



Mr Mark McLeish
Manager New Regulatory Project
Australian Energy Regulator
GPO Box 520
Melbourne, VIC 3001

24 April 2018

By email: mark.mcleish@aer.gov.au

Dear Mr McLeish,

RE: New Reg process: towards consumer-centric energy network regulation, a joint initiative of the Australian Energy Regulator (AER), Energy Consumers Australia (ECA) and Energy Networks Australia (ENA)

As the peak body for the health and community services sector in South Australia, the South Australian Council of Social Service (SACOSS) has an established history of interest, engagement and provision of proposed advice on the necessary market mechanisms and policy for essential services, including electricity. SACOSS would like to thank Energy Consumers Australia (ECA), Energy Networks Australia (ENA) and the Australian Energy Regulator (AER) for providing SACOSS with the opportunity to comment on the proposed New Reg process. SACOSS would also like to thank AusNet Services for its willingness to engage with SACOSS and be transparent through the trial process.

Background

The AER, ENA and ECA (the Project Team) have agreed to develop and trial an alternative approach to network regulation, referred to as the New Reg process. The Project Team identified the need for an alternative approach on the basis of the 'poor outcomes' of the current regulatory process, and general negative observations about the process by stakeholders.¹ The proposed approach focuses on an alternative path for network businesses to take in building their regulatory proposals, and (importantly for our

¹ New Reg: Towards Consumer-Centric Energy Network Regulation: A joint initiative of the Australian Energy Regulator, Energy Consumers Australia, and Energy Networks Australia: Approach Paper, March 2018 (**Approach Paper**) p. 5

purposes) for the AER in assessing those proposals.² The overall vision of the New Reg process is that ‘consumers’ priorities and stated preferences should drive, and be seen to drive, energy network businesses proposals and regulatory outcomes’.³

In February this year, SACOSS participated in a teleconference with ECA and other consumer advocates, during which the New Reg process was discussed. Given the potential broader impact of the New Reg process on the AER’s current and future revenue determination decision-making, SACOSS expressed concern about the level of engagement which had been undertaken on the New Reg up to that time. ECA then provided SACOSS with a ‘working draft’ Approach Paper and Directions Paper, dated February 2018 for consideration and comment (the Draft Papers) as well as an Overview Paper, dated 20 August 2017 (Overview Paper).

On 23 March 2018, the AER published the first draft of the New Reg process as explained in the following two papers:

- New Reg: Towards a Consumer-Centric Energy Network Regulation: A joint initiative of the Australian Energy Regulator, Energy Consumers Australia and Energy Networks Australia, Directions Paper (working draft), March 2018 (**Directions Paper**).
- New Reg: Towards a Consumer-Centric Energy Network Regulation: A joint initiative of the Australian Energy Regulator, Energy Consumers Australia and Energy Networks Australia, Approach Paper (working draft), March 2018 (**Approach Paper**).

AusNet Services has agreed to trial the New Reg process for its Victorian electricity distribution business.⁴ The process involves the establishment of a Consumer Forum⁵ to negotiate with the network business and SACOSS understands AusNet’s Consumer Forum was appointed in February 2018 (with applications for positions on the Consumer Forum closing on 10 January 2018). An Early Engagement Plan (EEP) prepared by AusNet was published on its website in March 2018. The EEP timeline (figure 2) indicates that the ‘intensive training, investigation, scoping and agreeing of time-frames’⁶ commenced in March 2018 and will be finalised by the end of July, with negotiations between AusNet, AER and the Consumer Forum commencing on the issues in scope in August 2018. It is worth noting that up to the end of March 2018, there was limited public information available about the New Reg process, even though the trial had been underway for several months.

The Approach Paper indicates the Reference Group for the New Reg process requested the Project Team not release a discussion paper and submissions process, and that they ‘consider alternative means’⁷ of undertaking consultation with stakeholders. The AER has now indicated that it will run a public engagement process on New Reg throughout 2018, and are open to receiving comments and submissions on the New Reg

² New Reg: Towards Consumer-Centric Energy Network Regulation: A joint initiative of the Australian Energy Regulator, Energy Consumers Australia, and Energy Networks Australia: Directions paper, March 2013 (**Directions Paper**) p.3

³ Approach Paper, p.3

⁴ Approach Paper, p.10

⁵ AusNet Services’ Early Engagement Plan refers to the Customer Forum, whereas the Directions and Approach Papers refer to the Consumer Forum – in the interests of consistency, we refer to Consumer Forum throughout the submission, which includes references to the Customer Forum

⁶ AusNet Services, Early Engagement Plan, EDPR 2021-25 Customer Forum, p.11

⁷ Approach Paper, p.4

process at any time. SACOSS welcomes the open engagement from this point on, but is disappointed by the limited stakeholder involvement in the development of the model and trial. We feel that the consultation on the New Reg process and trial was inadequate, and potential adverse outcomes, as well as alternative models, were not sufficiently canvassed with stakeholders prior to development and implementation (see further discussion, below).

Overview of New Reg process

The Overview Paper highlights two broad stages to the proposed new regulatory process: the Early Engagement Process and the Fast-Track Review.⁸ The Approach Paper states that the ‘overarching principle in the design of the process is the opportunity for a network to reach agreement with its consumers on its revenue proposal resulting in a regulatory proposal that reflects consumer preferences’.⁹ The Directions Paper notes that ‘if a business successfully undertakes an Early Engagement Process, and reflects the outcomes of this process in its regulatory proposal, the AER may if it considers it appropriate expedite and/or streamline the revenue determination process.’¹⁰

Early Engagement Process

The Early Engagement Process involves network businesses formally engaging with consumers in the development of the regulatory proposal. For the purposes of the trial, an Early Engagement Plan would be developed by the network business and approved by the AER, specifying how the Early Engagement Process will be carried out. ‘All consumer voices’¹¹ in the process would be represented by a Consumer Forum. The function of the Consumer Forum is to:

‘be the formal counterparty in negotiations with the network business and to, as far as possible, reach agreement with the network business on the regulatory proposal prior to the submission of the regulatory proposal.’¹²

In acting as the formal counter-party, the Consumer Forum will represent the perspective of all the network businesses’ consumers, including ‘all direct customers and end users (residential, small business, corporate and industrial).’¹³ The purpose of the Consumer Forum is to ‘represent the long term perspective of consumers, and not to represent consumers directly’.¹⁴

The parties’ commitment to the Early Engagement Process would be formalised in accordance with an Engagement Agreement entered into by the network business, the AER and the Consumer Forum. Amongst other things, the Engagement Agreement would set out the roles, responsibilities, expectations, scope and funding arrangements of the Early Engagement Process. The goal of the Early Engagement Process is to reach an agreement between the network business and the Consumer Forum that the regulatory proposal reflects consumer perspectives and preferences.¹⁵ The Directions Paper states that the ‘objective is not simply to say that consumers have been consulted but that they agree with the revenue proposal’.¹⁶ An

⁸ ECA, Overview of AER/ENA/ECA Project, 20 August 2017, p.4

⁹ Approach Paper, p. 9

¹⁰ Directions Paper, p.11

¹¹ Directions Paper, p.4

¹² Directions Paper, p.10

¹³ Directions Paper, p. 10

¹⁴ Directions Paper, p.10

¹⁵ Directions Paper, p.3

¹⁶ Directions Paper, p.9

Engagement Report would be prepared by the Consumer Forum¹⁷ setting out the processes followed and the agreements reached (or otherwise) between the parties. The Engagement Report would also explain why these agreements are consistent with consumer perspectives and preferences.¹⁸

The Fast-Track Review

Depending on the agreements reached between the network business and the Consumer Forum (as outlined in the Engagement Report), the New Reg process envisages that the AER 'may undertake a less detailed assessment of certain issues.'¹⁹ For the purposes of the trial, the Directions Paper suggests it would be consistent with the AER's current regulatory obligations to expedite the regulatory process after the draft determination stage.²⁰ The EEP also states that the 'AER must have regard to the Engagement Report when making the Draft and Final Decision. Furthermore, if the AER considers it appropriate, it may expedite and / or streamline the formal revenue determination process. Were the AER to expedite its regulatory process, it may do so after the draft decision stage to allow for consultation on the outcomes of the trial'²¹ (this is discussed in further detail, below).

