AUSTRALIAN COMPETITION TRIBUNAL

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

Citation:	Application by United Energy Distribution Pty Limited [2012] ACompT 1
Review from:	Australian Energy Regulator
Parties:	**UNITED ENERGY DISTRIBUTION PTY LIMITED (ABN 70 064 651 029)** **SPI ELECTRICITY PTY LIMITED (ABN 91 064 235 776)** **CITIPOWER PTY (ABN 76 064 651 056)** **POWERCOR AUSTRALIA LIMITED (ABN 89 064 651 109)** **JEMENA ELECTRICITY NETWORKS (VIC) LTD (ACN 064 651 083)**
File numbers:	ACT 6 of 2010 ACT 7 of 2010 ACT 8 of 2010 ACT 9 of 2010 ACT 10 of 2010
Tribunal:	**FOSTER J (DEPUTY PRESIDENT), MR G LATTA AM AND PROFESSOR D ROUND**
Date of decision:	6 January 2012
Legislation:	*Acts Interpretation Act 1901* (Cth) *Competition and Consumer Act 2010* (Cth), s 44AAF *Corporations Act 2001* (Cth) *Electricity Safety (Bushfire Mitigation) Amendment Interim Regulations 2010* *Electricity Safety Act 1998 (Vic) s 113A of Div 2A of Pt 10* *Electricity Safety (Electric Line Clearance) Regulations 2005, cll 9, 9.1, 9.3, 12, reg 10* *Electricity Safety (Electric Line Clearance) Regulations 2010, Table 2* *Interpretation of Legislation Act 1984* (Vic), s 27, s 28(2) *National Electricity Law*, ss 2, 2B, 2C, 2D, 3, 5, 7, 7A, 8, 9, 11(2), 14B, 15, 16, 16(1)(b), 18, 28D, 28ZC, 57B, 71B,

614 For essentially the same reasons as we rejected the AER's contentions in respect of Issue 3, we also reject them in respect of this issue. We should add that, in order to justify its position, the AER was driven to re-writing cl 6.4.3(a)(6) and cl 6.4.3(b)(6) in order to remove the constraints imposed upon its approach by the definition of "previous *regulatory control period"* so as to make clear that the particular clauses contemplated the carrying over into the current *regulatory control period* negative carryover resulting from performance in the 2001–2005 regulatory period.

615 The fact that the AER had to resort to rewriting the clause, in our view, confirms that, upon the correct interpretation of the clause as it is drafted, it does not authorise a carryover into the current *regulatory control period* of these negative amounts in the case of Powercor.

616 The consequence of the conclusions which we have expressed at [613]–[615] above is that the AER had no power to do that which it did. Its decision must be set aside.

617 The AER has raised in its Written Submissions (at pars 112–129) the proposition that a holding by this Tribunal that the AER did not have power to carryover into the current *regulatory control period* the negative amounts which it purported to carryover from the 2001–2005 regulatory period, might have consequences for decisions made in respect of other DNSPs upon the same basis as the decision which we have made in respect of Powercor.

618 The Tribunal proposes to reserve for further consideration the consequences of its decision insofar as other DNSPs are concerned. As was the case with Issue 3, the Tribunal will invite the parties to make submissions in respect of those consequences.

619 In light of the conclusions to which we have come in respect of this issue, it is not necessary for us to consider discretionary factors.

ISSUE 16—VEGETATION MANAGEMENT OPEX STEP CHANGE (CITIPOWER AND POWERCOR)

Introduction

620 This issue concerns both CitiPower and Powercor.

621 The step change involved in this issue arises from changes made in regulations made under the Safety Act. In particular, the changes that were made to those regulations concerned electrical line clearances. Until 29 June 2010, the regulations were those contained in the regulations made in 2005. Those regulations contained certain exceptions and various other provisions which were less onerous in terms of the work programs required to be carried out by the DNSPs. The 2010 regulations did not carry over those exemptions. In addition, there was a standalone exemption granted by ESV to the DNSPs in respect of the manner in which they are obliged to deal with vegetation management in the HBRA. That standalone exemption did not continue beyond the making of the 2010 amendments to the regulations made under the Safety Act.

