Barriers To Fair Network Prices

An analysis of consumer participation in the merits review of AER EDPR determinations

A report prepared for Consumer Action Law Centre and Consumer Utilities Advocacy Centre by May Mauseth Johnston

August 2011

consumer action law centre

CUAC Consumer Utilities Advocacy Centre

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This report has been prepared for the
Consumer Action Law Centre Ltd (Consumer Action) and
Consumer Utilities Advocacy Centre Ltd (CUAC)
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May Mauseth Johnston, August 2011
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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
Consumer Action	Consumer Action Law Centre
Capex	Capital expenditure
CCF	Australian Energy Regulator's Consumer Consultative Forum
CLCV	Consumer Law Centre Victoria
CPI	Consumer Price Index
CUAC	Consumer Utilities Advocacy Centre
Distributor	Distribution business
EDPR	Electricity Distribution Price Review
ENA	Energy Networks Association
ESC	Essential Services Commission
ESCOSA	Essential Services Commission South Australia
ETSA	Electricity Trust of South Australia
IPART	Independent Pricing and Regulatory Tribunal
FTE	Full time equivalent
MAIFI	Momentary Average Interruption Frequency Index
MCE	Ministerial Council on Energy
NEL	National Electricity Law
NEM	National Electricity Market
NER	National Electricity Rules
NSW	New South Wales
Ofgem	Office of the Gas and Electricity Markets
Opex	Operating expenditure
RAB	Regulated Asset Base
RIIO	Revenue using Incentives to deliver Innovation and Outputs
UED	United Energy
UK	United Kingdom
VCOSS	Victorian Council of Social Service
VESCAP	Victorian Essential Services Consumer Advocacy Project
WACC	Weighted Average Cost of Capital
QCA	Queensland Competition Authority

Executive Summary

Australian electricity distribution businesses (Distributors) are natural monopoly businesses that operate the poles and wires networks. The revenues of Distributors are therefore regulated by the Australian Energy Regulator (AER) through five year pricing determinations to ensure that the prices claimed represent efficient revenue levels. Under the National Electricity Law (NEL), Distributors have the right to seek a review of the AER's price determinations through a merits review process by appealing decisions to the Australian Competition Tribunal (the Tribunal).

Since the AER took on the function as the economic regulator of Distributors across the (National Electricity Market) in 2008, it has conducted price reviews in Queensland, South Australia, ACT, New South Wales and Victoria. Distributors have extensively utilised their review rights by launching appeals against the AER's final decision in all of the jurisdictions except the ACT.

Electricity prices have been rising significantly over the last few years for a number of reasons and are causing a financial strain for many ordinary consumers, especially low-income households. With distribution prices representing an average of 40% of a consumers' bill, the Electricity Distribution Price Review (EDPR) is one of the few inputs into rising prices that consumer representatives can potentially influence, and by doing so, help to represent consumer interests and thereby mitigate financial pressure on households.

Since the AER took on the function as the economic regulator of Distributors across the (National Electricity Market) in 2008, it has conducted price reviews in Queensland, South Australia, ACT, New South Wales and Victoria. Distributors have extensively utilised their review rights by launching appeals against the AER's final decision in all of the jurisdictions except the ACT.

Consumer Action Law Centre (Consumer Action) and the Consumer Utilities Advocacy Centre (CUAC) actively advocated consumer interests in the AER's formal consultation process towards its draft and final decision for Victorian network prices for 2011-2015. Both organisations formed the view, that on balance, the AER's

decision making process had been extensive, thorough and in accordance with (NEL) and National Electricity Rules (NER) requirements, and that the final decision represented a fair and reasonable outcome for Victorian consumers.

Following the AER's decision, however, each of the five Victorian Distributors took advantage of their right to seek a merits review of the AER's decision. It was the view of Consumer Action and CUAC that the merits review allowed Distributors to 'cherry-pick' the least advantageous matters in the AER's overall decision, without having to contest any elements of the decision they want retained. For a Distributor, there is little to lose in applying to the Tribunal for review, whilst the Tribunal may theoretically deliver a decision that is less advantageous to the Distributors, the ability of Distributors to cherry-pick means that in practice, the worst outcome of an appeal is likely to be that the AER's decision is maintained.

Following the announcement of the Distributors to appeal against the AER's decision on 19 November 2010, in December 2010, Consumer Action and CUAC lodged a notice to intervene in the Tribunal's proceedings for the five Victorian Distributors' appeals. Consumer Action and CUAC believed it was important to represent consumers in the merits review so there was a balanced representation of claims to the Tribunal and to try to ensure that network prices were kept to a reasonable level. This report documents the experiences of Consumer Action and CUAC in seeking to intervene in the merits review. It tracks their learning, identifies the barriers to consumer intervention, highlights the deficiencies in the current merits review process in facilitating balanced representation and efficient outcomes and ultimately explores scenarios for reform.

Despite the significant efforts of the organisations and their staff in preparing their case for intervention, on the basis of legal advice Consumer Action and CUAC withdrew their notice to intervene in January 2011. The barriers to their intervention included:

- the significant financial resources required to facilitate effective participation in the appeal process, such as legal representation, senior counsel and expert technical advice (of worldwide standing);
- the timelines for developing applications for leave to intervene;
- the NEL requirement for consumer representatives to be granted leave by the Tribunal to intervene;
- the NEL criteria for consumer intervention;
- potential risks faced by consumer interveners of a costs order against their organisations;

- the timing of the AER's determinations in Victoria which requires consumer interveners to develop their application for leave to intervene over the Christmas/summer holiday period (when staff, legal and technical consultants are commonly scheduled for leave);
- lack of access to 'commercial in confidence' information of Distributors; and
- no requirement for the AER to provide intervening parties with 'factual' information throughout the appeals process.

Consumer Action and CUAC's attempt to intervene in the merits review process shows that the current review arrangements are designed around the theoretical principle that all parties *may* achieve standing to participate in appeals processes. To be a legitimate option for consumers, however, it must instead be designed around the principle that it has a *real* ability to ensure that all parties can participate in the appeals process in an effective manner.

The significant increases in distribution costs and the number of appeals made to the Tribunal since the AER became the economic regulator, and all NEM jurisdictions obtained access to merits reviews, are clear signals that the current arrangements are not working in the interest of consumers. Rather, they are clearly working against the interest of consumers, resulting in network costs hundreds of millions of dollars higher than they would have been based on AER determinations.

Consumer Action and CUAC explore a number of scenarios that address these shortcomings in the merits review. Given that EDPR reviews are extensive, thorough and consultative, Consumer Action and CUAC form the view that this cannot be replicated in a relatively short Tribunal process.

There seems little value in tweaking current arrangements to enhance the probability of consumer organisations being able to intervene in merits reviews as it is likely that the process will continue to present insurmountable barriers to consumer intervention.

The effectiveness of a merits review vs a judicial process is examined, including the notion of accountability, regulatory certainty, correct initial decisions, stakeholder views, minimising gaming, minimising delays and costs.

Ultimately Consumer Action and CUAC believe the only workable solution to this problem is to ensure that Distributors do not have access to apply for a merits review of the AER's electricity price determinations. The risk of significant regulatory error, they argue, is adequately managed by replacing the right to a

merits review of the AER's electricity price determination with a right to a judicial review.

Concerns regarding the scope of review available under judicial review, can be addressed by enhancing the NEL, specifically relating to the way in which the AER makes a price determination.

Chapter Overview

This report documents barriers to consumer groups seeking to intervene in the merits review process and discusses scenarios for how they can be rectified.

The text boxes in sections 3 and 4 of the report are based on conversations with staff from Consumer Action and CUAC a few weeks after the notice for intervention was withdrawn.[1] The staff involved in the 'intervention project' reflected upon the challenges experienced and the barriers they faced during the process, what they could have done differently in hindsight, and learnings to be passed on to other potential future interveners.

The '**Background'** section outlines the significant price impact EDPR decisions have on consumers, as well as the lengthy and thorough process required to reach these decisions.

The second section **'Appeal arrangements and past appeals'** provides an overview of past jurisdictional appeal arrangements as well as past appeals. It also discusses relevant current arrangements in Britain and its recent reforms and comparisons with the Australian arrangements.

Historically, Distributors in jurisdictions with access to merits reviews have demonstrated an eagerness to appeal against regulators' price determinations compared to jurisdictions with judicial review arrangements only. The Distributors' industry body, the Energy Networks Association (ENA), has also been a keen lobbyist for appeal arrangements to include merits review processes.

Although there are overseas appeal arrangements that also allow distributors to access merits review arrangements, Britain's model, for example, features mechanisms absent in the National Electricity Law (NEL). In Britain, the review body re-opens the whole determination and the distributors thus risk an adverse

[1] These conversations are based on two meetings. The meeting with CUAC (Jo Benvenuti and David Stanford) took place on 20 April 2011 and the meeting with Consumer Action (Janine Rayner) was held on 5 May 2011.

outcome from an appeals process. The lack of this risk in the Australian context means that Distributors are able to 'cherry-pick' the issues for their appeal. The analysis provided in this report indicates that Australian Distributors currently enjoy an extraordinary advantage in regards to appeal arrangements and as such it can be expected that they would vehemently oppose any attempt to adjust current arrangements.

Section 3 **'The current merits review model'** provides an outline of the current legal framework as well as the intention behind the merits review arrangements stipulated in the NEL. It also provides an overview of the legal advice Consumer Action and CUAC received throughout the process, which demonstrates how the NEL creates barriers to consumer representation in itself.

The NEL outlines the rights and obligations for Distributors, consumer representatives and other parties seeking to appeal or intervene in Tribunal proceedings. It also outlines the powers and obligations of the Tribunal.

It is clear, however, that the Distributors, as the appellants, drive the review process. Although the NEL provides for other voices to be heard during the proceedings, the reality is that due to a lack of resources, information and specialist technical expertise, as well as financial risks and tight timelines, it is practically impossible for a third party consumer group, to successfully lodge an application for leave to intervene, let alone be able to influence the Tribunal's decisions.

The right to apply for leave to intervene thus becomes a tokenistic right that makes the NEL seem more fair and balanced on paper. This is not in line with the intents for the NEL amendment as explained in the South Australian Parliament in 2007: "Persons with a sufficient interest in the original decision are able to intervene, as well as jurisdictions, and user and consumer associations and interest groups with the leave of the Tribunal."[2]

The 'power-balance' between the stakeholders needs to be adjusted. Simply having a law that allows consumer groups the right to appeal or apply for leave to intervene in the merits review process does not create such a 'power-balance'. Indeed, Consumer Action and CUAC's experience suggests the apparent 'right' is little more than window dressing.

Section 4 **'Barriers to intervene'** discusses the barriers experienced

[2] Parliament of South Australia, Legislative Council, Hansard 16 October 2007, p 891.

firsthand by Consumer Action and CUAC. It also contains tips for future interveners (if contemplating an intervention within the current framework) and reflects on the relationship between the regulatory arrangements and appeal mechanisms.