The Directions Paper acknowledges that 'the prospect of a shortened and less costly revenue determination process is one important incentive for a business to undertake a trial of the Early Engagement Process'.²²

Overview of submissions

The importance of revenue determination decisions to consumers cannot be overstated. Electricity is an essential service, and the AER's regulatory determination directly impacts on the price paid by consumers for this service. Retailers' cost information provided to the ACCC shows that 'on a NEM wide basis network costs accounted for 48 per cent of the retailer cost stack in 2015- 16'.²³ The interests of consumers are clearly affected by the regulatory determination, and the National Electricity Objective (NEO) along with the statutory public consultation requirements in the National Electricity Law (NEL) and National Electricity Rules (NER) reflect this (see further discussion, below).

SACOSS strongly supports consumer engagement and consultation at each stage of the regulatory determination process. For our purposes, each stage of the process includes engagement during the development of jurisdictional service standards and targets by the relevant state or territory government, engagement with network businesses during the pre-lodgement phase, engagement with the AER during the determination phase and potential involvement at the judicial review stage.

The New Reg process proposes an innovative process for undertaking consumer engagement at the regulatory proposal stage. SACOSS supports network businesses in undertaking their consumer engagement obligations with more oversight from the AER and more transparency in scope and outcomes. However, SACOSS does not support the implementation of a model of engagement that would result in the fast-tracking of the AER's regulatory determination decision-making processes. SACOSS submits that the AER has a duty to observe the principles of procedural fairness in its decision-making, and those principles are

¹⁷ Directions Paper, p.11

¹⁸ Directions Paper, p.6

¹⁹ Directions Paper, p.12

²⁰ Directions Paper, p.12

²¹ AusNet Services, EDPR 2021-25 Early Engagement Plan, p15.

²² Directions Paper, p.12

²³ ACCC, Retail Electricity Pricing Inquiry: preliminary report, 22 September 2017, p.61

reflected in its consultation and engagement obligations contained in the NER. Any failure to comply with its decision-making responsibilities, may call into question the fairness of the procedure by which the regulatory determination is made.

Meaningful consumer participation in the AER's determination process, which largely occurs after the regulatory proposal phase, remains of key importance in ensuring the long term interests of consumers is at the centre of decision making, irrespective of whether an agreement has been reached between the network business and consumers at the regulatory proposal stage. It is at the determination stage that economic analysis is undertaken by the AER to ensure the network business' proposal is efficient, and SACOSS submits the concept of efficiency is at the core of protecting the long term interests of consumers. SACOSS further submits that questions of efficiency cannot be outsourced to, or resolved by, agreements reached between the network business and a Consumer Forum.

SACOSS' submission on the New Reg process highlights our concerns with the following matters:

- the importance of consumer engagement and consultation at every stage of the regulatory determination process
- the limited consultation in the development of the New Reg process and commencement of the trial
- the need to place the trial in context
- streamlining and / or expediting the revenue determination process, including the proposal to expedite the AER's decision after the draft determination stage for the purposes of the trial
- the international examples provided in support of a 'negotiated approach'
- the role of the Consumer Challenge Panel and consumer organisations under the New Reg process

For the purpose of these submissions, SACOSS considers it is important to firstly outline the current consumer consultation and engagement obligations that apply to network businesses and the AER.

Consumer engagement and consultation obligations

Jurisdictional service standards and targets

Whilst the New Reg process focuses on 'early engagement', at the development stage of the regulatory proposal, it is important to point out that the network business' regulatory proposal, and the AER's regulatory determination, are directly influenced by the jurisdictional service standards and targets set by state and territory governments.²⁴

In the 2013 Expenditure Objectives Rule determination, the AEMC stated that 'in light of the evidence provided it should be made clear in the NER that where the jurisdiction determines a regulated standard for reliability it is this level of reliability that expenditure in an NSP's regulatory proposal should be based on and not any other level. In practice this means that the NSP should propose no more expenditure than is necessary to comply with the reliability standard, and for the AER not to approve any more expenditure than required by the standard'.²⁵ This statement reinforces the importance of ensuring the process of setting the standards is consultative and involves an economic assessment by the relevant decision-maker (which varies depending on the jurisdiction), consistent with the NEO.

²⁴ Australian Energy Market Agreement, Annexure 2, State and Territory Functions, Clause 19, Service Reliability Standards

²⁵ AEMC Rule Determination National Electricity Amendment (Network Service Provider Expenditure Objectives) Rule 2013, 19 September 2013 p 16

The level of consumer consultation and engagement during the process of setting the standards varies across jurisdictions. In 2013, the AEMC published its Review of the National Framework for Distribution Reliability which proposes a framework that can be adhered to across jurisdictions when setting reliability standards and targets. In the Review, the AEMC outlines a ‘Proposed process flow for setting reliability targets’ (illustrated in Figure 1.1²⁶) which proposes three months for consultation with customers and development of reliability scenarios, then six months for the economic assessment of reliability scenarios (involving further customer consultation), three months for the setting of the reliability targets, and then an additional nine months for the development of the regulatory proposal by the network business. The AEMC’s proposed process therefore contemplates a 12 month period of engagement and consultation with consumers feeding into the setting of the reliability targets, **prior to** the commencement of the regulatory proposal process.

The AEMC’s recommended framework promotes an economic assessment process to inform the setting of reliability targets, and SACOSS supports this approach.²⁷ The AEMC notes this will ‘involve evaluating the way network costs vary with different levels of reliability and explicitly assessing the expected costs of investments against the value that customers place on reliability and the cost of interruptions’.²⁸

SACOSS notes that the Approach Paper and Directions Paper for the New Reg process, do not discuss consumer input into the development of the jurisdictional service standards. SACOSS submits that consumer input and engagement after the standards have been set, as contemplated by the New Reg process, will necessarily be constrained by the standards. The Directions Paper acknowledges this, by stating that ‘certain matters may be taken ‘off the table’...’ as ‘...some aspects of the proposal may be out of the business’ control due to government regulations or reliability standards...’.²⁹

Network business’ engagement obligations

The National Electricity Objective (NEO) requires electricity distribution network service providers to operate their networks in the long term interests of consumers:³⁰

The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to-

- (a) price, quality, safety, reliability and security of supply of electricity; and*
- (b) the reliability, safety and security of the national electricity system.*

The National Electricity Rules (NER) place an explicit obligation on network service providers to demonstrate how they have engaged with electricity consumers and sought to address any relevant concerns identified as a result of that engagement.³¹ Specifically, the NER requires network service providers to provide an overview paper with their regulatory proposal which describes:

- how the network business has engaged with electricity consumers in developing the proposal, and
- the key risks and benefits of the regulatory proposal for electricity consumers.³²

²⁶ AEMC, Review of the National Framework for Distribution Reliability, 27 September 2013, p.6

²⁷ SACOSS, Submission to ESCOSA on the SAPN Reliability Standards Review 2020 -25, 18 February 2018.