622 Under cl 9 of the *Electricity Safety (Electric Line Clearance) Regulations 2005* (**the 2005 clearance regulations**) in force prior to the 2010 amendments, certain clearance spaces around aerial bundled cables and insulated cables in all areas were stipulated for by reference to tables and diagrams forming part of the schedule to those regulations. Some relief from the requirements of cl 9.1 was afforded to DNSPs through the exceptions set out in cl 9.3. Clause 9.3 provided:

> 9.3 If the responsible person complies with clause 12, the requirements of clause 9.1 do not apply to existing tree branches that exceed 130 millimetres in diameter, if the branch is more than 300 millimetres from an aerial bundled cable or insulated cable.

623 Clause 12 provided an exception in the event that appropriate annual risk assessments were carried out at the behest of the relevant DNSPs. In general terms, the effect of this exception was that the DNSPs could allow light vegetation into the mandated clearance space, so long as they were not likely to abrade the cable. One of the areas of present controversy concerns insulated cable, that is to say, cables that pass between a pole and, ordinarily, a house or other building. There are many thousands of such cables both in metropolitan and regional areas.

624 The 2010 regulations removed the opportunity for DNSPs to avoid the strict consequences of applying cl 9.1 of the 2005 clearance regulations.

625 The second substantial change concerned spans between poles which exceeded 100 metres in length. In respect of those spans, the minimum clearance space must be

extended by an additional distance to allow for sag and sway of the conductors. Further, an additional distance must be added to the minimum clearance space to allow for regrowth during the period between cutting times. Table 2 in the *Electricity Safety (Electric Line Clearance) Regulations 2010* (**the 2010 clearance regulations**), specified minimum clearance spaces are laid down for spans exceeding 100 metres.

626 The third significant change was the removal of a specific exemption granted to Powercor under reg 10 of the 2005 clearance regulations in respect of HBRA. That exemption had provided:

> **1. Hazardous Bushfire Risk Areas**
>
> Powercor is exempted from the requirement to maintain a clearance space in accordance with clause 2.1 of the [2005 Clearance Regulations] provided that Powercor achieves the minimum clearance space requirements specified in Tables 9.3 and 11.1 of [those Regulations] during:
>
> (a) the fire danger period, in an area declared under section 4 of the Country Fire Authority Act 1958 (**CFA Act**) for an area; or
>
> (b) the period 15 December to 31 March for an area in which there is no fire danger period declared under section 4 of the CFA Act.

627 That exemption was not continued in the 2010 clearance regulations. It was not continued in any ongoing regulatory legislation or instrument after the making of the 2010 clearance regulations.

628 The fundamental difference of opinion in respect of this issue between the AER and Powercor, (and, to a lesser extent, CitiPower) concerns the unit rates applied by the AER. The AER picked up the unit rates propounded by other DNSPs, being lower than those put forward by CitiPower and Powercor, and adopted those rates to the larger span volumes, in particular. The approach taken by the AER did not accommodate the clearance plans actually put together by CitiPower and Powercor and approved by ESV.

629 Citipower and Powercor argued that, in adopting the rates which it did, the AER committed errors of fact, wrongly exercised a discretion and acted unreasonably in all the circumstances. The AER submitted that it did its best with the information which had been provided by CitiPower and Powercor.

The Contentions made by CitiPower and Powercor

630 The clearance work which the DNSPs are required to carry out around their poles, wires and other infrastructure is carried out by subcontractors. That is to say, it is carried out by expert clearance contractors. The Tribunal was informed that, in Victoria, effectively there are only two such contractors. CitiPower and Powercor use the same contractor. Other distributors use a different contractor.

631 Step changes within a *regulatory control period* are the means by which an allowance for incremental costs arising from (*inter alia*) changes in regulatory obligations or changes in the DNSP's operating environment from the base year are provided for.

632 The expert retained by the AER (Nuttall Consulting) made a fundamental error in failing to appreciate the idiosyncrasies of the Powercor (and, to a lesser extent, CitiPower) network. It applied general conclusions in order to derive averages across the whole of the State by reference to (*inter alia*) the circumstances of other DNSPs but failed to appreciate that the Powercor network was to a large extent different from the other networks.