This section highlights barriers to consumer group participation, such as difficulties in accessing information, stringent timelines, financial risks (adverse costs order), and lack of financial resources, as well as how these factors impact on the ability to access legal and technical expertise.

The 'power-balance' between the stakeholders needs to be adjusted. Simply having a law that allows consumer groups the right to appeal or apply for leave to intervene in the merits review process does not create such a 'power-balance'. Indeed, Consumer Action and CUAC's experience suggests the apparent 'right' is little more than window dressing.

The final section **'Conclusion and recommendation'** provides a discussion of scenarios for improvements to the current framework arrives at a recommendation to remove the Distributor's rights to the merits review mechanism stipulated in the NEL.

The intention of the NEL is clearly to ensure that third party stakeholders can participate, and have their voices heard, in the event of a review process as well as exposing the Distributors to the potential risk of having the review broadened. In reality however, a consumer voice is highly unlikely to be present at the appeal stage and the Distributors can quite safely appeal the AER's decisions without facing the risk of consumer groups broadening the matters considered by the panel. Based on Consumer Action and CUAC's experience with the appeals process and the analysis presented in this report, urgent amendments to the NEL are required to be enacted prior to the next round of EDPR reviews.

The barriers highlighted in section 4 ensure that no consumer group should expect to successfully participate in an appeals process. The only *real* scenario is thus to remove the right to apply for merits reviews from *all* stakeholders.

Consumer Action and CUAC arrived at this conclusion after considering the realistic outcomes of the following **three scenarios**:

1) To make minor amendments to the NEL, and allocate financial resources for consumer interveners, with the aim to enhance consumer participation in appeals processes.

2) To amend the NEL in order to introduce more risk to the Distributors if they decide to appeal EDPR decisions.
3) To amend the NEL to remove the Distributors' access to merits reviews and thus rely on judicial review arrangements alone.

In regards to **scenario 1**, the value of tweaking current arrangements to enhance the probability of consumer organisations being able to intervene in merits reviews must be carefully assessed. Consumer Action and CUAC regard these scenarios as 'band-aid' measures as their own experience with the Tribunal process demonstrated that the current arrangements are not actually designed to have consumer participation in the reviews. Acting on scenario 1 can thus result in a change-process that adds very little practical value to the problem that needs to be resolved.

In regards to **scenario 2**, Consumer Action and CUAC acknowledge that the framework currently in place in Great Britain reduces the Distributors ability to 'cherry-pick' and that recent developments can promote regulatory accountability, as well as improve the power balance between the various parties participating in price reviews. However, the cost impacts on interveners (as well as the regulator and ultimately consumers) make this scenario undesirable.

Consumer Action and CUAC's attempt to intervene in the merits review process has proved that consumer organisations do not have the resources to successfully participate in merits reviews. Review arrangements should thus not be designed around the theoretical principle that all parties *may* achieve standing to participate in appeals processes. They should be designed around the principle that it has a *real* ability to ensure that all parties can participate in the appeals process in an effective manner. As this appears unachievable, the only remaining scenario is to minimise the Distributors' opportunity to game the regulatory framework to the cost of end users. **Scenario 3**, to ensure that Distributors do *not* have access to apply for a merits review of the AER's electricity price determinations, is thus the only workable solution.

This report recommends repealing Distributor's rights to a merits review in the NEL, while maintaining their access to judicial review, to adequately ensure that the AER's process of making the decision was reasonable, that the decision was within the power of the AER and is not so unreasonable that no reasonable decision maker could have reached that conclusion.

1. Background

1.1 Electricity Distribution Price Determinations

The national electricity market includes the monopoly distribution network businesses that distribute electricity to end-users. The Australian Energy Regulator (AER) has been responsible for the economic regulation of these distribution networks since 1 January 2008. Chapter 6 of the National Electricity Rules (NER) sets out the approach the AER must take in regards to the economic regulation of distribution businesses (Distributors).[3]

In Victoria, electricity distribution costs typically make up between 40-45% of domestic customers' electricity bills. The 2011-2015 Electricity Distribution Price Review (EDPR) decision resulted in a 6% increase in expected revenue for the Distributors in 2011 (compared to 2010) and further increases of between 5.5% and 8% for each of the years thereafter.[4] However, there are significant variations in customer impacts from these increases between the network areas. In the case of the 2011-2015 determination, customers in SP AusNet and Jemena's network areas are facing the highest increases while Citipower's customers are facing the lowest.

Table 1 AER Final decision for Victorian Distributors, change in network prices (nominal)[5]

	Citipower	Powercor	Jemena	SP AusNet	UED
2011	-4%	2.7%	7.7%	12.8%	3%
2012-2015 (Average)	7.2%	6%	5.7%	7.2%	6.4%

As the network price is a component of the total price charged by retailers, it is important to look at how changes to the network prices impact on the retail prices ultimately paid by customers[6]. According to the AER's final decision:

> (T)he result for customers from this decision is that retail price changes for 2011 are expected to range from a reduction of 1.6 per cent (for Citipower) to an increase of 5.1 per cent (SP AusNet). Annual nominal increases in prices averaging between 2–3 percent for the remainder of

[3] See the National Electricity Rules p. 582-593.

[4] AER, Final Decision, Victorian electricity distribution network service providers, Distribution determination 2011–2015, October 2010, p IX.

[5] Based on Table 4 in AER, Final Decision, Victorian electricity distribution network service providers, Distribution determination 2011–2015, October 2010, p X.

[6] Whether consumers actually benefit from any price decreases is difficult to quantify as retail charges are unregulated and therefore not transparent.

the period are needed to finance the approved capital program and to meet rising costs.[7]

Table 2 below demonstrates the significant impact EDPR decisions can have on an average consumption household's annual bill. In South Australia, for example, the EDPR decision for ETSA Utilities resulted in a 6% increase in the first year. This is equivalent to an annual bill increase of over $80 for a typical South Australian household just to pay for increases in network costs.[8]

Table 2 Price impact (nominal) on end users, estimated impact of EDPR decisions on average annual retail bills[9]

Jurisdiction/ Year of decision	Network	Year 1	Year 2	Year 3	Year 4	Year 5
South Australia (2010)	ETSA	6%	3.4%	3.4%	3.4%	3.4%
Victoria (2010)	Citipower	-1.6%	2.9%	2.9%	2.9%	2.9%
	Powercor	1.1%	2.5%	2.5%	2.5%	2.5%
	SP AusNet	5.1%	2.9%	2.9%	2.9%	2.9%
	Jemena	3.1%	2.3%	2.3%	2.3%	2.3%
	United Energy	1.2%	2.6%	2.6%	2.6%	2.6%
Queensland (2010)	Ergon	11.6%	1.8%	1.8%	1.8%	1.8%
	Energex	6.8%	2.7%	2.7%	2.7%	2.7%
New South Wales (2009)	Energy Australia	7.15%	5.28%	5.62%	5.96%	4.2%
	Country Energy	5.36%	5.77%	5.54%	5.88%	0
	Integral	5.03%	3%	3.12%	0.92%	0
ACT (2009)	ActewAGL	4.15%	1.36%	1.36%	1.36%	1.36%

[7] AER, Final Decision, Victorian electricity distribution network service providers, Distribution determination 2011–2015, October 2010, p I

[8] Bill impact calculation based on a typical South Australian household with an annual electricity bill of $1400. See AER media release, *AER's final decision on the South Australian distribution determination for ETSA utilities*, May 2010.

[9] Sources: AER, Final Decision South Australia, May 2010, p xxxiv. AER, Final Decision Victoria, October 2010, p x. AER, Final Decision Queensland May 2010, p xxxix and xl. AER, Final Decision NSW, April 2009, p 320, 322 and 324. AER, Final Decision ACT, April 2009, p xxvi.

1.2 The Electricity Distribution Price Review process

Chapter 6 of the National Electricity Rules (NER) sets out the approach the AER needs to take to the economic regulation of Distributors.[10] The Distributors must periodically apply to the AER to determine their total revenue requirements for periods of at least five years. This process begins 24 months before the end of the current regulatory period and takes about five months. The AER prepares and publishes a framework and approach paper for each determination. Approximately half way into the price review (and no less than 13 months before the end of the current regulatory period) the Distributors must submit a compliant regulatory proposal and a proposed negotiation framework for their distribution services.[11]

Table 3 Timelines for the 2010-15 review

Date	Event
19 December 2008	The AER published its Framework and Approach Position Paper
6 March 2009	Submissions closed on the Framework and Approach Position Paper
29 May 2009	The AER published its Framework and Approach
30 November 2009	The Distributors submitted their Regulatory Proposals to the AER
17 December 2009	The AER held a public forum on the Distributors' Regulatory Proposals
December 2009	The AER consulted on the proposed negotiated distribution service criteria
February 2010	Submissions closed on the regulatory proposal
May 2010	Release of the AER's draft determinations and consultants' reports
June 2010	The AER held a public forum on its draft determinations
23 July 2010	The Distributors submitted their Revised Proposals
19 August 2010	Submissions closed on revised proposals and draft determination
29 October 2010	The AER released its Final Decision and Determinations

The Victorian EDPR Review process 2010-15

The EDPR process allows for consumer groups and other interested stakeholders to submit their views and responses throughout the process. Although EDPR reviews are necessarily highly technical in nature, and stakeholders that have

[10] See the National Electricity Rules p. 582-593 for the approach that the AER must adopt.
[11] ACCC, AER Strategic Plan and Work Program 2009-11 (2009), p 16

significant interest in the outcomes (price and quality of service) may find it difficult to effectively participate in such a technical review, the AER's process does facilitate stakeholder input through various avenues; the AER's Consumer Consultative Forum, public forums and submissions. The AER clearly allocates significant resources to the EDPR reviews and has processes in place to facilitate input from stakeholders.[12] Consumer Action and CUAC, amongst other stakeholders, also allocate significant resources (relative to the total resources available to them) to represent their constituents in the process. The nearly two year long Victorian 2010-15 EDPR process can be divided into six stages:

1. Establishing framework and approach
    - In December 2008, the AER published its preliminary position paper on the framework and approach for the five Victorian Distributors in anticipation of the 2011-15 distribution determination. This preliminary position paper was open for consultation until early March 2009. AER published a final framework and approach paper in May 2009. This paper stated the form of control that will apply to the distribution services provided by the five Distributors in the 2011-15 regulatory period, and set out the likely approach to the classification of services and the application of a service target incentive scheme, efficiency benefit sharing scheme and demand management incentive scheme.[13]

2. The Distributors regulatory proposals and consultation
    - In November 2009, the five Victorian Distributors submitted their regulatory proposals together with supporting information to the AER. The proposals covered the 2011 to 2015 regulatory period and included information on the Victorian electricity distribution network service providers' proposed capital and operating expenditure (capex and opex) for the period. The AER commenced formal consultation on the regulatory proposals in late December 2009.[14]

3. Draft decision and draft determinations
    - In early June 2010 the AER published its draft decision and draft determinations on the regulatory proposals submitted by the five Distributors.