²⁸ AEMC, Review of the National Framework for Distribution Reliability, p.i

²⁹ Directions Paper, p.5

³⁰ National Electricity (South Australia) Act 1996, National Electricity Law – Schedule, section 7

³¹ National Electricity Rules, cl. 6.8.2(c1)(2) (distribution) and 6A.10.1(g)(2) (transmission)

³² National Electricity Rules, cl 6.8.2 (c1)(2) and 6.8.2 (c1)((3)

To assist network service providers with this task, the AER published the Consumer Engagement Guideline for Network Service Providers (the Guideline) in November 2013. The objective of the Guideline is to help Network Service Providers better engage with their consumers, so they can provide services that better align with consumers' long term interests.³³

SACOSS strongly supports greater consumer involvement in the regulatory process, in line with the Guideline. However, SACOSS does not believe that consumer engagement and input should be confined to, or largely focussed on, the regulatory proposal stage, as proposed by the New Reg process. The obligations on the AER to assess the proposal, to ensure the proposal is efficient and to engage and consult with consumers throughout its decision-making process (in line with its statutory consultation requirements) cannot be avoided on the basis of an agreement that the regulatory proposal reflects consumer preferences.

The AER's consultation obligations

The regulation of prices charged for distribution services is in recognition of the monopolistic nature of those services. The functions and powers of the AER are contained in Part 3 of the National Electricity Law (NEL). Section 16 of the NEL provides for the manner in which the AER performs its economic regulatory functions or powers, with s16(1)(a) providing that the AER **must** perform or exercise its economic regulatory function or power in a manner that 'will or is likely to contribute to the achievement of the NEO'.³⁴

Sub-sections 16(1)(b)(v) – 16(1)(b)(vii) of the NEL state the AER must ensure that 'any user or consumer associations or user or consumer interest groups that the AER considers have an interest in the determination, are, in accordance with the Rules - informed of material issues under consideration by the AER, and given a reasonable opportunity to make submissions in respect of the determination before it is made'. It is worth pointing out that the New Reg process contemplates identifying possible law and rule changes during the trial.³⁵ Whilst changes to the NEL can be made by the Australian Energy Market Commission (AEMC) if it is satisfied that the rule will contribute to the NEO, changes to the NEL require the legislature's assent.

In considering the regulatory proposal, the AER must have regard to 'the extent to which the forecast includes expenditure to address the **concerns** of electricity consumers identified by the DNSP in the course of its engagement with electricity consumers'³⁶ (the Consumer Engagement Factor).

The NEL places explicit obligations on the AER to consult on network revenue determination processes and to publish information that will inform those decisions. These obligations are contained in clauses 6.8 to 6.11 of the NEL. The AER Network Revenue Determination Engagement Protocol Version 1.0 (the Engagement Protocol) summarises the AER's consultation requirements under the NEL, stating the AER must:³⁷

- publish the framework and approach paper
- publish the regulatory proposal and any supporting material
- publish an issues paper

³³ AER, Explanatory Statement – Consumer Engagement Guideline for Network Service Providers, November 2013 p.10

³⁴ National Electricity (South Australia) Act 1996, Schedule National Electricity Law, s16

³⁵ Directions Paper, p.7

³⁶ NEL Clause 6.5.6(e)(5A)

³⁷ AER, Network Revenue Determination Engagement Protocol, Version 1.0, p. 7

- invite written submissions
- hold a public forum on the issues paper
- publish a draft decision and reasoning
- invite written submissions on the draft decision
- hold a pre-determination conference
- publish the revised proposal
- publish a final decision and reasoning

Under the NER, the AER is required to hold both a public forum on the issues paper and a predetermination conference for the purpose of explaining the draft determination. The Engagement Protocol states that Public forums usually involve:

- network business presentations on their proposals
- Consumer Challenge Panel presentation
- AER staff presentations, including on the process and possibly substantive matters
- questions from the public.

Predetermination conferences or hearings involve:

- AER staff presentations on draft decisions
- network business presentations on the AER's draft decision
- Consumer Challenge Panel presentation
- questions from the public.³⁸

The AER, not the network business, is the decision maker. The consultation and engagement requirements set out in the NER reflect the importance of the regulatory determination, its impact on consumers and the need for a transparent and consultative decision making process.³⁹ There is no discretion in the process; the AER 'must' follow the consultation process contained in the NER. Whilst the level of consumer engagement undertaken by a network business is a factor in the AER's decision making, this factor cannot be a replacement for the AER's broader public consultation and decision making responsibilities.

The Directions Paper states that 'ideally, the business and Consumer Forum can agree to the proposal as a whole – and that it fully reflects consumer perspectives and preferences wherever relevant'.⁴⁰ The New Reg's early engagement process may more clearly reflect the perspectives and preferences of consumers in the regulatory proposal, but the AER still has the responsibility to ensure the proposal is in 'the long term interest of consumers', by undertaking an assessment of the **efficiency** of the proposals. The Australian Energy Market Commission (AEMC) notes that the NEO 'is an economic concept and is intended to be interpreted as promoting **efficiency** in the long-term interests of consumers'⁴¹. The Expert Panel reviewing governance arrangements in the National Electricity Market (NEM) also confirmed that 'the overall objective

³⁸ Ibid, p.8

³⁹ In 2015, the High Court stated that in 'the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions' Minister for Immigration and Border Protection v WZARH [2015] HCA 40 (4 November 2015) (Keifel, Bell and Keane JJ). This obligation is 'codified' in the AER's consultation and engagement obligations set out in the National Electricity Rules.

⁴⁰ Directions Paper, p.5 (para 6(a))

⁴¹ AEMC, Applying the Energy Objectives: A Guide for Stakeholders, 1 December 2016 p. 3

for the energy sector in Australia is that the long-term interests of consumers are **efficiently** served' (our emphasis).⁴²

Therefore, SACOSS submits the 'long term interests of consumers' is an economic concept, and not solely about consumers' perspectives and preferences. The achievement of the NEO not only requires consumer participation at every stage of the regulatory determination process, but it also requires the regulator to undertake an assessment of the efficiency of the proposals. It is this assessment and decision making process which also requires consumer input, and the NER reflects this.

Limited Merits Review and Judicial Review

The 'extensive public inquiry processes and consultations' involved in the AER's decision making, was cited in the explanatory memorandum to the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017 as a reason in support of abolishing LMR.⁴³ The explanatory memorandum explained that these processes and consultations could not 'adequately be replicated by the Tribunal'.