633 In general terms, the costs of a given vegetation work program are the product of the number of spans to be dealt with in that work program and the unit rate (per span), or the average cost per span, for actioning those spans. The nature of the work required to be carried out on any span, and therefore the volume of work activity per span, may differ between work programs, with the result that different unit rates are used in costing different work programs.

634 The revised regulatory proposals lodged by CitiPower and Powercor took into account the commencement of the 2010 clearance regulations. Accordingly, CitiPower and Powercor included in their revised regulatory proposals operating expenditure step change amounts to account for the increase in costs estimated to result from these changes.

635 In the case of CitiPower, it does not have any HBRA or spans exceeding 100 metres. Therefore, two of the significant regulatory changes do not impact upon CitiPower.

636 CitiPower and Powercor ordinarily engage an independent, third party vegetation management contractor, Vemco Pty Ltd (**VEMCO**), to undertake vegetation clearance on

their networks in accordance with the requirements of the regulations applicable from time to time. VEMCO has provided vegetation management services to CitiPower and Powercor since 1997.

637 For the purposes of proposing their step change amounts in respect of the regulatory changes referred to at [621]–[627] above, CitiPower and Powercor obtained cost estimates from VEMCO. Those estimates were set out in a letter to CitiPower and Powercor from VEMCO dated 13 July 2010. That letter was provided to the AER.

638 In that letter, the author said:

> We have considered the cost impact of each of the key regulatory changes identified in the advice from DLA Phillips Fox and we have identified the below key regulatory changes in the 2010 Regulations as having a major cost impact on PAL/CP. Based on our analysis of the increased workload to comply with the changes to the Regulations the following costs increases, above the 2009 actual costs, will apply over the five years from January 2011 to end December 2015.

639 Immediately following that paragraph, the author set out a table in the following terms:

#	Nature of Change	Cost for Powercor Network	Cost for CitiPower Network
1	Removal of Exemption from compliance with clearance space requirements in hazardous bushfire risk areas (**HBRA**)	**$28,800k**	**$0k**
2	New requirement that a responsible person must, as far as practicable, restrict cutting or removal of native trees or trees of cultural or environmental significance to the minimum extent necessary to ensure compliance with the Code (clause 2(3) of the 2010 Code).	**$6,368k**	**$280k**
3	New requirement that the cutting or removal of habitat trees must be undertaken outside of breeding season wherever practicable, and if not practicable translocation of fauna must be undertaken (clause 4 of the 2010 Code).	**$500k**	**$0k**
4	Changes to notification and consultation requirements (clause 5 of the 2010 Code).	**-$8k**	**-$5k**
5	New requirement to cut trees within 60 days of notifying affected persons (clause 5 of the 2010 Code).	**$150k**	**$50k**

#	Nature of Change	Cost for Powercor Network	Cost for CitiPower Network
6	Omission of clauses 9.2.1 and 9.2.2 of the 2005 Code which allowed light vegetation/foliage to enter the clearance space and omission of clause 9.3 which allowed within the clearance space branches exceeding 130 millimetres that were more than 300 millimetres from an aerial bundled cable or insulated cable – lines from pole to pole.	**$14,481k**	**$1,545k**
7	Omission of clauses 9.2.1 and 9.2.2 of the 2005 Code which allowed light vegetation/foliage to enter the clearance space and omission of clause 9.3 which allowed within the clearance space branches exceeding 130 millimetres that were more than 300 millimetres from an aerial bundled cable or insulated cable – service lines from the pole to the building.	**$20,996k**	**$13,558k**
8	Removal of allowance for reduced clearances in LBRA for powerlines of 22,000 volts or less and powerlines of 566,000 volts by omission of clauses 10(b), 10(c) and 12 of the 2005 Code.	**$9,405k**	**$3,366k**
9	Removal of allowance for overhang in HBRA by omission of clause 11.2 of the 2005 Code.	**$450k**	**$0k**
10	Table 2 of the 2010 Code requires a larger clearance space for spans exceeding 100 metres than Table 10.1 of the 2005 Code.	**$7,300k**	**$0k**

We note that in addition to the above costs of complying with the 2010 Regulations, the following costs above 2009 actual costs will apply during the period January 2011 to end December 2015 in respect of PAL/CP's program of achieving compliance with the clearance space requirements in low bushfire risk areas.