[12] Estimates by the Essential Services Commission Victoria indicate that their price review for the 2005-10 period cost the regulator approximately $7m. Paul Fearon, Chief Executive, Essential Services Commission, *A Practitioners Perspective*, in Public Utility Regulation, Melbourne University Law School, 23 January 2006.
[13] See AER website: www.aer.gov.au/content/index.phtml/itemId/725003
[14] See AER website: www.aer.gov.au/content/index.phtml/itemId/732540

4. Revised regulatory proposals and consultation

- The Victorian electricity distributors had until late July 2010 to submit revised regulatory proposals to the AER. Submissions to the draft decision and revised regulatory proposals closed on 17 August 2010.

5. Further consultation on the debt risk premium

- In September 2010, the AER published a paper outlining its approach for measuring the debt risk premium: *AER draft approach for measuring the debt risk premium for the Victorian Electricity Distribution Determinations*.

6. Final decision and final determinations

- On 30 October 2010, the AER published its final decision and determinations for the 2011-2015 regulatory period.

Consumer Action and CUAC were relatively satisfied that the EDPR process ending with the AER's final decision and determination for the 2011-15 regulatory period in October 2010 was extensive, thorough and in accordance with NEL and NER requirements. The process lasted for nearly 23 months (commencing with a preliminary position paper on framework and approach, 19 December 2008). The AER reports published at the different stages of the process comprise 3,894 pages in total. The EDPR process elicited:

- 51 submissions from interested stakeholders, totalling 816 pages
- 15 consultants reports to the AER, totalling 1,660 pages
- Proposals and submissions from the Distributors to the AER, totalling 4,632 pages

Consumer Action and CUAC's primary interest in the Victorian EDPR review is the significant financial impact the decisions have on the community. The organisations also have an interest in broader issues such as the effective implementation of the NEL objectives and in the efficiency, reliability, affordability and sustainability of the system generally.[15]

In their initial regulatory proposals in November 2009, the Distributors each proposed increases in expenditure that significantly exceeded what they had spent during the 2006-10 regulatory period. Overall, the Distributors requested that capital expenditure rise by around 66% (compared to their actual spending

[15] See Appendix A and B for a more detailed outline of Consumer Action and CUAC's work in the energy area.

during the 2006-10 period) and operating expenditure by 36%.[16] In its draft decision, the AER significantly reduced the increases sought by the Distributors. In relation to capital expenditure the AER proposed an average increase of 16% ($2billion less than that sought by the Distributors). The AER proposed an increase of 2% to the operating expenditure.[17] In the final decision however, the AER agreed to a 45% ($4.7billion) increase for capital expenditure and 32% ($2.7billion) for operating expenditure compared to the 2006-10 period.[18]

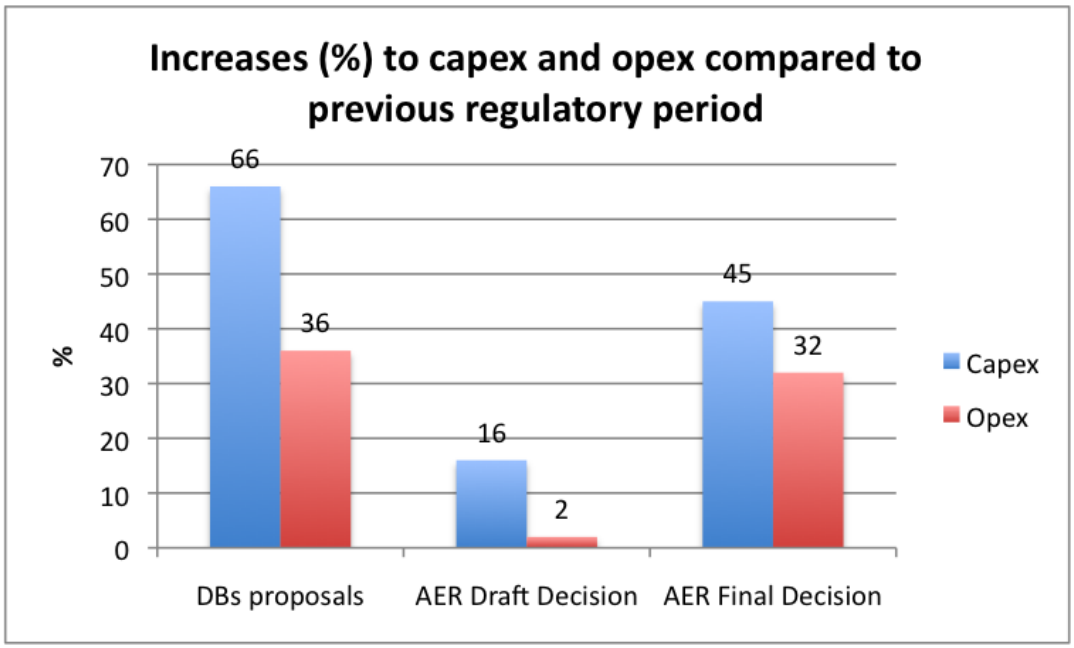

Chart 1 Increases sought by the Distributors in their initial proposals and increases allowed by the AER at draft decision and final decision stage.

When the AER makes changes from the draft decision to the final decision stage, the cost differential for households may amount to hundreds of dollars. Table 4 below shows the difference between the draft and final reports by Distributor for total revenue per customer, or the amount of total revenue paid on average by customers of each of the Distributors.

[16] AER, Draft Decision, Victorian electricity distribution network service providers, Distribution determination 2011–2015, June 2010, p vi
[17] Ibid, p vii-ix
[18] AER, Final Decision, Victorian electricity distribution network service providers, Distribution determination 2011–2015, October 2010, p ii

Table 4 Total Revenue allowed in the Draft and Final Decision of the AER ($2010), per customer [19]

Distributor	Draft Report	Final Report	Change (%)
Citipower	$3,465	$3,636	4.9%
Powercor	$3,095	$3,380	9.2%
Jemena	$2,830	$3,119	10.2%
SP AusNet	$3,255	$3,778	16.1%
United Energy	$2,239	$2,615	16.8%
Averages	$2,943	$3,296	12.0%

Note: Percentages are based on the differences between Draft and Final Reports by distributor divided by the customer numbers presented in the Draft Report.

The table shows that total revenue by customer between the draft and final decision increased across all networks, ranging from 4.9% for Citipower to 16.8% for United Energy. Any wins for the Distributors during the appeals process will increase these percentages further as additional revenue will be granted with no change in customer numbers.

[19] These calculations were produced by Orion Economic Services in its analysis of the impact on customers from the AER Draft Report, Final Report and Appeals, January 2011.

2. Appeal arrangements and past appeals

2.1 Merits Reviews and judicial reviews

Under the current legislative and regulatory process, Distributors are not only able to seek judicial review of a decision made by the AER (which is accepted as an appropriate accountability for all government and administrative decision-making), they can also seek to review the AER's distribution decisions on the *merits* – that is, ask the Tribunal to consider and make the decision anew.

In general terms, a merits review is a process where someone who was not involved in reaching the original decision reconsiders the facts, law and policy aspects of a decision. The role of the review body is to 'step into the shoes' of the primary decision maker when reviewing their decision.[20] The broad purpose of a merits review is to determine whether the original decision was 'correct and preferable'. Merits reviews can take place on the grounds of an error of fact-finding by the regulator and incorrect or unreasonable exercise of discretion by the regulator (having regard to all circumstances).

In contrast, judicial or administrative review is a more limited form of review that essentially undertakes a review of the process by which the decision was made and the legality of the decision, such as, whether the process of making the decision was reasonable, whether principles of procedural fairness were observed, whether there was bias on the part of the decision-maker, and that the decision was within the power of the decision-maker to make and is not so unreasonable that no reasonable decision maker could have reached that conclusion.

Both Consumer Action and CUAC have on numerous occasions raised concern about the use of merits reviews for regulatory decisions in the energy market.[21] In 2006 Lowe and Nelthorpe published the report; 'Grounds for appeal: representing the public interest in the review of regulatory decision making in the energy market' which discusses in detail the role of judicial review and concluded that judicial review alone provides the greatest likelihood of participation by public interest organisations, as well as promoting public interest

[20] Administrative Review Council, *What decisions should be Subject to Merit Review?* ARC Publications 1999.

[21] See for example, Consumer Action and CUAC *Submission to the Ministerial Council on Energy 2006 Legislative Package: Gas and Consumer Advocacy* at www.ret.gov.au/Documents/mce/_documents/CALC_CUAC20061219171549.pdf and Consumer Action Submission to the *Review of the Essential Services Act 2001*, 29 June 2007.

outcomes.[22] It thus recommended against the use of any form of merits review for price review decisions. The report argues that as judicial reviews include fewer grounds for which a review may be sought it basically limits the Distributors ability to 'game' the review process by picking and choosing elements of a decision to appeal. Furthermore, the report highlighted the difficulties consumer groups have experienced in obtaining standing in merits review processes, the short time available to the appeal body to review the decision (and the lack of key stakeholder input due to not obtaining standing), the costs to a consumer group intervening in a merits review and that adding a liability for the costs of other parties where unsuccessful would effectively guarantee that consumer groups would not participate in a review process.

The Distributors incentive to 'game' both the regulatory process and the review arrangements is a widely acknowledged issue, including amongst regulators. For example, as the former Chief Executive of the Essential Services Commission (ESC) stated:

> The asymmetry of information and the amount of shareholder value at stake naturally creates significant incentives for businesses to pursue strategic "gaming" strategies during the processes of regulatory price reviews and to appeal the processes and the outcomes of those reviews.[23]

2.2 Decisions appealed to the Competition Tribunal

Since the AER took on the function as the economic regulator of distribution businesses across the NEM in 2008, it has conducted EDPRs in Queensland, South Australia, ACT, New South Wales and Victoria. Appeals against the AER's final decision have been lodged with the Australian Competition Tribunal (Tribunal) by Distributors in all of the jurisdictions except the ACT.

In November 2009 the Tribunal made orders varying the AER's NSW distribution determination 2009–10 to 2013–14 by:

- determining the weighted average cost of capital (WACC) to be based on an August–September 2009 averaging period for the 10-year bond rates. This results in increasing the nominal vanilla WACC for the NSW Distributors (Country Energy, Energy Australia and Integral Energy) to 10.02% from around 8.80%.

[22] Catriona Lowe and Denis Nelthorpe, *Grounds for appeal: representing the public interest in the review of regulatory decision making in the energy market*, September 2006.

[23] Paul Fearon, Chief Executive, Essential Services Commission, *A Practitioners Perspective*, in Public Utility Regulation, Melbourne University Law School, 23 January 2006, p 7.