The Explanatory memorandum outlines the role of consumer engagement in the AER's decision making process, stating that:

*'Consumer engagement is a central part of the process. When the regulator assesses a proposal, it considers how effectively the network business has consulted with the community. It also seeks stakeholder input through public forums and by consulting with network businesses, consumer representatives, governments and investment groups. To inform such stakeholders and encourage their participation, the regulator publishes a framework and approach paper (electricity only), the regulatory proposal and an issues paper; invites submissions; holds public forums; publishes a draft decision and its reasoning; invites submissions on the draft decision; holds pre-determination conferences (required for electricity only); publishes any revised proposals; and holds a further round of submissions and consultations. It also seeks input from the Consumer Challenge Panel, which provides an independent consumer perspective to challenge the regulator and network businesses during the process.'*⁴⁴

Whilst the failings of the LMR process were clear, the ability of consumer groups to participate in that process was improved by the 2013 reforms to the NEL. These reforms included cost protections and a consumer consultation process where the Tribunal was obliged to consult with consumers prior to making a decision. In the ACT hearing of SA Power Networks' review of its Regulatory Determination,⁴⁵ 16 South Australian organisations provided evidence to the Tribunal as part of the community consultation process. The Tribunal held that the 'the consultation process and the submissions of consumers (and the Minister) may have become particularly significant (if error had been found in the final decision) in the consideration of the materially preferable NEO decision.'⁴⁶ In other words, had the Tribunal found that the AER had erred in its Regulatory Determination for SA Power Networks, the evidence of the consumer organisations (which

⁴² Dr Michael Vertigan AC, Professor George Yarrow, Mr Euan Morton, Review of Governance Arrangements for Australian Energy Markets, Final Report, October 2015, pp.22

⁴³ The Parliament of the Commonwealth of Australia, House of Representatives, Competition and Consumer Amendment (Abolition of Limited Merits Review Bill) 2017, Explanatory Memorandum, paragraph 1.15

⁴⁴ The Parliament of the Commonwealth of Australia, House of Representatives, Competition and Consumer Amendment (Abolition of Limited Merits Review Bill) 2017, Explanatory Memorandum, paragraph 1.18

⁴⁵ <http://www.competitiontribunal.gov.au/current-matters/community-consultations/act-11-of-2015>

⁴⁶ Ibid, para 103

overwhelmingly focussed on the impact of electricity prices), may have been sufficient for the Tribunal to make a determination consistent with the long term interests of consumers with respect to price. This decision highlighted the importance of consumer involvement at the LMR stage of the process. The Tribunal's decision to uphold the AER's determination was recently affirmed by the Full Court of the Federal Court.⁴⁷

Judicial review is now the only avenue by which a decision of the AER can be reviewed / appealed. PIAC argues that consumers may not have standing in judicial review proceedings, as traditionally the 'person aggrieved' test under the Administrative Decisions Judicial Review Act (ADJR Act) has been difficult to establish for consumers seeking review of a decision in the 'public interest'.⁴⁸ Consequently, PIAC has sought that consumers be given a statutory right of standing in judicial review proceedings.⁴⁹ There is some support for the existence of a public interest judicial review model. The High Court has held that in circumstances where a statute specifies a procedure to be followed in the exercise of a particular power, then the decision-maker must comply in order for its decision to be valid.⁵⁰ Where the decision maker does not comply, there may be grounds for the affected member of the public to challenge the validity of the decision.

The AER has been granted the power to make regulatory determinations on the basis that its decisions are likely to contribute to the achievement of the NEO. The NEO contains broad public interest-based considerations, and therefore the decisions of the AER need to follow **prescriptive public consultation provisions**, which (if not followed) may arguably be enforced by consumers through judicial review in the 'public interest'. SACOSS strongly argues in support of maintaining the level of consultation currently required under the NEL and the NER. SACOSS does not support a New Reg process that would truncate the public inquiry processes and consultations, which may lead to public interest review being denied to consumers. The Early Engagement contemplated by the New Reg process may be useful for the AER in considering how effectively the network has consulted with the community (satisfying the consumer engagement factor), but it cannot be at the expense of the statutory public consultation requirements contained in the NEL and the NER. SACOSS supports the early engagement being in addition to the existing obligations.

SACOSS refers the ECA, ENA and AER to the Public Interest Advocacy Centre's (PIAC) Submission to the Senate Environment and Communications Legislation Committee in relation to the Inquiry into the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017, dated 19 September 2017 (PIAC Submission).⁵¹ Whilst the PIAC Submission broadly supported the abolition of LMR, it raised concerns about the funding of consumer participation in the AER's decision making process and sought legislative amendments to address standing and cost protection for consumer groups in judicial review proceedings. SACOSS, NCOSS, Consumer Action Law Centre and Consumer Policy Research Centre supported the submission. PIAC submitted, and SACOSS strongly agrees, that 'the regulatory system must provide for consumer involvement **at all stages of the process**, including administrative review processes, in order to ensure a focus on consumer outcomes, in keeping with the National Electricity Objective (NEO) and the

⁴⁷ <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2018/2018fcafc0003>

⁴⁸ PIAC, Submission to the Senate Environment and Communications Legislation Committee: Inquiry into the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017, 19 September 2017, 4.

⁴⁹ Ibid, p.5

⁵⁰ *Scurr v Brisbane City Council* (1973) 133 CLR 242.

⁵¹ PIAC, Submission to the Senate Environment and Communications Legislation Committee, re: Inquiry into the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017, 19 September 2017

National Gas Objective (NGO).⁵² PIAC submitted that ‘meaningful consumer engagement, including participation in both the determination and appeals processes, is a key way of ensuring that regulatory decisions continue to serve the long term interests of consumers in accordance with the NEO’.⁵³

Limited engagement on the New Reg Process and Trial

SACOSS submits the consultation with stakeholders in the development of the New Reg process, and the creation of the trial, could have been deeper and more extensive. We believe there has been insufficient consideration by all parties involved of the potential broader impacts of the trial, and is surprised the AER (in particular⁵⁴) did not seek public comment on the proposed New Reg process during its design and prior to the commencement of the trial. SACOSS believes the lack of consultation has impacted on funding for consumer representatives and has also resulted in other potential models not being adequately considered.

Impact of the New Reg trial on funding for consumer representatives

Whilst SACOSS understands the enthusiasm for a regulatory model that envisions improved sector engagement and a more efficient and effective process, SACOSS submits the focus on a ‘negotiated’ pre-lodgement outcome (in line with the oft-cited Scottish Water model) has obscured the existing need for resourcing of consumer participation **throughout** the regulatory process. Importantly, the New Reg process and trial may already have had an adverse (although unintended) impact on resourcing for consumer advocates, and we feel the lack of critical thinking on the proposed process (due to the limited consultation) may have resulted in those potential adverse impacts being inadequately canvassed or explored.