#	Nature of Activity	Cost for Powercor Network	Cost for CitiPower Network
1	Costs of achieving compliance with clearance space requirements in low bushfire risk areas (**LBRA)**.	**$3,250k**	**$450k**

640 CitiPower and Powercor carried forward the estimates given to them by VEMCO into their revised regulatory proposals.

641 To facilitate a review by ESV (at the request of the AER) of the volume and number of spans to be actioned in 2011–2015 *regulatory control period* as a result of the changes effected by the 2010 clearance regulations, the AER and ESV requested further and more detailed information from the DNSPs regarding the volume or number of spans to be actioned by them under the 2010 clearance regulations. In response to that request, CitiPower and

Powercor obtained and provided to the AER a statement dated 30 August 2010 made by Mr Joyce, the Managing Director of VEMCO.

642 CitiPower and Powercor placed great reliance before the Tribunal on this statement. The statement is slightly more than 40 pages in length and comprises 226 paragraphs. Mr Joyce is familiar with the networks of both CitiPower and Powercor and described those networks in some detail. He also made clear in his statement that much of the work of clearing would be done by subcontractors retained by VEMCO. The essence of the material conveyed by Mr Joyce is contained in pars 32–39 of his statement which are in the following terms:

> **Vegetation management costs**
>
> 32 Vegetation management costs for any given work program are generally a product of the number of spans to be actioned in that work program and the unit rate (per span), or average cost per span, for actioning those spans.
>
> 33 In costing the changes as between the 2005 Regulations and Code and the 2010 Regulations and Code, I assumed that the various work programs required to address compliance with those changes would be implemented as part of the cyclic inspection and clearance programs that will be carried out by Powercor and CitiPower under the 2010 Code.
>
> 34 The nature of the work required to be carried out on a span and therefore the volume of work activity per span may differ between work programs, with the result that different unit rates are used in costing different work programs. In this case, the nature of the change between the 2005 Regulations and Code and the 2010 Regulations and Code will affect the nature and volume of the work per span required to address that change. As a result, the unit rates per span vary across the different changes between the 2005 Regulations and Code and the 2010 Regulations and Code.
>
> 35 VEMCO determines the unit rates per span for any given work program based on a number of factors, including:
>
> (a) the cutting workload per span associated with the work program including in particular:
>
> (i) the number of trees to be actioned per span in the work program; and
>
> (ii) the targeted clearance distances and the resultant aggressiveness of the cutting required in the work program;
>
> (b) the inspection of spans required as part of the work program (as it is common to recover the costs of these inspections through the unit rate per span applied to the number of spans to be actioned in the work program);
>
> (c) the historical costs of that cutting workload per span and those inspections;
>
> (d) the expected future number of spans to be actioned in the work program to which the unit rate applies and in other work programs or

activities (as this will determine the demand over which common costs, such as the costs of travel to and from the site and management costs, may be spread/recovered and, thus, the amount of these costs reflected in the unit rate for the work program);

(e) the costs of travel to and from the site;

(f) site access costs;

(g) traffic control costs;

(h) clean up requirements for the work program and the resultant clean up costs;

(i) weather impacts (for example, rain and total fire bans);

(j) the notification and consultation costs expected to be associated with the work program;

(k) customer requirements expected to be associated with the work program and the resultant costs of complying with those requirements;

(l) the composition of the crew(s) required for the work program – including the type of crew expertise required to undertake the work and the cost of that crew make up per hour;

(m) enterprise bargaining agreements;

(n) machinery capital and running costs;

(o) the productivity of crews;

(p) the management costs associated with the work program; and

(q) the costs of any auditing required as part of the work program.

36 These factors differ for the different changes between the 2005 Code and the 2010 Code and as between LBRA and HBRA and the CitiPower and Powercor networks. This is because the work per span required to be undertaken differs depending on the relevant change, whether the cutting or removal of the trees required by that change is in LBRA or HBRA and whether the cutting or removal required by that change is in the CitiPower or Powercor network. As a result, in costing the impact of the changes between the 2005 Code and the 2010 Code for CitiPower and Powercor I used different unit rates for different changes.