- increasing the controllable operating expenditure allowance for Energy Australia by $4.5 million to $2,582 million (in 2008–09 dollars).[24]

In June 2010, Energex, Ergon Energy (Queensland) and ETSA Utilities (South Australia) lodged applications for review of the AER's decision regarding the value of imputation credits (gamma). Ergon Energy also sought review of aspects of its capital expenditure allowance, forecast customer service costs, demand forecasts, alternative control services (quoted services), the classification of street lighting services, the service target performance incentive scheme, and labour cost escalators. ETSA Utilities also appealed against the value of its opening regulatory asset base.[25]

Most recently, all the Victorian Distributors lodged applications for review of the AER's decision with the Tribunal in December 2010. Issues all five distribution businesses appealed against were:

- The AER's approach to setting the debt risk premium
- The value of imputation credits (gamma)
- The indexation of regulated asset base (RAB) for inflation

In addition to these issues the Distributors appealed against particular aspects of their determinations, including:

- United Energy, Citipower, Powercor and Jemena appealed the AER's conclusions on their respective operating expenditure forecasts and allowances.
- Citipower and Powercor appealed the AER's decisions as to nominated events subject to cost pass through arrangements (specifically, in relation to measures resulting from recommendations of the Victorian Bushfire Royal Commission).
- SP AusNet appealed the decision on cost pass through arrangements.
- United Energy and Powercor appealed the application of pre-existing service incentive and efficiency incentive schemes.
- Jemena sought review of an aspect of its capital expenditure allowance.[26]

[24] AER Statement at www.aer.gov.au/content/item.phtml?itemId=734813&nodeId=70d9e12017e3864c83ff81ff1afee8b6&fn=AER%20statement%20on%20updates%20for%20NSW%20DNSPs%20distribution%20determination%202009–10%20to%202013–14.pdf

[25] See AER website: http://www.aer.gov.au/content/index.phtml/itemId/737663

[26] AER Communication No. 355 - *Review of the Victorian electricity distribution determinations by the Australian Competition Tribunal*, circulated by email on 3 December 2010.

2.3 Past appeals against EDPR Decisions

Victoria

The Victorian Distributors are not novices in regards to appealing the regulator's price review decisions. Appeals were lodged in response to the ESC's decision for the 2005-10 regulatory period as well as the Office of the Regulator-General's decision for the 2001-05 period.[27]

The Essential Services Commission Act 2001 stipulates that a determination by the ESC can be appealed and, if so occurs, an Appeal Panel (consisting of three members) must be established.[28] The role of the Appeal Panel is to undertake a merits review of the issues raised in the applications.[29] In October 2005 the ESC handed down its EDPR Determination for the 2005-10 regulatory period. The Final Decision resulted in annual real price reductions for the period, although the reductions in the final decision were lower than those anticipated in the draft decision.[30]

Four of the Victorian Distributors (Powercor, Citipower, SP AusNet and United Energy) appealed against the ESC's EDPR Decision for the 2005-10 regulatory period.[31] The Distributors made nine appeals in total (on 13 grounds) and of those three appeals were withdrawn by the Distributors, four upheld the ESC's decision and two were set aside by the Appeal Panel.

The two appeals set aside included an instruction for the ESC to re-examine the information provided by Powercor in relation to peak demand forecast and an overturning of SP AusNet's MAIFI targets.[32] The review of Powercor's peak demand forecast did not alter the outcome of the EDPR final decision but SP AusNet's new MAIFI targets resulted in an amendment of the final decision and un-quantified customer impacts. As stated by the ESC:

> The effect of the Appeal Panel's decision is to ease the target against which SP AusNet's MAIFI performance will be assessed. This decision will

[27] Paul Fearon, Chief Executive, Essential Services Commission, *A Practitioners Perspective*, in Public Utility Regulation, Melbourne University Law School, 23 January 2006.
[28] Part 7 of the Essential Services Commission Act 2001.
[29] ESC decisions can also be subject to judicial review heard by the Supreme Court of Victoria.
[30] These reductions were average reductions and some customers would have experienced increases (depending on their network area and tariff type).
[31] The Distributor's then appealed under the provisions of the *Essential Services Commission Act 2001*.
[32] The MAIFI target is based on the Momentary Average Interruption Frequency Index, the total number of customer interruptions of one minute or less, divided by the total number of distribution customers.

not impact upon the X-factors in the CPI-X formula. However, it is likely to increase the potential for SP AusNet to earn rewards under the service incentive scheme because SP AusNet does not have to achieve as high a level of MAIFI performance on its rural network as set out in the Final Determination to access those rewards. This is likely to result in higher prices during the regulatory period than previously anticipated.[33]

As the changes to the MAIFI target were directed by the Appeal Panel, no stakeholder consultation was undertaken prior to changing the determination.

The former Chief Executive of the ESC has argued that the scenarios for regulatory reviews (judicial or merit) cannot be resolved independently of the method employed for regulation itself. As the building-block approach to regulation is both information intensive (which provides the Distributors an incentive to 'game' the regulatory process) and involves a considerable amount of regulatory discretion, the regulatory approach itself increases the likelihood of regulatory reviews. Paul Fearon stated that:

> Indeed, appeals of regulatory decisions can represent an extension of the gaming dynamic that is intrinsic to building block regulation, *i.e.*
>
> - Companies have strong incentives to present gamed cost forecasts during the initial regulatory review.
> - Regulators must ultimately use discretion when evaluating those forecasts and determining reasonable, forward-looking costs.
> - Companies can argue that regulators' discretion was unreasonable and appeal the decision, thereby providing another opportunity to game cost projections that are imprecise and subjective to at least some extent.[34]

South Australia

The Essential Services Commission Act 2002 (South Australia) stipulates that the Distributor and/or the Minister may request the Essential Services Commission of South Australia (ESCOSA) to undertake a merits review of its price review decision.[35] The Distributor, or any other party participating in the price review,

[33] ESC, Electricity Distribution Price Review 2006-10, *Outcome of the Appeals against the Final Decision*, Open letter, 23 February 2006.
[34] Paul Fearon, Chief Executive, Essential Services Commission, *A Practitioners Perspective*, in Public Utility Regulation, Melbourne University Law School, 23 January 2006, p 22.
[35] Essential Services Commission Act (South Australia) 2002, Part 6.

can appeal the decision (or reviewed decision) to the court for a form of merits review.[36]

After ESCOSA's price review determination for the 2005-10 regulatory period, ETSA Utilities sought review of the decision relating to the regulatory asset base (RAB) and the equity beta.[37] After a review of the decision, ESCOSA decided to confirm the price determination, "except in respect of the value of the equity beta used for the purposes of the Capital Asset Pricing Model".[38] ESCOSA's decision in respect of the value of the equity beta was to change that value from 0.8 to 0.9. Consequently, ESCOSA also decided to change the following values for the purpose of the price determination:

- the value of the WACC from 6.85% to 7.13%
- the value of the X-factor from 0 to –0.8%
- the value used in the re-balancing control from 2.5% to 3.5%[39]

Queensland

The Queensland distribution businesses, Ergon Energy and Energex, did not have the opportunity to apply for merits review when the Queensland Competition Authority (QCA) was responsible for price determinations and there were no appeals made against QCA's price determinations. The Energy Networks Association (ENA), however, was an active advocate for the introduction of merits reviews of electricity distribution price determinations in Queensland. In a submission to the QCA the ENA stated:

> The subjective nature of the decisions in the Draft Determination such as, the resource constraint on capital expenditure allowance, the treatment of efficiency gains, and the claw back on depreciation because of changed industry opinion on standard asset lives, merely reinforces the need for the introduction of a merits review for regulatory decisions impacting on distribution networks.[40]

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[36] The court cannot consider new information. See Catriona Lowe and Denis Nelthorpe, *Grounds for appeal: representing the public interest in the review of regulatory decision making in the energy market*, September 2006, p 55.

[37] ETSA Utilities, Application for Review, 19 April 2005 at http://archive.escosa.sa.gov.au/site/page.cfm?u=163

[38] ESCOSA, *Electricity Distribution (Variation) Price Determination*, June 2005 at http://archive.escosa.sa.gov.au/site/page.cfm?u=163

[39] Ibid.

[40] Energy Networks Association, Submission to the Queensland Competition Authority, *Regulation of Electricity Distribution, Response to Draft Determination*, 25 February 2005, p 2.

New South Wales

In NSW, the Independent Pricing and Regulatory Tribunal (IPART) did not experience a Distributor appeal against their price review decisions during the time it was responsible for the economic regulation of NSW Distributors. IPART decisions can be subject to a judicial review but not a merits review. This process falls within the jurisdiction of the Supreme Court of NSW.[41]

At the IPART Conference in May 2010, Tribunal member Sibylle Krieger argued against the use of merits reviews in relation to the economic regulation of infrastructure services.[42] In her paper Krieger argues:

> What economic regulators do is to weigh up and balance the conflicting policy objectives in their charters and the competing interests of their stakeholders in an ever-changing economic and political environment. In some instances, such as water regulation, even the ever-changing climatic environment is relevant.
>
> This is not territory in which the law and traditional legal processes are particularly helpful. In a traditional legal contest there are clearly identified parties with more or less defined rights and claims which delineate and confine the scope for decision-making. Decisions are made largely based on the material and arguments which the parties put forward. For each argument there is a proponent and an opponent. The role of the decision-maker is umpire rather than originator. The interests of third parties who are not directly involved count for little or nothing.
>
> That is not the world of economic regulation. In the pricing work which we do at IPART, the agency affected does not always even put forward a proposal. The core regulatory approach is more often than not originated by us and the interests of all affected stakeholders are relevant, whether they are represented or not. All important decisions are published in draft for comment, and all submissions are taken into account.
>
> While it is not the function of IPART to make consensus decisions, its processes do have the effect of narrowing down the topics on which stakeholder opinions differ. Sometimes we even persuade them to change their minds and sometimes they persuade us. At the end of the day,

[41] Monash Centre for Regulatory Studies, Faculty of Law, *Keeping the Regulators Accountable: Improving Practices in Energy Markets for Disadvantaged Consumers and Stakeholders*, October 2008, p 52.

[42] Krieger acknowledged that while her argument was not only relevant to IPART, some Commonwealth regulators are more constrained by constitutional issues than the state based regulators.