In March 2018, SACOSS, PIAC, Uniting Communities and ECA provided submissions to Paul Locke from the Federal Department of Environment and Energy (DEE) in support of the COAG proposal to increase funding for consumer organisations to participate in AER network determinations. We have been informed that the DEE has ‘little support for any new funding from around the jurisdictions’ for reasons including the AusNet Customer Forum trial. The DEE indicated that the trial was going to cost \$300,000, and therefore questioned why consumer representatives needed more funding. Therefore, the New Reg trial has arguably had the far-reaching consequence of drawing the focus away from the existing (and overwhelming) need for resourcing of consumer advocacy in network regulation. SACOSS submits this, in turn, has impacted on the ability of consumer advocates to meaningfully participate in the AER’s current and future network regulatory determination processes⁵⁵. The funding of the AusNet trial (referred to by the DEE) relates to a limited time-frame of pre-lodgement engagement in **one** network’s revenue determination process (i.e. from March 2018 to July 2019 when AusNet’s final revenue proposal will be lodged with the AER), and should not be used as a reason to deny broader resourcing considerations. It is worth noting that the funding for consumer engagement for the trial does not extend (as far as we are aware) to resourcing consumer participation in the AER’s statutory public consultation for the AusNet regulatory determination process under the NEL and the NER, which largely occurs after lodgement of the regulatory proposal.

⁵² PIAC Submission, p. 1

⁵³ PIAC Submission, p.2

⁵⁴ Noting the AER’s Stakeholder Engagement Framework and Network Revenue Determination Engagement Protocol

⁵⁵ See AER, State of the Energy Market, May 2017, p.94. The AER regulates five state based transmission networks and 13 major electricity distribution networks across the NEM

<https://www.aer.gov.au/system/files/AER%20State%20of%20the%20energy%20market%202017%20-%20A4.pdf>

Negotiated outcomes during the pre-lodgement phase may also result in less evidence-based engagement by consumer organisations in the AER's statutory consultation phase, which may have the result of excluding potential involvement by consumers in judicial review proceedings.⁵⁶

Lack of consideration of alternative models

Further, SACOSS submits the lack of broad consultation in the development of the New Reg process has not provided a real opportunity for consumer representatives to develop their thinking on what 'alternative regulatory approach' is likely to achieve regulatory decisions that are in the long term interests of consumers. The New Reg process is **one** proposed model which focuses on pre-lodgement engagement, and an expedited AER decision-making process. Another model could involve addressing the asymmetry of resources between networks and consumer groups. Greater and more meaningful consumer engagement on customer preferences needs to be supported and resourced not just during the pre-lodgement phase, but also during the development of jurisdictional service standards which frame elements of the networks' revenue proposals, and post-lodgement of the proposal. Increasing resources for consumer participation would enable consumer representatives to provide the jurisdictional standard setter and the AER with evidence-based submissions detailing alternative perspectives on methodologies and other considerations throughout the decision-making process⁵⁷. Understanding customer preferences is one aspect of consumer engagement; it is not the end goal. As noted by PIAC, 'informed and effective consumer engagement is a means to an end – not the end in itself. Consumer engagement done properly should lead to regulatory decisions and investments that are in the long term interests of consumers.'⁵⁸

As already noted, SACOSS is **not** opposed to greater pre-lodgement engagement between consumers, networks and the AER (as envisaged by the New Reg process), but we are concerned that the focus on network engagement is coming at the expense of consumer engagement in the jurisdictional regulator and AER's processes. We are also concerned that the Consumer Forum engagement model (as outlined in the EEP) does not clearly identify the Forum's engagement with consumer organisations. The Directions Paper states that the Consumer Forum 'should be resourced to communicate directly with end-customers, customer representatives, and other engagement channels and forums the network uses for its business-as-usual engagement...'⁵⁹, and SACOSS supports this approach. SACOSS is seeking that the Consumer Forum's engagement with consumer representatives (including AusNet's Customer Consultative Committee) be more clearly articulated in the EEP, including a requirement to document and detail the role of consumer representatives in the Consumer Forum's engagement process.

SACOSS is pleased the Approach Paper indicates that engagement with stakeholders, on the process and the trial, will continue throughout the project, and is supportive of the approach that 'nothing in the trial will reduce the ability of any consumer or advocacy body, or the AER's Customer Challenge Panel to have their view on the network regulatory proposal heard.'⁶⁰ SACOSS strongly supports a consultative and transparent process around the trial and the proposed new approach to network regulation. SACOSS does note that the involvement of consumer organisations in expressing their views on the trial will not be separately

⁵⁶ Assuming a public interest judicial review model and questions of standing can be successfully argued.

⁵⁷ Including the setting of jurisdictional service standards, the network's customer engagement phase and the AER's consultation obligations under the NEL and NER.

⁵⁸ PIAC, Consumer resourcing for participation in revenue determinations, 6 November 2017, p. 9

⁵⁹ Directions Paper, p.6

⁶⁰ Approach Paper, p.5

resourced, the funding allocated to the trial will largely be to support the involvement of the Consumer Forum during the pre-lodgement phase. SACOSS submits well-resourced consumer engagement at every stage of the regulatory process is essential to ensuring the long-term interests of consumers are met. SACOSS refers to the AER's statement that they 'adhere to the principles of 'open government'. A key aspect of this is providing procedural fairness so that all of our stakeholders have an opportunity to be heard and have their views considered.'⁶¹ SACOSS supports those principles, but reminds the AER that in order to meaningfully participate by providing evidence based submissions as opposed to broad principle based commentary, adequate resourcing is essential.

The New Reg Trial in context

The idea of the trial is to 'learn by doing', and SACOSS submits that all learnings need to be carefully looked at in context, particularly given they may lead to law and rule changes.⁶² AusNet Services may be more willing to engage with, and listen to, consumers than other network businesses. A success in the trial may not necessarily mean success in wider practice. We believe indicators for regulatory change from the trial need to be highly scrutinised and contextualised, as not all network businesses conduct their operations in the same way as AusNet. The AER's current prescriptive processes operate as safeguards for consumers, and negotiated outcomes may involve a less accountable process with no pathway for review.

The New Reg process and trial draw on the approach used by Scottish Water during its 2015-2021 Strategic Review of Charges.⁶³ The Scottish Water example can be distinguished from the regulatory environment in Australia on several levels (see further commentary below). For the purposes of the trial, it is important to point out that the matters in scope for negotiation (which have not yet been defined) will be more limited than in the Scottish Water case. The scope will not include the jurisdictional service standards, whereas Scottish Water agreed to the entire Business Plan, which included performance standards.⁶⁴ As outlined above, in order for consumers' priorities and stated preferences to drive energy network businesses proposals and regulatory outcomes, there needs to be consumer input into the development of jurisdictional service standards (which are the responsibility of state and territory governments and outside the scope of the trial).

The Legacy Report prepared by the Customer Forum for Water in Scotland states that whilst the Forum was initially expected to focus on discretionary investments, it pushed for discussions which 'addressed the Business Plan in its entirety and not by discrete components, as having a global view was a *sine qua non* of understanding what trade-offs could be made and how the overall balance could be improved'.⁶⁵ The Report states that 'instead of having future standards set *a priori* and then charges fixed at the minimum level required to deliver them, there was a 'customer-informed' debate over what level of charges was acceptable, along with what service performances were desirable. Both components of the equation were considered simultaneously to achieve a satisfactory balance'.⁶⁶ The scope and discussion around trade-offs in

⁶¹ AER Network Revenue Determination engagement protocol, Version 1.0, p.3
<https://www.aer.gov.au/system/files/AER%20network%20revenue%20determination%20engagement%20protocol%20-%20September%202015.pdf>

⁶² Approach Paper, p.5

⁶³ AusNet Services, Early Engagement Plan, p.2

⁶⁴ The Customer Forum for Water in Scotland, Legacy Report: Lessons learned from customer involvement in the 2015-2021 Strategic Review of Charges, February 2015, p.12

⁶⁵ Ibid, p.8

⁶⁶ Ibid, p.8

the context of the AusNet trial is limited by the state-based reliability standards.⁶⁷ There is no scope for the Consumer Forum to consider what service performance is desirable, as service performance and reliability targets have already been determined. The New Reg approach envisages the Consumer Forum and AusNet exploring different trade-offs between aspects of the regulatory proposal including ‘balancing the need of particular customer types, different network development strategies, or across different dimensions of current and future value of network services.’⁶⁸ It is important to put the trade-offs agreed to by the Consumer Forum in the AusNet trial within this context, noting that the scope of the AusNet trial is limited and achieving ‘a satisfactory balance’ may be more elusive.