37 With the exception only of the estimation of the incremental costs due to the removal of the exemption from compliance with the requirements of the 2005 Code in HBRA granted to Powercor by ESV on 21 December 2005 (**HBRA Exemption**), in estimating the incremental cost of any given change as between the 2005 Regulations and Code and the 2010 Regulations and Code I estimated the number of spans that will require vegetation management activities in order to comply with that change. In some cases, the spans would have still required action in the absence of the change (i.e., in order to comply with the 2005 Regulations and Code), but the change under the 2010 Regulations and Code necessitates that additional work be carried out in actioning the spans. The unit rate I applied to the estimated number of spans requiring vegetation management activities as a result of the change reflects only the cost per span of those additional work activities necessitated by the change. This ensured that only the cost of the additional work activities necessitated by the change between the 2005 Regulations and Code and the 2010 Regulations and Code are costed.

> 38 In estimating the incremental costs due to the removal of the HBRA Exemption, the method I adopted differs from that described in the preceding paragraph but it nonetheless ensures that I isolated the incremental cost due to the removal of the HBRA Exemption. This method is described in detail below.
>
> 39 I describe in detail below the impact of the key changes for Powercor and CitiPower identified in paragraphs 10 and 14 above and my methodology for calculating the incremental costs of those key changes.

643 At par 77 of his statement, Mr Joyce set out various unit costs which he had used in formulating his cost estimate conveyed to CitiPower and Powercor by his letter dated 13 July 2010. He did not, however, explain in par 77 (or anywhere else in his statement) precisely how he had derived those unit rates. At par 79 of his statement, he provided a summary of the total cost position in which he compared the costs of clearing in accordance with the 2010 clearance regulations and the costs of doing so without the impact of those regulations. He also made some general remarks concerning the frequency with which inspections will be required in the future.

644 In oral submissions made to the Tribunal, Senior Counsel for CitiPower and Powercor spent some considerable time going through the statement made by Mr Joyce in an endeavour to persuade the Tribunal that the statement was very detailed and provided all the reasonable information that the AER could have required in order to accept the step change amounts included in the revised regulatory proposal of CitiPower and Powercor.

645 In the final decision, the AER did not accept the step change amounts proposed by CitiPower and Powercor. It concluded that:

(a) The unit rates estimated by Mr Joyce of VEMCO and proposed by CitiPower and Powercor did not reasonably reflect the efficient and prudent unit rates of complying with the relevant changes effected by the 2010 clearance regulations; and

(b) The efficient and prudent step change amounts for CitiPower and Powercor were those estimated by applying unit rates based on those proposed by other DNSPs to the volumes estimated by VEMCO and proposed by CityPower and Powercor.

646 The AER had asked the ESV to carry out an assessment of the volume of work proposed by VEMCO. The ESV reported to the AER that the volume of work proposed by

VEMCO as a result of the changes effected by the 2010 clearance regulations was reasonable.

647 The AER, therefore, ultimately reached its conclusion on the basis that it was not satisfied with the unit rates which VEMCO had proposed to CitiPower and Powercor. Its dissatisfaction on this point was based upon the findings of Nuttall Consulting. Nuttall Consulting had been retained by the AER to evaluate those rates.

648 CitiPower and Powercor contend that the evaluation conducted by Nuttall Consulting was defective because it placed too much emphasis on common features across all networks and, in particular, on unit costs on an average basis undertaken by other networks without paying due regard to the idiosyncrasies of the CitiPower (and, in particular) the Powercor networks.

649 Nuttall Consulting took the approach which it did because it came to the view that:

(a) CitiPower and Powercor had not provided sufficient information to support their cost estimates;

(b) The supporting information provided by, and unit rates of, the other DNSPs were highly consistent (although inconsistent with those supplied by CitiPower and Powercor);

(c) The VEMCO unit rates underpinning CitiPower's and Powercor's step change amounts were considerably higher than the unit rates proposed by the other DNSPs; and

(d) Nuttall Consulting could not deduce any legitimate reasons for these differences.

650 For these reasons, the AER substituted its own estimates for the step change amounts propounded by CitiPower and Powercor.