> however, our job is to balance the competing interests and the frequently conflicting parameters set out in our terms of reference, and to find a middle way. [43]

The jurisdictional differences outlined above indicate that Distributors are more likely to challenge price determinations if they have access to merits reviews, and that these appeals do result in economic gains to the networks. Unsurprisingly then, the Energy Networks Association (ENA) has continuously been advocating for the Distributors access to merits reviews in relation to price determination. In ENA's view, merits review is a core feature of an effective and balanced regulatory framework. They argue that merits reviews will improve the quality, transparency and consistency of regulatory decision-making as well as ensuring decisions are supported by robust evidence. They also state that merits reviews will reduce the risks to service providers, as well as the community, of regulatory error and failure.[44] Lowe and Nelthorpe, on the other hand, note that judicial review is specifically designed to address serious administrative error whilst permitting the exercise of discretion.[45]

The jurisdictional differences outlined above indicate that Distributors are more likely to challenge price determinations if they have access to merits reviews, and that these appeals do result in economic gains to the networks.

2.4 EDPR Determinations and appeal processes in Great Britain

It is difficult to make international comparisons of review arrangements as the appropriateness and effectiveness of the review arrangements will depend on the broader legal system and regulatory environment. However, due to recent debate and interesting developments in Great Britain Great Britain, this section looks at current and future regulatory and appeal arrangements in Great Britain and how these differ to the Australian energy market.

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[43] Sibylle Krieger, *Should the Law Have a Greater Role in Economic Regulation of Infrastructure Services?* IPART Conference, Sydney 7 May 2010, p 4-5.

[44] See, for example, ENA submission to Ministerial Council on Energy, Standing Committee of Officials, *National Framework for Electricity and Gas Distribution and Retail Regulation, Response to Issues Paper*, October 2004, p 15.

[45] Lowe and Nelthorpe also make the point that the scope of judicial review can be significantly expanded depending on the approach taken in the legislation that empowers the decision maker. See Lowe and Nelthorpe, *Grounds for appeal: representing the public interest in the review of regulatory decision making in the energy market*, September 2006, p 24.

The Office of the Gas and Electricity Markets (Ofgem) is responsible for the economic regulation of Great Britain's distribution businesses. Ofgem uses a similar regulatory approach to the AER. Great Britain is thus a jurisdiction that can produce somewhat meaningful comparative analysis when compared to Australian price control decisions.

Ofgem's principal objective is to protect the interests of consumers, existing and future, wherever appropriate by promoting effective competition. It must also have regard to the need to secure that licensees can finance their regulated activities, and to the need to contribute to the achievement of sustainable development. Furthermore, it must have regard to the interests of individuals who are disabled or chronically sick, of pensionable age, with low incomes, and residing in rural areas.[46]

Ofgem reviews the price controls every five years. The price controls set the maximum amount of revenue that energy distribution businesses can take through charges they levy on users of their networks to cover their costs and earn them a return in line with agreed expectations.[47] For the price reviews the Distributors are required to provide their forecast network and business costs using a building block framework.

Ofgem's price review process has been similar to the AER's approach, with both regulators conducting step-by-step processes with extensive stakeholder consultation. In December 2009, Ofgem published its final decision for the current price controls (referred to as DPCR5), which runs from 1 April 2010 to 31 March 2015. The Distributors then had until the first week of January 2010 to decide whether to accept Ofgems's final proposals (Decision) or to have the matter referred to the Competition Commission.[48]

All Distributors accepted Ofgem's final decision and no appeal to the Competition Commission were made.[49] The decision not to appeal the price control determination to the Competition Commission occurred despite the distribution businesses publicly criticising the decision, and the WACC setting in particular.[50]

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[46] See Ofgem website: www.ofgem.gov.uk/About%20us/Documents1/file37517.pdf, p 8

[47] See Ofgem website: www.ofgem.gov.uk/Networks/Pages/Ntwrks.aspx

[48] See Ofgem website: www.ofgem.gov.uk/Networks/ElecDist/PriceCntrls/DPCR5/Documents1/Initial%20consultation%20document.pdf

[49] Ofgem Media Release, *Electricity distribution network operators accept Ofgem's final proposals for the 2010-2015 price control*, 8 January 2010.

[50] See for example Utility Week, *Network firms slam Ofgem for cost of capital ruling in price review*, 21 December 2009 at www.utilityweek.co.uk/news/news_story.asp?id=84395&.

The current appeal arrangements in Great Britain allow the Distributors to refer the decision to the Competition Commission if they do not accept the changes to the licence agreements (effectively where the price controls are stipulated) set by Ofgem. No other parties can intervene in the Competition Commission's redetermination process. If other parties wish to appeal the decision they have to seek a judicial review. As Ofgem is required to consult with the Secretary of State prior to amending licence agreements (which contain changes to the price controls) and the Secretary of State has the power to veto proposed amendments, other parties, in theory, also have the scenario to lobby the Secretary of State to use its veto powers if they disagree with the price review decision.[51]

While distribution businesses in Great Britain also can appeal the regulator's final decision, the businesses face more risk in doing so than their Australian counterparts.

While distribution businesses in Great Britain also can appeal the regulator's final decision, the businesses face more risk in doing so than their Australian counterparts. In a comparative analysis of distribution businesses and their regulatory environment in Great Britain, NSW and Victoria, Littlechild and Mountain argue:

> In both markets there is provision for appeal against the regulator's price control proposals or decisions. In Great Britain, Ofgem proposes price caps (and associated incentive schemes) that distributors may accept or reject. Ofgem will expect to refer any rejected proposal to the Competition Commission. The Competition Commission is required to re-open the whole matter and make its own recommendation on all aspects of the price control proposal. Its recommendation may be more or less advantageous than Ofgem's proposal in some or all respects. In some cases it has indeed been less advantageous to the appealing company.
>
> This mechanism prevents a distributor from 'cherry picking' – that is, accepting those aspects of a decision that it likes and appealing those aspects that it does not like. It also obliges the distributor to consider carefully whether it has a strong case before rejecting Ofgem's proposal. In fact, only one electricity distribution price control proposal has been

[51] See LECG report for Ofgem, *Should energy consumers and energy network users have the right to appeal Ofgem price control decisions? If so, what form should the appeals process take?,* Final report October 2009.

appealed to the Competition Commission out of 42 such proposals made to date. The inability to cherry pick and, the possibility of a worse outcome, can be expected to strengthen Ofgem's hand in making price control proposals.[52]

Recent developments

In October 2010, Ofgem announced its recommendations for a new regulatory approach to distribution price reviews.[53] Changes to the appeals framework are important components of this new model. Distribution businesses can continue to refer price control decisions to the Competition Commission for redetermination but under the new model third parties will also be able to request a redetermination. According to one of the consultancies involved in the review project: "Ofgem has proposed a change whereby even if a company accepts Ofgem's price control decision, another interested party can request Ofgem to exercise its discretionary power to refer the matter for redetermination, on the basis that price control determination may operate against the public interest".[54] The consultant notes that this would be an interesting development and it "increases the likelihood that companies will find themselves facing a Competition Commission redetermination, even if they accept Ofgem's proposals. It is important, therefore, that companies approach the price control with this in mind".[55]

A report produced by LECG and commissioned by Ofgem, assessed the pros and cons of extending appeal rights to consumers and users (remembering that, as noted above, cherry-picking is not enabled under the current framework). It found that *positive* aspects included the following three criteria:

- *Good regulatory process*, as it would:
    - Promote accountability of the regulator to consumers and users
    - Provide incentives for consumers and users to engage in price control processes, and for Distributors to engage with consumers and users
    - Promote a more 'equal balance of power' during the price control process

[52] Mountain, B and Littlechild, S., Comparing electricity distribution network revenues and costs in New South Wales, Great Britain and Victoria, Energy Policy (2010).

[53] The project investigating changes to the regulatory arrangements is known as the RPI-X@20 project and the new approach recommended by OFGEM is known as RIIO (based on Revenue=Innovation+Incentives+Outputs). The RIIO model would thus replace the old RPI-X model for price regulation.

[54] LECG, *Ofgem's new approach to setting regulated network tariff price caps,* p 2.

[55] Ibid p 5.

- *Consumer benefits*, as it would have the potential to improve outcome of price control determinations, which would have significant benefits for consumers.
- *Sustainability*, as it would help ensure that sustainability considerations are given appropriate weight in price control decisions

In terms of *negative* aspects, the assessment referred to:

- *Direct costs*, as an increase in appeals would be expected, this would have a cost impact on appellants, Distributors and the regulator.
- *Indirect costs*, as appeals would create uncertainty for the Distributors during the appeal process and potentially about price control outcomes. There is also the risk and indirect cost implication of appeal decisions being incorrect.[56]

Ofgem, like the AER, has a mandate to promote the interest of consumers and it can thus be argued that consumers' interests are already well represented in the price review process, and that this diminishes the need for third party consumer voices in review processes.[57] However, as raised in the Ofgem report, if one accepts this argument one would also need to accept the argument that the regulators have a mandate to ensure financial viability of the networks and thus work in the interest of the Distributors as well:

> An appeal process recognises that checks on the decision process are required and that the decision maker may not always make perfect decisions. Ofgem has to balance a number of duties when making regulatory settlements and an appeal process should allow for a check on the full range of duties. It will limit the benefit of the appeal system if some parties with important interests cannot defend them.[58]

Ofgem aims to enhance stakeholder engagement in regulatory reviews under the new model and they state they "remain of the view that transparent provisions

[56] LECG report for Ofgem, *Should energy consumers and energy network users have the right to appeal Ofgem price control decisions? If so, what form should the appeals process take?,* Final report October 2009, p 36-37.

[57] Ofgem's principal statutory objective is 'to protect the interests of gas and electricity customers, present and future, wherever appropriate by promoting effective competition'. In Australia, the National Electricity Objective as stated in the NEL refers to the 'long term interest of consumers'. The Australian Energy Market Commission is responsible for ensuring that the rules are in line with the NEL objective and the AER is responsible for applying the rules.

[58] LECG report for Ofgem, *Should energy consumers and energy network users have the right to appeal Ofgem price control decisions? If so, what form should the appeals process take?,* Final report October 2009, p 38-39.

to allow third parties to challenge our price control determinations are an integral element of enhanced engagement".[59] A separate guidance document was published to outline the process and criteria that Ofgem would adopt to determine whether to make a price control modification reference to the Competition Commission should a third party raise 'legitimate and material' concerns with their final price control proposals.[60] Design features of the new arrangements include:[61]

- Ofgem is responsible for determining whether a modification request from a third party is compliant with the criteria, and it is at their discretion whether to refer the request to the Competition Commission or to pursue an alternative course of action (which may include making no change).
- Anyone can make a modification request to Ofgem but will need to meet the criteria set out in the guidance document for Ofgem to refer the matter to the Competition Commission.
- Third parties will be expected to demonstrate how their request for a price control modification reference is consistent with Ofgem's statutory and principal objectives, explaining why such a reference would be in the interests of existing and future consumers. It should also take account of Ofgem's broader statutory duties, including the need to secure that licence holders are able to finance their activities. Third parties will also be expected to provide evidence that they had engaged effectively throughout the price control review process. This includes showing that they had brought any evidence relied upon in the price control modification request to Ofgem's attention during the price control review process.
- Third parties ought only to make a modification request on the merits of the final price control proposals (broadly consistent with what the Distributors are able to do in rejecting a price control package). Were a third party to raise a modification request around a process issue, this would likely be seen as out of scope and the request likely refused on the grounds that other routes, such as judicial review, are available.
- Third parties may decide whether to make a modification request with respect to the price control package as a whole or with respect to a particular element(s) of it. However, Ofgem will have discretion in setting the terms of the reference to the Competition Commission.

