonable ground found?	Error of fact(s) or incorrect exercise of discretion also found re this error?	Reasons underlying unreasonable ground on review	Misapplication of law/rules or substitution of the Tribunal's reasoning	Notes
	The Tribunal agreed with the AER and EnergyAustralia's joint submission that the AER's decision on which matters qualified for 'pass through' was incorrect.	Yes: [263]–[264].	Yes: the Tribunal agreed with the AER and EnergyAustralia's joint submission, which submitted that the decision 'was affected by reviewable errors answering the description of an incorrect exercise of discretion or an unreasonable decision': [263]–[264].	The AER conceded that it had made reviewable errors. AER and EnergyAustralia sought to remedy the matter by agreement.	Unclear	–
	The Tribunal found the AER had erred in relation to a decision to reduce TransGrid's forecast opex by reducing its forecast defect maintenance for new growth assets: [305].	Yes: [309].	Yes, per [309] 'for the above reasons, TransGrid has established that *either* the AER exercised its discretion in correctly, *or* its decision was unreasonable in all the circumstances' (emphasis added): [309].		Substitution of reasoning	–
Application by EnergyAustralia [2009] ACompT 7	The Tribunal found the AER had erred in its determination of the various aspects of the appropriate opex for public lighting.	No.	Exercise of discretion: [30].	The AER conceded that it had made reviewable errors. AER and EnergyAustralia sought to remedy the matter by agreement [23].	Ground not discussed	
Application by United Energy Distribution & Ors [2012] ACompT 1	The Tribunal found that the AER did not have the power to apply a 's-factor scheme' used by the Victorian Essential Services Commission (ESCV).	Unclear. United Energy Australia alleged this constituted unreasonableness or an incorrect exercise of discretion: [230]. The Tribunal did not expressly identify a ground of review, but it expressed agreement with UED's case: [242]–[247].	Not expressly. The Tribunal expressed agreement with UED's case, so arguably, in addition to unreasonableness, it also adopted discretion.	Tribunal found that the AER had acted beyond its powers: [247].	Misapplication of law/rules.	AER inference

Decision	Error(s) found by the Tribunal	Unreasonable ground found?	Error of fact(s) or incorrect exercise of discretion also found re this error?	Reasons underlying unreasonable ground on review	Misapplication of law/rules or substitution of the Tribunal's reasoning	Notes
	The Tribunal found that the AER erred regarding calculating the regulatory asset base: [378] and [384]	Yes: [384]	Not expressly. The Tribunal said the finding was "erroneous and unreasonable in all the circumstances" [384], which could be construed as an error of fact.	No clear legal error is expressed.	Substitution of reasoning	AER inference
	The AER erred when estimating the debt risk premium in:					
	(a) failing to annualise the fair value, and also	Yes: [441]	No.	The Tribunal found that the AER's approach 'was contrary to cl 6.12.3(f) of the NER': [441].	Misapplication of law/rules	–
	(b) having regard to the bonds issued by the Australian Pipeline Trust (APT).	Yes: [434], [437].	No.	The Tribunal stated that the AER's conduct was 'inconsistent with the requirements of the NER': [442]. However, the AER submits that the Tribunal disagreed with the AER's application of the NER on a matter that clearly involves opinion and estimation of future events, rather than finding that the AER had misunderstood the law or applied any incorrect test.	Unclear	–
	The AER erred in not including certain costs in its forecast opex allowance for the enterprise support function	Yes: [504].	Yes, also found errors of fact: [504].		Substitution of reasoning	–
	The AER erred in its adopting a particular gamma (γ) value, [512]–[517].	Not expressly. The AER conceded the issue given that the Tribunal's decision on the same matter in *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9, [42].	Not expressly.	The AER submits that the value of gamma is a matter of economic opinion, on which reasonable minds can (and clearly do) differ.	Substitution of reasoning	AER inference

Decision	Error(s) found by the Tribunal	Unreasonable ground found?	Error of fact(s) or incorrect exercise of discretion also found re this error?	Reasons underlying unreasonable ground on review	Misapplication of law/rules or substitution of the Tribunal's reasoning	Notes
	The Tribunal found that the AER had not granted procedural fairness to Powercor in respect of a changed definition of 'insurance event': [533]–[539].	Unclear.	Unclear. It could be argued that a denial of procedural fairness at law amounts to an incorrect exercise of discretion, though this was not expressly found.		Ground not discussed	–
	The Tribunal found that the AER had erred in carrying over the 'accrued negative carryover' amounts into the current regulatory control period.	Not expressly. However the Tribunal said that its reasoning 'raises the same considerations as were raised ... in relation to ... S factor scheme': [613].	Unclear. As noted above, in the case of the 's' factor scheme the Tribunal agreed with a submission that the error constituted unreasonableness or an incorrect exercise of discretion.	Following the logic of the S-factor finding, it was there found that the AER had acted beyond its power. Hence possible error of law/rules.	Misapplication in law/rules	AER inference
	The AER erred in assessing the costs of Powercor's work program: [667].	Yes: [667].	No.		Substitution of reasoning	–
ActewAGL Distribution [2010] ACompT 4	The Tribunal determined the AER had erred in relation to its methodology of determining the DRP: in particular regarding the indices it used for comparative purposes: [39].	Yes. The Tribunal determined that the complaint 'is best considered under the 'unreasonableness' head: [37].	Unclear. The Tribunal stated that 'some of the alleged errors ... may be complaints about errors of fact' and that '[i]t may be possible to characterise the final decision ... as being an exercise of discretion'.	Unreasonableness only. The Tribunal did not find any clear objective error; rather, the Tribunal disagreed with the AER regarding a matter that is clearly one of opinion, being the debt risk for a particular firm.	Substitution of reasoning	–