651 The errors to which CitiPower and Powercor point are the following:

(a) The AER failed to afford to each of CitiPower and Powercor procedural fairness in the regulatory process;

(b) The AER erred in concluding that CitiPower and Powercor had not provided sufficient detail and sufficient information to support their proposed step change amounts;

(c) The AER placed undue weight on the findings of Nuttall Consulting and insufficient weight on the material provided by Mr Joyce;

(d) The AER failed to take due account of the fact that the other DNSPs were all serviced by one clearance contractor whereas CitiPower and Powercor were serviced by the only other available clearance contractor; and

(e) The AER placed far too much weight on the unit rates propounded by the other DNSPs.

652 CitiPower and Powercor devoted a great deal of time and effort, both in their written and oral submissions, in attempting to make good the errors which we have summarised at [651] above. Accompanying those submissions were various schedules which Senior Counsel deployed in aid of his oral submissions.

653 In very broad terms, those schedules were designed to demonstrate the following:

(a) In relation to HBRA, compared with all of the other DNSPs, Powercor's less frequent cutting involves more aggressive cutting, which is more costly per span cut than more frequent light cutting. This illustrates the need for the AER, when comparing unit rates of one DNSP with one or more of the other DNSPs, to be careful to ensure that appropriate consideration is given to the differences between the networks and the work programs in place for achieving the clearance requirements according to the relevant regulations.

(b) Insofar as the insulated service line changes were concerned, it is apparent that there were vast differences in the frequency of cutting in SP AusNet's network compared with Powercor's network. Nuttall Consulting had placed considerable weight on SP AusNet's rates. In addition, there were substantial differences between the inclusions in the rate as between CitiPower and UED/JEN. The costliest lines, for example, were not in the unit rate because aspects of the costs were dealt with as capital (rather than opex). Furthermore, the AER did not make allowance for inspection costs in applying the unit rates of other DNSPs.

(c) In respect of the low bushfire risk area (**LBRA**) spans exceeding 100 metres, Powercor submitted that the vegetation characteristics of those spans as between the networks were vastly different. The use of other DNSPs' unit rates in respect of those items did not provide a proper comparison.

654 The procedural fairness complaint is a simple one: CitiPower and Powercor complain that the AER should have told them that it was contemplating evaluating the efficiency and prudence of unit rates calculated by VEMCO by comparing them with unit rates put forward by other DNSPs. It did not do this. Second, it should have provided to CitiPower and Powercor the unit rates which it had in mind benchmarking so that CitiPower and Powercor could comment on those rates. It did not do that. Third, the denial to CitiPower and Powercor of the opportunity to comment on the rates propounded by the other DNSPs produced a serious injustice because Nuttall Consulting and the AER placed far too much store in the utility of using the other DNSPs' rates as a comparator.

The AER's Submissions

655 In its draft decision, the AER expressed dissatisfaction with the forecast opex provided by each of the DNSPs. It also made reference to step changes. Appendix 1 to the AER's draft decision described the AER's approach to benchmarking. In that Appendix, the AER said that, with assistance from its consultants, it had undertaken trend analysis, bottom up benchmarking, ratio analysis and reviews of policies and procedures to compare the efficiency of the opex and capex forecasts proposed by the DNSPs.

656 In Appendix L to its draft decision, the AER set out its analysis of the DNSPs proposed step changes. The AER foreshadowed an expectation on its part that more precise forecasts in respect of the step changes likely to be required as a response to the 2010 clearance regulations would be known by the time the revised regulatory proposals were submitted to it.

657 After publishing its draft decision, the AER looked carefully at Annexure MJ-7 to Mr Joyce's statement and the calculations contained in the spreadsheet forming part of that Annexure. The spreadsheet only contained calculations in relation to the removal of the HBRA exemption. It did not contain calculations in respect of any other proposed step changes as a result of the 2010 clearance regulations coming into force. The unit rates shown

in the spreadsheet were final numbers without any breakdown or detailed information about how they had been derived. That shortcoming was not ameliorated by the text of the statement.

658 Nuttall Consulting benchmarked CitiPower's and Powercor's step change amounts and formed the view that they were excessive. The AER said in the final decision that it had assessed the step changes solely against the opex criteria and the opex factors according to cl 6.5.6 of the NER in a manner which was consistent with the NEO and which took into account the RPP. It explained its reasoning processes in Appendix H and Appendix L to the final decision.

659 The AER submitted that its decision was perfectly justifiable given the shortcomings in the information provided by CitiPower and Powercor.