[59] Ofgem, *RIIO: A new way to regulate energy networks*, Final Decision, October 2010, p 18.
[60] See Ofgem, *A Guide to Price Control Modification References to the Competition Commission - Licensee and Third Party Triggered References,* October 2010.
[61] See Ofgem, *Handbook for implementing the RIIO model*, October 2010 for design features.

- The direct costs of making a modification request, along with reputational costs if unsuccessful, would be borne by the third party making the request.

2.5 British appeal arrangements in an Australian context

The greatest difference between the current appeal arrangements in Great Britain and the Australian energy market is that Australian Distributors can decide exactly which issues they would like to appeal to the Competition Tribunal while their British counterparts do face the risk of the entire decision being opened up for review. It also appears that the AER has more appeals against their price decisions than Ofgem has experienced. This could of course be put down to something as simple as Ofgem being a better regulator (at least from a network business' perspective) than the AER, or it could mean that the risk attached to Australian Distributors decisions to appeal price determinations is too low. The Energy Networks Association (ENA), in response to Bruce Mountain's arguments, obviously does not accept the 'cherry-picking' argument and cautions against judging a framework as new as the national regulatory framework:

The greatest difference between the current appeal arrangements in Great Britain and the Australian energy market is that Australian Distributors can decide exactly which issues they would like to appeal to the Competition Tribunal while their British counterparts do face the risk of the entire decision being opened up for review.

> The energy regulator is legally required to be satisfied that all proposed expenditure reasonably reflects prudent, efficient costs of meeting expected demand. It must provide sound reasons to support its decisions, a normal requirement for a decision maker. Electricity distributors in Britain operate under a largely equivalent framework. Experience in Australia has led to governments favouring merits reviews focused on the issues actually in dispute, rather than a rehearing of the entire decision, and the risks, costs and design of reviews make a cherry-picking criticism redundant.
>
> A cursory review of recent decisions shows the claim that every distribution pricing decision to date has been appealed is just wrong.

> National distribution regulatory rules have been in place for only two years. It's difficult to see how they can either be prejudged to be a failure, or reasonably held out as a driver of prices over the past decade, as Mountain's work asserts.[62]

The ENA is right to point out that the national energy regulation is new. However, the sheer number of appeals to date, combined with the experience in Victoria and South Australia prior to national regulation (where the appeals mechanism was similar in key respects), should arguably be regarded as an indication that Distributors favour this type of review mechanism and that it provides them with an incentive to appeal the regulator's price determinations. As noted above, in only one instance where limited merits review was available for EDPRs have the Distributors in that jurisdiction failed to take up the scenario. As no appeal to date has resulted in less revenue for the Distributors, it is also reasonable to suggest that appeals against the price determinations do increase the cost of electricity for consumers

[62] Andrew Blyth, CEO, Energy Networks Association, *Mountain claim meets stubborn facts*, Letter to the Editor, Australian Financial Review, 22 February 2010.

3. The current merits review model

The Australian Competition Tribunal (Tribunal) operates under the *Trade Practices Act* 1974 (Cth). The Tribunal hears applications for review of determinations of the Australian Competition and Consumer Commission (ACCC). The Tribunal consists of a judge (of the Federal Court) and two expert members.[63]

The Tribunal is a review body. A review by the Tribunal is a re-hearing or a re-consideration of a matter. The Tribunal may perform all the functions and exercise all the powers of the AER, as set out in the NEL and the NER, for the purposes of review. It can affirm, set aside or vary the original decision.[64] The Tribunal may also remit the matter back to the AER to make the decision again (in accordance with directions provided by the Tribunal).[65] In doing so, the Tribunal must have regard to the nature and complexities of the decision and matter that is subject to a review.[66]

3.1 The legislation

Division 3A of the NEL stipulates the legal framework for merits review and other non-judicial review. This section outlines the rights and obligations for Distributors, consumer representatives as well as other parties seeking to appeal or intervene in Tribunal proceedings. It also outlines the powers and obligations of the Tribunal.

The introduction of merits review provisions

Initially the NEL did not propose merits review to be part of the appeal framework. The second reading of the NEL in the Parliament of South Australia in 2005 stated that:

> Decisions of the Australian Energy Regulator are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. Again, merits review is not available for decisions of the Australian Energy Regulator under the new National Electricity Law and Rules, and this is consistent with the position under the current arrangements where merits review of the Australian Competition and Consumer Commission's electricity transmission revenue determinations is not available.

[63] Non-judicial members of the Tribunal are appointed by the Governor-General and must have knowledge of or experience in industry, commerce, economics, law or public administration.
[64] See www.competitiontribunal.gov.au/about.html and NEL 71P(3)
[65] NEL 71P(2)(b)
[66] NEL 71P(4) (a and b)

> Nonetheless, the Ministerial Council on Energy has undertaken to reconsider the issue of merits review for electricity when it makes its response to the Productivity Commission's *Review of the Gas Access Regime*.[67]

Subsequently, the proposed amendments to the NEL in 2007 changed the appeal arrangements to include merits reviews for AER price review decisions. The second reading speech stated that new merits review provisions had been introduced to:

> [A]llow the review of the Australian Energy Regulator's decisions by regulated businesses and users and consumers, providing the appropriate checks and balances on the decision making process.[68]

More specifically it was argued that the amended review model, which now ensured consistency with the appeal arrangements under the National Gas Law, would:

> [A]llow a range of affected parties, including; network service providers, users and consumer associations, to seek review of the primary transmission and distribution determinations made by the Australian Energy Regulator.[69]

To demonstrate that the proposed amendments included provisions for all stakeholder interests, the speech stated that:

> There will be a relatively wide scope for persons and groups to intervene in merits review proceedings, once commenced. Persons with a sufficient interest in the original decision are able to intervene, as well as jurisdictions, and user and consumer associations and interest groups with the leave of the Tribunal. Specific provision is made for the intervention of user and consumer associations and interest groups to overcome legal arguments that regulatory decisions are not sufficiently connected to their concerns or members.[70]

During the debate on the second reading, the Minister was asked to provide greater detail on what such a merits review arrangement would mean in

[67] Parliament of South Australia, Legislative Council, Hansard 16 February 2005, p 1101-1102.
[68] Parliament of South Australia, Legislative Council, Hansard 16 October 2007, p 883.
[69] Ibid, p 891.
[70] Ibid.

practice.[71] The Minister replied later in the debate that merits review provisions provide the regulated businesses the ability to review decisions that have significant impact on them and that because it is only a limited merits review mechanism it appropriately balances "the costs and delays of the merits review process and the fact that regulatory decisions are usually reached after extensive public consultation processes".[72]

In practice, this report asserts that serious, perhaps insurmountable, barriers exist to effective intervention by users and their advocates, and that the limited nature of the merits review process invites cherry picking by Distributors.

The Tribunal

When the Tribunal undertakes a review it cannot consider any matter other than 'review related matter'.[73] By 'review related matter' the NEL means:[74]

- The application for review and supporting material submitted.
- The reviewable regulatory decision (including written reasons for it).
- Any document, proposal or information required or allowed under the Rules to be submitted as part of the process for the making of the EDPR determination.
- Any written submissions made to the AER before the reviewable regulatory draft decision or final decision was made.
- Any reports and materials relied on by the AER in making the reviewable regulatory draft decision or final decision.
- Transcript of any hearing conducted by the AER for the purpose of making the reviewable regulatory decision.

The Tribunal is required to have regard to any of the documents prepared and used by the AER to make the decision that is being reviewed as well as any document the AER has made publicly available.[75] If the Tribunal finds that there is ground for review, it can allow new information to be submitted as long as it assists the decision they have to make and that the information was not unreasonably withheld from the AER in the first instance.[76]

Upon granting leave for review the Tribunal must use its best endeavours to make a decision within a three month period.[77]

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[71] Question raised by the Hon. Rob Lucas. See Parliament of South Australia, Legislative Council, Hansard 23 October 2007, p 1094.
[72] Parliament of South Australia, Legislative Council, Hansard 14 November 2007.
[73] NEL 71R(1)
[74] NEL 71R(6)(a-h)
[75] NEL 71R(2)
[76] NEL 71R(3) 'Unreasonably withheld' is defined as any information or material requested by the AER but not provided by the Distributors (NEL71(R)(4)).
[77] NEL 71Q(1)

Appealing the AER's decision

A distribution business or an affected person or body (including consumer groups) can apply for leave and review of a regulatory decision within 15 business days of a decision being published by the AER.[78] If so, the appellant must specify on which ground they're seeking the decision reviewed.[79] The appellant's grounds for review must refer to one or more of the grounds set out in the NEL, these are:[80]

1) That the AER made an error of fact and that the error was material to the AER's decision
2) That the AER made more than one error of fact and that those errors, combined, were material to the AER's decision
3) That the AER used its discretion incorrectly
4) That the AER's decision was unreasonable

The Tribunal must refuse the application for leave to intervene if:

- There is not a serious issue to be heard and determined[81]
- If the application is about an *error* relating to revenue below the material threshold[82]
    - The present threshold is $5m or 2% (whichever is lesser) of the Distributors average annual regulated revenue[83]

In the case of the appellant being a Distributor, the Tribunal can refuse the appellant's application for leave if it believes that the Distributor failed to comply with a request or direction from the AER, behaved in a manner that delayed the AER's decision making process, or misled (including attempted to mislead) the AER.[84]

Intervening in a review

Consumer representatives that participated in the AER price review process can seek leave to intervene under section 71K of the NEL. The timelines for serving a notice to intervene will be determined at the Tribunal's initial directions hearing. Section 71L deals with leave for a user or consumer to intervene in the Tribunal

[78] NEL 71B(1) and 71D
[79] NEL 71B(2)(b)
[80] NEL 71C
[81] NEL 71E
[82] NEL 71F
[83] NEL 71F(2)
[84] NEL 71H(2)

proceedings.[85] The Tribunal *may* grant leave to a consumer representative to intervene if:[86]

1) They raise matters in their application that are different to those matters that *will* be raised by the AER or the Distributor(s); or
2) They are likely to present information or material in a better manner than another party participating in the review; or
3) Their interests (or their members' interests) are affected by the decision reviewed.[87]
    - Their interests are taken to be affected if the decision relates to an object or purpose of the consumer representative, conversely a consumer representative's interests are not regarded as affected simply because its interests are different to those of the Distributor.[88]

A consumer representative intervening may raise matters on the same grounds as an appellant (discussed above) and they may raise matters on different grounds to those used by the Distributors (as long as it is one of the four grounds specified in section 71C).[89]

A consumer representative intervening can only raise matters that were raised in submissions during the AER's price review.[90]

A Minister of the relevant jurisdiction and a Distributor affected by the matter to be reviewed (but is not the appellant itself) do not need to seek leave from the Tribunal in order to intervene.[91]

In regards to other interested parties, the Tribunal cannot grant leave if the party did not make a submission (within the timelines) during the AER decision making process, or if the AER decided not to take the submission into account in making the decision.[92]

[85] Consumer organisations come under the definition 'user or consumer intervener'. The NEL defines 'user or consumer intervener' as: a) a user or consumer association; or b) a user or consumer interest group.
[86] The wording of 71L (*'may* grant leave') allows the Tribunal to make a discretionary decision as to whether leave will be granted or not.
[87] NEL 71L(3)(a-c)
[88] NEL 71L(4)
[89] NEL 71M(1)
[90] NEL 71O(2)
[91] NEL 71J
[92] NEL 71G

3.2 The NEL and leave to intervene

The NEL provides consumer groups with a right to involve themselves in a distribution price review appeal either as an appellant or as an intervener.[93] In this instance, an appeal from the decision of the AER was not contemplated given Consumer Action and CUAC were broadly satisfied with the decision of the AER as a whole. Once the Distributors appealed, however, the organisations were keen that the consumer interest be represented in the Tribunal proceedings. Thus it was the provisions relating to intervention that were the subject of detailed consideration.