Although the scope of the matters to be negotiated between the Consumer Forum and AusNet has not yet been finalised, AusNet has included a list of criteria within the EEP which it proposes to use for determining the scope. SACOSS understands that determining the matters in scope will be a challenging process, and one which requires the goodwill of all parties involved. Clearly AusNet have expressed a willingness to be involved in the trial of the New Reg process, and its goodwill is not in question. AusNet have invested significant energy and resources into making the trial a success. However, SACOSS is concerned that the scope of negotiated matters will vary depending on the willingness and goodwill of the network business agreeing on the scope on a case by case (or network by network) basis. SACOSS submits the scope may vary significantly from one network’s regulatory determination process to the next, and the outcomes of the trial should be placed in this context. What may be in scope for this trial may not be in scope for another New Reg process. The Approach Paper states that ‘success in this project will be reflected in a qualitatively different culture by all parties – consumers, networks and the regulator’.⁶⁹ SACOSS questions to what extent culture can be imposed on a business, as opposed to being generated from within.

Streamlining and / or expediting the regulatory determination process

The Approach Paper states that the current AusNet trial will be conducted ‘within the framework of the existing Rules and Guidelines’ and that ‘nothing in the trial will reduce the ability of any consumer or advocacy body, or the AER’s Customer Challenge Panel (CCP) to have their view on the network regulatory proposal heard.’⁷⁰ SACOSS supports this approach to the trial, and considers the continuing role of the CCP to be of importance to the process. However, whilst SACOSS welcomes the AER’s reassurance that the New Reg process trial will be conducted in accordance with the existing Rules and Guidelines, SACOSS is concerned that one of the original goals of the project was for the early engagement to enable a fast-tracking of the AER’s decision-making processes. The Overview Paper (from August 2017) states that ‘if the business and the Consumer Forum can reach an agreement in good faith on many if not all aspects of the regulatory proposal, there would be a firm expectation that the AER would fast track (that is streamline and / or expedite) the formal approval process – strengthening parties’ incentives to engage constructively.’⁷¹

In terms of incentivising network businesses to engage, SACOSS agrees with PIAC’s position that ‘additional incentives are (not) warranted for regulated businesses to conduct meaningful and effective consumer engagement as part of the revenue determination process.’⁷² Further, SACOSS submits that expediting the

⁶⁷ Directions Paper, p.11

⁶⁸ Directions Paper, p.11

⁶⁹ Approach Paper, p.3

⁷⁰ Approach Paper, p.5

⁷¹ Overview Paper, p. 4

⁷² PIAC, Consumer resourcing for participation in revenue determinations, 6 November 2017, p.10

formal approval process may strengthen the Network Businesses' incentive to engage, but questions why consumers would be incentivised to limit further opportunities for participation and consultation (as contained within the NER).

The expectation of a fast-tracked approval process is also reflected in the most recent Directions Paper, which sets out 12 steps for the proposed New Reg process. Step 11 contemplates the AER having the discretion to expedite and / or streamline the formal revenue determination process⁷³, depending on the success of the Early Engagement Process. The Directions Paper states that 'if a business successfully undertakes an Early Engagement Process, and reflects the outcomes of this process in its regulatory proposal, the AER may if it considers appropriate expedite and / or streamline the formal revenue determination approval process'.⁷⁴ Further, it seems clear from a reading of all the documents that one of the purposes of the trial is to identify where the Rules (including consultation provisions) are currently too prescriptive to allow for a negotiated approach, thereby informing future rule change requests to minimise prescription and enable a faster decision-making process.

SACOSS acknowledges that the main focus of the Approach and Directions Papers is on improving consumer engagement at an early stage so that consumer preferences can be seen to drive network business proposals and regulatory outcomes⁷⁵, but we feel it is important to outline our concerns with the associated network incentive of a 'streamlined' AER approval process, within this submission.

The Overview Paper from August 2017 states that the 'AER has scope to streamline the revenue approval process to an extent for the purpose of the trial. **Less prescription in the NER and NGR around the AER's consultation requirements** would give the AER greater flexibility to Fast-Track a business' proposal' (our emphasis)⁷⁶. SACOSS strongly opposes less prescription around consultation requirements, we submit that these requirements are essential to ensuring consumers can meaningfully contribute at each stage of the AER's decision-making process. The clear statutory intent is that 'the grant of decision-making powers requiring reference to broad, public interest-based considerations should be conditioned by effective and enforceable public consultation provisions'.⁷⁷ SACOSS submits the current consultation requirements are **not** overly prescriptive, but are rather a reflection of the need for consumer participation in the making of a decision that will affect their interests. The current consultation requirements under the NEL and the NER have been highlighted as a central part of the process (see reference to the Explanatory Memorandum, above). The Explanatory Memorandum cites network consumer engagement **as well as** statutory public consultation requirements ensure the centrality of consumer interests in the decision-making process, **not** instead of.

The Directions Paper states that 'the AER may have regard to any agreements reached between a business and the Consumer Forum on an aspect of the proposal, and if it considers it appropriate, it may undertake a **less detailed assessment of certain issues** (our emphasis)⁷⁸. SACOSS submits the NEO does not contemplate a process whereby the interests of consumers can be agreed to at the earliest stages of the regulatory

⁷³ Directions Paper, p.7

⁷⁴ Directions paper, p.7

⁷⁵ Approach Paper, p.3

⁷⁶ Overview Paper, p.4

⁷⁷ Edgar, Andrew Public and Private Interests in Australian Administrative Law, 214 UNSW Law Journal, Volume 36(1), p. 220

⁷⁸ Directions Paper, p. 12

determination process. The AER is the decision maker, not the network business; it is the decision of the AER which will affect the interests of consumers. Consumers should be afforded the right to be heard at each stage of the decision making process, in line with the 'codified' principles of procedural fairness contained in the NER. The proposition that a negotiated agreement reached between a network business and a Consumer Forum representing the interest of all end users should enable the AER to limit its consultation obligations by accepting an agreement with less 'detailed assessment'⁷⁹ or further input does not, SACOSS submits, advance the NEO. As outlined above, SACOSS submits the NEO contemplates the decision maker taking into consideration the long term interests of consumers **at each stage** of the regulatory determination process, as reflected in the AER's obligations under the NEL and the NER (and if it fails to do so, the decision may be open to judicial review⁸⁰).