Decision

660 Despite the volume of words and the many pages devoted to the exercise, the information provided by CitiPower and Powercor via Mr Joyce's cost estimates and statement was at a general and "high level". A close examination of that information reveals that very little information about the build up of the unit rates relied upon by Mr Joyce was provided by CitiPower or Powercor or Mr Joyce. Virtually no information about the rates to be charged to VEMCO by its subcontractors was provided to the AER. Furthermore, no comparison between the rates proposed in the revised regulatory proposals and those incurred by the CitiPower and Powercor businesses in the 2009 calendar year was undertaken. As the AER pointed out, answers to the following questions would, at a minimum, have assisted the AER to accept the step change amounts proposed. These questions are:

- How many workers are in each crew (both cutting and clean up)?
- What are their hourly contract rates?
- What amount of time has been allocated for those crews per span?
- How many workers are involved in inspections?
- What are their hourly contract rates?
- What amount of time has been allocated for those inspections per span?

- What resources are required for notification and consultation, data capture, subcontractor resource management, auditing and quality control?
- How is the unit rate of $182.00 per crew broken down into the components generally listed in Mr Joyce's statement?

661 At par 35 of his statement, Mr Joyce lists a number of matters but does not relate those matters to the particular exigencies of the circumstances and network programs of each of CitiPower and Powercor. He made no effort at all to connect up the various matters listed in par 35 to the unit rates contained in his spreadsheet by, for example, breaking out those unit rates by reference to the various matters listed.

662 Furthermore, Mr Joyce was working on estimates. There was no evidence either before the AER or before the Tribunal, one way or the other, as to whether VEMCO had entered into a contract with either CitiPower or Powercor to do the work contemplated. There was, therefore, no firmness about the estimate beyond Mr Joyce's assertion that the estimates were reasonable.

663 The AER was entitled to be suspicious of the quantum of the step change amounts claimed by each of CitiPower and Powercor given the shortcomings in the information provided and the significant increase over the 2009 base year. Furthermore, it was entitled to benchmark those rates against information provided by the other DNSPs.

664 In our view, CitiPower and Powercor had ample opportunity to provide greater assurance to the AER concerning the step change amounts which they had claimed. They must be taken to have understood that the AER would wish to look at the rates which underpinned those amounts carefully, would wish to benchmark them against the other DNSPs' rates and would wish to cross-check them as against expenditure in prior periods.

665 For the reasons which we have explained at [660]–[664] above, we think that the AER was justified in not being satisfied with the information which had been provided to it by CitiPower and Powercor. The build-up of the unit rates relied upon by Mr Joyce in formulating his cost estimates should have been revealed to the AER so that a careful assessment of those estimates could have been undertaken by the AER and its consultants.

666 On the other hand, the assessment made by Nuttall Consulting failed to pay proper regard to the differences between Powercor's network and those of the other DNSPs and failed to take proper account of the differences between the work programs which had been put in place by Powercor, in particular, and those which the other DNSPs proposed to undertake. After all, the work programs which Powercor had put in place had been assessed as reasonable by ESV, at the behest of the AER. ESV had concluded that the Powercor work programs constituted a reasonable response to the new regulatory environment created by the Victorian Government as a result of the Black Saturday bushfires.

667 The AER was justified in not being satisfied with the VEMCO costings. However, its assessment of the costs of Powercor's work programs was unreasonable.

668 In those circumstances, we propose to remit this issue to the AER. We think that CitiPower and Powercor should be given a further opportunity to justify the VEMCO estimates and that the AER should then reconsider its decision on this issue in light of the information then available to it.

669 Given that there is to be a remitter of the final determinations of both CitiPower and Powercor, it is not necessary to consider the procedural fairness grounds raised by those corporations in relation to this issue.

670 There will be orders accordingly.

SUMMARY OF CONCLUSIONS

671 The conclusions to which we have come in these Reasons for Decision may be summarised as follows:

Issue 1—Public Lighting Issues	SGC failed to make out any of the grounds of review that were the subject of leave granted by the Tribunal to SGC pursuant to s 71B of the NEL. The decisions made by the AER in respect of the public lighting issues are affirmed.
Issue 2—UED Opex and Internal and Related Party Costs	UED has failed to make out its ground of review concerning the AER's assessment of a component of its forecase opex (viz its internal