As also discussed above, Section 71 of the NEL sets out the basis on which a consumer intervener may be involved in the Tribunal proceeding:

> **71L—Leave for user or consumer intervener**
> (1) A user or consumer intervener may apply to the Tribunal for leave to intervene in a review of a reviewable regulatory decision under this Subdivision.
> (2) The Tribunal **may** grant leave to a user or consumer intervener to intervene in a review under this Subdivision.
> (3) Without limiting subsection (2), the Tribunal **may** grant leave to a user or consumer intervener to intervene in a review under this Division if the Tribunal is satisfied—
>
> (a) the user or consumer intervener, in its application for leave to intervene, raises a matter that will not be raised by the AER or the applicant; or
>
> (b) the information or material the user or consumer intervener wishes to present, or the submissions the user or consumer intervener wishes to make, in the review is likely to be better presented if submitted by the user or consumer intervener rather than another party to the review; or
>
> (c) the interests of the user or consumer intervener or its members are affected by the decision being reviewed.
>
> (4) For the purposes of subsection (3)(c)—
>
> (a) the interests of a user or consumer intervener are to be taken to be affected if the reviewable regulatory decision being reviewed relates to an object or purpose of the user or consumer intervener;
>
> (b) the interests of a user or consumer intervener are not to be taken to not be affected only because those interests do not coincide with the interests of the applicant.
>
> (emphasis added)

[93] For example user or consumer associations or interest groups are included within the category of persons who may apply for review of a decision under 71B of the NEL.

Thus it appears quite clear that the NEL does address one of the barriers to consumer intervention under earlier state based review mechanisms - that of standing. For example, consumer groups were denied leave to intervene in a review of a pricing determination by the (then) Victorian Office of the Regulator General on the basis that they lacked standing.[94]

However, what is the practical value of this standing? The view of the legal advisers was that in the context of the NEL, the use of the word "may" in section 71L(2) and (3) gives the Tribunal a discretion as to whether or not to grant leave for a consumer group to intervene. This view is supported by subsections (3) and (4) which set out a non-exhaustive list of factors the Tribunal may take into account in deciding whether or not to grant leave. As such the Tribunal can be expected to make a pragmatic decision in regards to granting leave.

The grounds set out under section 71L(3), whilst non-exhaustive (meaning the Tribunal can take into account other matters), provide strong guidance as to the matter or matters the Tribunal is likely to wish to be satisfied of in order to grant leave, namely that:

> (a) the user or consumer intervener, in its application for leave to intervene, raises a matter that will not be raised by the AER or the applicant; **or**
> (b) the information or material the user or consumer intervener wishes to present, or the submissions the user or consumer intervener wishes to make, in the review is likely to be better presented if submitted by the user or consumer intervener rather than another party to the review; **or**
> (c) the interests of the user or consumer intervener or its members are affected by the decision being reviewed.
> (emphasis added)

Consideration of the basis on which to cast the application for leave proceeded on two main fronts, with initial advice suggesting that ground 71L(3)(c) provided the strongest basis but that material in support of the matters set out at (3)(a) and (b) would also be put forward. More specifically, the legal team advised Consumer Action and CUAC that "it would appear wise to focus upon defenses of the reasonableness of the various economic and accounting methodologies adopted by the AER in reaching its determinations, rather than to descend into a

[94] The Consumer Law Centre Victoria (CLCV), Energy Action Group (EAG) and the Energy Users' Group (EUG) sought to intervene in the appeal by four of the five Victorian distribution business from the 2001-2005 pricing determination.

detailed analysis of calculation and costings, however, we will take instructions and advice on this issue from yourselves, experts and counsel."

Accordingly, consideration also proceeded as to the other grounds[95] on which the groups may seek to intervene, including that:

1. the AER erred in accepting the forecasts of the distribution business relating to operating expenditure and maintenance expenditure for the 2011-15 period;

2. that the AER erred in its estimation of the debt risk premium;

3. that the AER erred in its approach to the issue of/value of gamma;

4. departure by the AER from its Statement of Regulatory Intent in the Decision;

5. a consumer perspective on grounds of review raised by the businesses including pass through, the efficiency carry over, capital expenditure and the S factor;

6. indexation of distribution businesses' assets base;

7. approach to vegetation and tree clearing;

8. approach to the Jemena project; and

9. allowances for new UED business model of contracting out.

In order to manage the litigation under severe time and resource constraints, it was necessary to reduce the number of grounds under consideration. Therefore more detailed consideration by Counsel focussed on the grounds 1 and 4-9 listed above.

Consumer Action and CUAC were concerned to put material before the Tribunal demonstrating:

- historical overestimation of costs by the Distributors. However, the groups were advised that in the absence of clear evidence of intent the highest argument available was that there was ample opportunity to present this information during the price review determination process and therefore it ought not be allowed to be presented to the Tribunal. This was likely to be an argument that was also raised by the AER.

[95] Under 71M(1) an intervener may raise in a review any of the grounds specified in section 71C even if the ground that is raised by the intervener is not raised by the applicant.

- double dipping in relation to costs. Again, Counsel's advice was that lack of access to information was a barrier to being able to bring arguments of this kind.

Consideration then turned to the scenario of opposing the granting of leave to appeal by the Distributors on the basis that the AER is adequately resourced and its decision was adequate; that we do not think it should be repented and the Tribunal should be slow to move from the regulator's original decision; that the Tribunal should not encourage this to become a two-step process, particularly in view of the Distributors' capacity to put all relevant information before the AER in the first instance; and, that the Tribunal should consider the cost impact on consumers and therefore not grant leave lightly. To support this argument evidence would be led about the regulatory approach taken in other jurisdictions ("the New Approach").

In order to make these arguments it was necessary to consider the expertise available to lead and support these arguments. It was determined to rely on the consumer organisations' own expertise in combination with external economic experts. Upon review of the prepared material however, Counsel formed the view that the material was not sufficient to support the New Approach. Further it had transpired that the AER had agreed that the applications by the Distributors did raise serious issues and therefore the Distributors would be granted leave to appeal by the Tribunal.

In order to proceed, it was therefore necessary to return to consideration of the detailed grounds. These were again narrowed to focus on the procedural fairness of the AER's decision in relation to the "Broadmeadows Project" and UED's new business model.

Ultimately Counsel and our solicitors advised that:

- In this case the review hearing will be conducted at a very high level of technical and economic complexity;

- Whilst Consumer Action and CUAC would most likely be able to establish, under section 71L(3)(c) of the NEL, that the interests of their constituents may be affected by the decision reviewed, the Tribunal's pragmatic view on granting the application to intervene will ask whether the intervention will add value to the review process, or engage in a manner which is likely to confer a genuine benefit upon those constituents;

- Given the very limited resources available, Consumer Action and CUAC were not in a position to prepare submissions which either grappled with

the relevant issues at a sufficient level of detail, or which carried sufficient weight to counter the expert evidence which would be adduced by the Distributors at the review hearing (in practice it was clear in discussions with legal advisers that an expert needed to be world leading to meet this standard);

- These considerations impact negatively upon the prospects of establishing that Consumer Action and CUAC would, as interveners, "raise a matter that will not be raised by the AER or the applicant" as required by section 71L(3)(a) or would present information, material or submissions which were "likely to be better presented if submitted by the user or consumer intervener rather than another party to the review" as required by section 71L(3)(b);

- Accordingly, based on the material prepared by Consumer Action and CUAC to date, it is likely that the Tribunal may acknowledge that a prima facie right to standing as an intervener is made out, but will question the practical utility of exercising such a right given the insufficiencies in the submissions proposed to be advanced once that intervention is granted;

- Thus, it is not clear that the Tribunal would ultimately grant the application to intervene;

- Further, even if the application to intervene were successful, under section 71X of the NEL, costs could be awarded against Consumer Action and CUAC if the Tribunal were of the view that they had conducted their intervention without due regard to the costs and time incurred by other parties as a result of that conduct. Given the hostile posture adopted by certain Distributors in response to the application to intervene, such a costs application is a real risk;

- Weighing up all these considerations, on balance, the application to intervene ought to be withdrawn;

- If Consumer Action and CUAC nevertheless wanted to continue, they should consider appearing unrepresented, given that public interest organisations that appear without legal representation may be held to less rigorous standards of conduct of a proceeding and may thus be less likely to be the subject of an adverse costs order.

Consumer Action and CUAC withdrew its notice to intervene on 24 January 2011. Despite the advice that a public interest organisation 'may' obtain a more sympathetic hearing before the Tribunal, it was Consumer Action and CUAC's

view that to proceed posed an unacceptable risk to the two organisations because:

- of the legal advice received regarding the strength of the case;
- the risk of an adverse costs order under section 71X of the NEL; and
- such 71X arguments had already been foreshadowed by some of the Distributors.

> *"In our experience consumer interests are represented in the regulatory review process and in the regulator's decisions, but consumers are effectively locked out of the Tribunal's review of those decisions. The NEL provides consumer representatives with a right to apply for leave to intervene but because of the time, resources, technical and legal expertise required, as well as potential cost risks involved in taking court action, such intervention is unlikely"*
> *(see footnote 3)*

3.3 Parties' ability to appeal/intervene

While the Distributors must be able to argue their case and demonstrate that they have grounds for appeal, there is little or no deterrent for the Distributors to 'have a go' and appeal aspects of the decision where they believe additional revenue can be gained. Indeed, even a spend of tens of thousands of dollars in legal fees (which are tax deductible for corporations) is dwarfed by the potential for multi-million dollar gains in revenue through successful appeals. Despite being a regulated entity, a Distributor can exert considerable control over the information available to the regulator, or at least the format and timeliness of its information sharing with the regulator. A strategic Distributor may want to ensure that the regulator is not fully informed early in the process and/or that additional information can be produced at appeal stage. This is not to say that the Distributors have been behaving this way, but it does point out the power relationship between a regulator and a regulated entity.