The High Court in *Brisbane City Council v Scurr*⁸¹ found that the Council's failure to provide adequate public notice of a development, where that notice was mandatory, resulted in the Council's development approval being invalid. It has been suggested that 'this purposive reasoning seems to adapt procedural fairness concepts to a public consultation process, by protecting the ability of a member of the public to provide the decision-maker with an alternative view of the proposal, thus enabling the objector to participate in a meaningful manner and helping the decision-maker make an informed decision'.⁸² The concept of procedural fairness is an important protection for consumers. SACOSS understands that the goal of the early engagement under the New Reg process is to have all consumer views expressed by the pre-lodgement phase, meaning that consumers may not have an alternative view that needs to be expressed during the AER's consultative phase. However, we feel that on balance (taking into account all considerations outlined in this submission) those protections should remain in the public interest to allow for further alternative views to be considered and inform the AER's decision. The argument that an agreement reached between the Consumer Forum and the network business should be given greater evidentiary weight than other consumer representations during the regulatory process is not supported by the NER, and is not in the long term interests of consumers.

Trial of New Reg Process - AER may expedite its regulatory process after the draft determination stage

For the purposes of the **trial**, the Directions Paper states 'the AER may expedite its regulatory process only after the draft determination decision stage to allow for consultation on the outcomes of the Early Engagement Process'⁸³.

Clause 6.10 of the NER deals with the making of the Draft Determination and further consultation. Clause 6.10.1(b)(2) requires the AER to have regard to written submissions on the issues paper, in making the draft determination. Clause 6.10.2(a) of the NER states the AER **must** publish notice of a pre-determination conference and an invitation for written submissions on its draft determination. The AER does not have discretion under the NER to forego these important consultative steps. Further, clause 6.11.1(b) of the NER requires the AER to have regard to submissions made under part E of the NER (which includes submissions made in response to the draft determination), in making the distribution determination.

⁷⁹ Directions Paper, p.12

⁸⁰ Schedule 3 to the Administrative Decisions Judicial Review Act includes the NEL as an Act that is an enactment for the purposes of the ADJR Act (see Schedule 3 Clause 2(da))

⁸¹ *Brisbane City Council v Scurr* (1973) 133 CLR 242

⁸² Edgar, Andrew, Public and Private Interests in Australian Administrative Law, UNSW Law Journal Volume 36(1) p. 214

⁸³ Directions Paper, p.7

The AER's obligations to consult on the draft determination, and to take submissions on the draft determination into account under the NER, are clear. SACOSS submits the AER does not have the discretion to choose whether or not to consult on the draft determination. The NER does not allow for the draft determination to be taken as a final decision of the AER. A predetermination conference must be held, and submissions **must** be sought on the draft determination. Further, the AER must have regard to those submissions when making the final regulatory determination.

The NER allows for the Network business to make submissions and submit a revised proposal after the draft determination is published, if (and only if) those revisions incorporate changes required to address matters raised by the draft determination.⁸⁴ Revisions that do not specifically relate to changes required to be made to the proposal in order to address matters raised by the draft determination cannot form part of the revised proposal submitted by the network business. Therefore, any revisions made to the regulatory proposal should be uncontentious, as those revisions would reflect matters that have been consulted on as part of the consultation on the draft determination. Clause 6.10.4 provides the AER with the discretion to consult on matters contained in the network business' revised proposal (if the network submits one). SACOSS submits the AER has been given this discretion to cover situations where the revised proposal complies with clause 6.10.3(b), but it considers it is in the interests of procedural fairness that further consultation on those matters is warranted. Once again, this is not a mandatory consultation obligation, as the revised proposal cannot contain information unrelated to the draft determination. Revisions to the network's regulatory proposal which are unrelated to the matters raised in the draft determination (i.e. any 'new' matters) are **out of scope**, and are dealt with in clause 6.11.1A of the NER.

SACOSS submits that if the AER were to 'expedite' the regulatory process by failing to comply with its consultation obligations to hold a predetermination conference and seek submissions after the publication of the draft determination, it would be in breach of the rules. SACOSS further submits the decision of the AER may therefore be open to judicial review on the grounds that 'procedures that were required by law to be observed in connection with the making of the decision were not observed'.⁸⁵

Evidence in support of a 'negotiated approach'

The Approach Paper draws on international experiences to support the need for a new 'negotiated' approach to regulatory determinations. The Approach Paper cites a report by the Regulatory Assistance Project (RAP Report)⁸⁶ in support of the statement that it is 'common for the parties to be encouraged to enter into negotiations with the aim of reaching agreement, to expedite the overall regulatory process'⁸⁷. The process referred to in the RAP Report relates to procedural elements of US Tariff Proceedings. Figure 8 in the RAP Report outlines the typical schedule for the Tariff Proceedings:⁸⁸

⁸⁴ NER, clause 6.10.3(b)

⁸⁵ Administrative Decisions (Judicial Review) Act 1977, s6(1)(b)

⁸⁶ Regulatory Assistance Project, Electricity Regulation in the US: A Guide, March 2011, p.34 see: <https://www.raponline.org/wp-content/uploads/2016/05/rap-lazar-electricityregulationintheus-guide-2011-03.pdf>

⁸⁷ Approach paper, p.6

⁸⁸ RAP Report, p.31

Figure 8:

Typical Schedule for a Major Rate Case

Activity	Calendar Date	Months From Filing Date
Notice of Intent to File	15-Jan	-2
Initial Filing of Tariffs and Evidence	15-Mar	0
Discovery Period Ends	15-Jun	3
Staff and Intervenor Evidence Due	1-Jul	3.5
Rebuttal Evidence Due	1-Aug	4.5
Rebuttal Discovery Period Ends	15-Aug	5
Expert Witness Hearings	Sept 1-20	6
Public Witness Hearings	Sept 25-27	6.5
Briefs Due	1-Nov	7.5
Commission Decision	15-Dec	9

The US Tariff proceedings process referred to in the Approach Paper, appears to be more akin to a formal adversarial court process, than a statutory consultative administrative decision making process. It is referred to as a ‘hearing’ and is held before an administrative law judge or examiner (depending on the State). SACOSS agrees that negotiated settlements are often reached in matters before the court, to avoid both parties incurring further costs, but submits this is a different proposition from the process where a regulatory determination is made.

It is worth noting that there are ‘statutory parties’ to these Tariff Proceedings, whose right to participate in the proceedings is established in law. These parties are ‘the utility, the commission staff, and the consumer advocate’.⁸⁹ The RAP Report notes that ‘other participants, or *intervenors*, such as representatives of industrial consumers, low-income consumers, and environmental groups, are granted the right to participate by the commission, sometimes after demonstrating a particularized interest that is not better represented by the statutory parties.’⁹⁰ In other words, all consumers are not guaranteed the right to participate in the ‘regulatory process’.

The particular quote referred to in the Approach Paper, relates to the stage of the proceedings after ‘rebuttal discovery period ends’ and prior to ‘expert witness hearings’ (refer to Figure 8, above). The ‘settlement negotiations’ stage comes at a time where all evidence has been formally presented, and rebutted, including evidence from intervenors (if permitted to participate). A formal robust process outlining views and rebutting those views has already taken place. SACOSS submits that the usefulness of this example in providing support for a negotiated settlement **prior** to a Regulatory Proposal being submitted, as well as support for expedited decision-making by the AER, is limited. SACOSS submits that the consideration of negotiation and settlement in the context of lengthy court proceedings, is vastly different to considering settlement and negotiation in terms of a regulatory framework that supports robust administrative decision making, which includes public participation and consultation. SACOSS supports decision making that is fair, high quality, efficient and effective,⁹¹ with meaningful public participation. Inadequate public consultation

⁸⁹ Ibid, p.31

⁹⁰ Ibid, p.31 Note the Federal Law, the Public Utility Regulatory Policies Act, which gives all consumers a right to intervene where rate design issues are considered

⁹¹ Attorney-General’s Department, Australian Administrative Law Policy Guide, 2011, p. 4

that does not accord with the consultation provisions in the NEL and the NER could lead to the AER being deprived of the benefit of 'worthwhile' objections when coming to its decision.⁹²

As outlined above, SACOSS supports earlier and deeper engagement between consumers and network businesses, but not at the expense of a fair and consultative administrative decision making process. SACOSS does not believe that a negotiated agreement at the regulatory proposal stage between the Consumer Forum and a network business should be considered by the AER to be 'the' consumer engagement factor, as opposed to 'a' consumer engagement factor in the AER's decision making process.

The Water Industry Commission for Scotland's (WICS) Strategic Review of Charges 2015-21⁹³ was also cited in the Approach Paper as an international example in support of the negotiated approach, where 'a network business and its consumers aim to reach an agreement on the revenue proposal'.⁹⁴ In this example, a Customer Forum successfully agreed a business plan with Scottish Water, which formed the basis of the regulatory decision.⁹⁵ The WICS manages the regulatory framework governing the operation of Scottish Water, including through setting prices.

There are significant differences between the regulation of Scottish water, and the regulation of energy network businesses in Australia. As noted by Havyatt in the ECA's Report on Negotiated Settlement and Consumer Engagement⁹⁶, Scottish Water is Government owned and is subject to objectives set by Scottish Ministers, which Scottish Water delivers within the funding allowed by the WICS (the regulator). Notably, the WICS only regulates one entity, Scottish Water. Conversely, the AER regulates wholesale and retail energy markets and electricity networks in the National Energy Market (NEM). In terms of distribution, the NEM has 13 major electricity distribution networks, and some smaller regional networks (covering over 735,000km of electricity network). Importantly, Electricity Network Service Providers in the NEM are largely privately owned businesses with significant resources.

Also, in terms of 'fast-tracking' the process, the WICS published the Draft Determination (including the Minute of Agreement between the Customer Forum and Scottish Water) and received eight representations from a wide range of stakeholders, which it 'carefully reviewed' prior to making the Final Determination. WICS also indicated that 'the Strategic Review has involved significant engagement with other stakeholders including the Customer Forum, Scottish Environment Protection Agency, the Drinking Water Quality Regulator, and Citizens Advice Scotland'⁹⁷. SACOSS submits that a negotiated approach presupposes an equal footing between the parties, which we suggest does not necessarily exist between network businesses and consumers in Australia. SACOSS submits the discussion around the need to move away from the adversarial nature of network regulation, is more relevant to the (now abolished) LMR proceedings, than the AER's prescriptive decision-making process.

In contrast with the statutory public consultation process and requirements contained in the NER, negotiated approaches and settlements may result in a decision-making process that lacks transparency and

⁹² *Brisbane City Council v Scurr*, p.252 (Stephen J)

⁹³ <https://www.watercommission.co.uk/UserFiles/Documents/Final%20Determination%20-%20Final.pdf>

⁹⁴ Approach Paper, p. 8

⁹⁵ Approach Paper, p. 7

⁹⁶ Havyatt, David, ECA, Negotiated Settlement and Consumer Engagement: UK Experience and lessons for Australia, ECA Research Report No. 2, 2 May 2016, p. 6

⁹⁷ Water Industry Commission for Scotland, The Strategic Review of Charges 2015-21, Final Determination, p.1

accountability. As Havyatt states in the ECA Report in reference to the adoption of negotiated settlements by 'firms' in the United States, 'there are many reasons why negotiated settlement was adopted by firms, but among these was the benefit from keeping out of the regulatory process (a)s it effectively avoided scrutiny.'⁹⁸ One of the key principles of the AER's Stakeholder Engagement Framework⁹⁹ is to be transparent and accountable in its engagement and decision making. SACOSS submits that an agreement at the regulatory proposal stage, and a fast-tracking of the regulatory determination stage, is not consistent with the AER's well-defined principles of stakeholder engagement.

AER's Consumer Challenge Panel

As noted above, SACOSS supports the position that 'nothing in the trial will reduce the ability of any consumer or advocacy body, or the AER's Customer Challenge Panel (CCP) to have their view on the network regulatory proposal heard.'¹⁰⁰ The establishment of the AER's Consumer Challenge Panel (CCP) was in recognition of the importance of strong consumer engagement in energy network regulation.¹⁰¹ SACOSS supports the CCP's continued role in challenging the network business' engagement activities and proposals, in the long term interests of consumers. Importantly, the CCP's roles and responsibilities are given clarity and structure by the Governance Handbook¹⁰², and perceived conflicts are managed by a Conflict of Interest Guideline¹⁰³.

SACOSS acknowledges the Project Team's efforts to ensure the independence and credibility of AusNet's Consumer Forum. The Consumer Forum has been given enormous responsibility in a very complex decision-making environment. As PIAC noted, 'historically, small consumer organisations have lacked the internal expertise and capacity to critique in detail the methods and approaches adopted by the Network businesses and AER in their regulatory proposals and draft decisions.'¹⁰⁴ PIAC submits that 'analysing these proposals, and understanding their likely impacts on consumers, may require (among other things) lawyers with expertise in both the National Electricity and Gas Laws and Rules, economists with expertise in the regulation of electricity and gas markets, and engineers with expertise in energy related infra-structure'.¹⁰⁵ The Consumer Forum appointed by AusNet has a very impressive mix of highly qualified members. Even so, given the complexity of the matters under consideration, the Consumer Forum may still benefit from the expert input and context the CCP and other consumer representatives may be in a position to provide. SACOSS would therefore like to see the role of the CCP and consumer representatives in the Consumer Forum's processes more clearly defined in the EEP.

⁹⁸ Havyatt, ECA 2016, p.2-3

⁹⁹ AER, Stakeholder Engagement Framework, September 2017, p.3

¹⁰⁰ Approach Paper, p.5

¹⁰¹ AER, Consumer Challenge Panel, January 2017

¹⁰² <https://www.aer.gov.au/system/files/Consumer%20Challenge%20Panel%20-%20Governance%20Handbook%20-%20January%202017.pdf>

¹⁰³ <https://www.aer.gov.au/system/files/Consumer%20Challenge%20Panel%20-%20Conflict%20of%20Interest%20Guideline%20-%202017.pdf>

¹⁰⁴ PIAC Submission, p.3

¹⁰⁵ Ibid, p.3

We thank you in advance for consideration of our comments. If you have any questions relating to the submission, please contact Jo De Silva via jo@sacoss.org.au or 08 8305 4211.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ross Womersley', enclosed in a thin black rectangular border.

Ross Womersley
Chief Executive Officer