Appellants have only 15 business days after a determination to lodge an application for leave and review. However, one may anticipate that a business the size of a network operator would prepare potential appeal matters well in advance based on indications from talks with the regulator, draft decision etc. The 15 days deadline is therefore unlikely to be much of a deterrent for a Distributor to lodge an appeal.

"Our experience with the intervention project can be described as a 'process of discovery' - we were learning on the go. This was exacerbated by the timing of the appeals (over the Christmas break), difficulty in accessing legal teams, lack of knowledge of the process, and the overall timelines of the intervention. It was particularly confusing because none of the parties (legal team, Consumer Action, CUAC, technical expert) had any experience in distribution pricing appeal processes and as such all parties were looking for clear directions"
(see footnote 3)

Third parties wishing to intervene in the appeal process were only given 15 days to prepare their notice of intention to intervene after the Tribunal issued the hearing directions on 1 December 2010.[96] While these notices do not require a potential intervener to outline its case in any detail, it must contain "particulars of the matters about which that person seeks to address the Tribunal".[97] A third party intervener is unlikely to allocate resources and prepare for an intervention prior to the Distributors appeal notices having been lodged. There may also be limited indication as to what the Distributors' intentions are in relation to the determination. SP AusNet, for example, circulated a media release welcoming the AER's decision, stating that: "SP AusNet was confident the company was able to successfully meet the demands and challenges over the next five years and respond positively to the direction set by today's decision".[98] Nonetheless, the business decided to appeal against the AER's decision on several issues. Furthermore, the timing of the Victorian regulatory periods, and thus the AER's determinations, creates another challenge for potential interveners. In order to intervene in the current review, a notice had to be lodged on 15 December 2010 and an application for leave to intervene, stipulating the matters to be raised and the grounds, had to be lodged by 24 January 2011. A consumer group wishing to intervene needs to access legal assistance and external expertise, as well as allocating internal resources to the process. It is indisputably more difficult to source staff and expertise over the main summer holiday period compared to other times of the year. As such, the timing creates additional hurdles. Chapter 6 of the NER (part E) stipulates the broad timelines for EDPR processes. These timelines include a requirement on the AER to commence a review 24 months

[96] Note that the Minister for Energy of the relevant jurisdiction does not apply for leave if he/she wants to intervene in the Tribunal proceedings.
[97] Australian Competition Tribunal, Directions, 1 December 2010.
[98] SP AusNet, *SP Aus Net responds to Final Decision on Electricity Distribution Price Review*, Media release, 29 October 2009.

prior to a decision taking effect (the reset) and to complete a review (publish final decision) *at least* 2 months prior to reset. Resets in Victoria occur on 1 January because the price control period is based on calendar years rather than financial years (as in other states) and this clearly impacts on the timing of the reviews. However, for consumer group interveners, moving the decision (and hence any appeals) forward by only a few weeks could have a positive impact on their ability to participate.

The NEL requires third party interveners to raise matters that are different to those matters that will be raised by the AER or the Distributor, and/or present information/material in a better manner than another party participating in the review. This requirement poses a major challenge for any consumer group developing an application for leave to intervene. It is practically impossible for a consumer group intervener to know what the AER or Distributors will raise prior to lodging their application for leave.

> *"We don't believe that a 'process of discovery' can possibly lead to successful outcomes with the short timelines the review process imposes on the organisations. Basically, a key barrier in itself is to be prepared enough for such a short but resource intensive process. We question whether it would be at all possible for a consumer group to have the capacity to reach that level of preparedness"*
> *(see footnote 3)*

If a third party is granted leave to intervene, it can raise matters that were not raised by the Distributors and thus create a new risk for the Distributors. This risk factor is effectively zero if the Tribunal hearing is between the Distributors on one side and the AER on the other as the Tribunal then only hears matters raised by the Distributors (appellants). Although the NEL allows the AER to raise matters not raised by the Distributors (or interveners), as long as it does not raise new grounds, it is unlikely to do so because it would effectively mean that they question their own decision in the first place.[99]

It is clear that the Distributors, as the appellants, drive the review process. Although the NEL provides for other voices to be heard during the proceedings, the reality is that due to a lack of resources, information and technical expertise, as well as financial risks and tight timelines, it is very difficult for a third party consumer group to successfully lodge an application for leave to intervene, let alone be able to influence the Tribunal's decisions.

[99] NEL 71O(1)

The NEL provides consumer groups with a right to apply for leave to intervene. However, the impression is that the NEL does not envisage how a consumer group may actually get standing to intervene. By using the term 'the Tribunal *may* grant leave', the NEL requires the Tribunal to make a discretionary decision in regards to leave to intervene. As such the Tribunal can be expected to make a pragmatic decision in regards to granting leave. A consumer group's application for leave to intervene would thus in all likelihood need to be very specific and/or authoritative in order for the Tribunal to hear its case. It is unlikely that a consumer group that applies to intervene on a more general basis, e.g. that the Distributors' appeals impose significant costs to consumers, will get across this hurdle.

The right to apply for leave to intervene thus merely becomes a tokenistic right that makes the NEL seem more fair and balanced on paper. This is not in line with the intents for the NEL amendment as explained in the South Australian Parliament in 2007: "Persons with a sufficient interest in the original decision are able to intervene, as well as jurisdictions, and user and consumer associations and interest groups with the leave of the Tribunal."[100]

[100] Parliament of South Australia, Legislative Council, Hansard 16 October 2007, p 891.

4. Barriers to intervention

Consumer Action and CUAC's attempt to intervene in the merits review process has shown that the design of the merits review process presents a range of barriers to meaningful participation by consumers or organisations.

4.1 Financial resources

Prior to making the decision to intervene in the Tribunal proceedings, consumer organisations will typically have to secure external funding to undertake the 'project'. Consumer Action and CUAC were fortunate to secure funding from the Consumer Advocacy Panel but there is of course no guarantee that the Panel is willing or able to fund future appeal intervention efforts. Lack of financial resources will thus be a barrier for all consumer organisations seeking to intervene in the appeals process. Furthermore, the tight timelines associated with an appeals process create a significant barrier to consumer organisations' ability to raise the funds required prior to notifying the court of their intentions. The alternative approach, to plan and prepare for an appeal during the price review process would add to the cost and it is difficult to see how an organisation can make a convincing business case for such a project prior to the AER handing down its final decision. The financial constraints also underpin or exacerbate other barriers such as access to technical and legal expertise.

4.1.1 Technical expertise

Consumer organisations allocate significant resources to participate in EDPR reviews. The approximately two year long review period, the high volume of information and the technical nature of the issues discussed, mean that significant staff resources are allocated towards the reviews. In addition, external expertise in areas such as economics and engineering need to be contracted from time to time. Organisations like Consumer Action and CUAC choose to allocate these resources because of the significant financial impact price review decisions have on their constituents.

> *"We don't believe it is possible to recruit all experts within the short timeframes, let alone having the substantial financial resources required to ensure such experts are willing to make an affidavit and potentially be subject to a cross-examination in court. Again, the level of expertise required by a court process and the costs attached seemed out of reach for a consumer organisation"*
> *(see footnote 3)*

In a court process an expert does not merely mean expertise and qualifications in the relevant fields. Consumer Action and CUAC's experience suggests that the expectation of senior counsel will be to call upon *the expert* in a field to witness in their case. This means a consumer organisation needs to be able to 'recruit' (and pay for) a well-known authority on the subject matter. The likelihood of such independent expertise being readily available, world-renowned and not already in the employ of the regulator or one of the Distributors is very small.

> *"The technical expertise required depended on the issues identified while identifying the 'suitable' issues required technical expertise. We did not know whom these experts were when the 'intervention project' started. Basically, consumer organisations do not have established relationships with experts in specific fields of finance, engineering or economics. Our approach was therefore to engage an economist who previously had undertaken work for Consumer Action during the price review process to assist in identifying the issues and suitable experts. However, it became increasingly clear how important perception is to mounting a successful court application and senior counsel would be reluctant to put any expert but the expert on the stand"*
> *(see footnote 3)*

4.1.2 Legal expertise and representation

Further to the technical expertise barrier outlined above, the negotiation of the legal framework and obtaining adequate legal representation to effectively intervene in a merits review process creates other challenges for consumer organisations.

> *"The number of law firms with experience and expertise in such proceedings are limited and most of those are in all likelihood already engaged by Distributors or the AER – and are thus prohibited from acting for a consumer organisation due to conflict (even if they wished to). Furthermore, to secure senior counsel with interest, experience and willingness to represent an organisation on a pro-bono basis is again no small challenge. Indeed, other parties to the review had already approached some of the senior counsel we contacted"*
> *(see footnote 3)*

A Tribunal review involving all five Victorian distribution businesses as well as the AER and other potential interveners results in a number of senior counsel being

involved in the review representing the various parties. The sheer number of parties (especially the number of Distributors) thus creates constraints on the pool of legal (and technical) expertise available, particularly those with experience of EDPRs.

Furthermore, paying for legal advice is prohibitively costly and consumer organisations would have no choice but to engage a legal team on a pro-bono basis. However, as the subject matter is highly technical in character the role of the legal team can easily become more time consuming than anticipated and beyond what may typically be expected from a pro-bono engagement. A pro-bono relationship tends to change the ability to 'demand' service and to marshal responses quickly. It can also, understandably, impact on a law firms' and barrister's willingness to allocate resources. The need for legal representation in itself thus creates a barrier for consumer groups to participate in review processes.

4.2 Access to information

In order for the Tribunal to grant a consumer organisation leave to intervene, the NEL requires that its application demonstrates that it will raise matters that are different to those matters that *will* be raised by the AER or the Distributor(s), or that they are likely to present the material in a better manner than another party participating in the review.[101] These requirements present a significant hurdle for consumer organisations developing applications for leave. Consumer Action and CUAC, for example, were unable to ascertain what matters the AER and the Distributors would raise. While a request for further information about their cases was put to all of the Distributors, only one of the Distributors (United Energy) was willing to provide such information.[102]

> *"We think the court process, which dictates that an organisation must seek leave to intervene, but does not guarantee any disclosure of information before leave has been granted, in itself produces a challenge"*
> *(see footnote 3)*

[101] NEL 71L(3)(a)(b)

[102] Note that Jemena did provide Consumer Action/CUAC with its leave application in December. This application set out all the matters that Jemena raise in the review and was received with the offer to explain the grounds in more detail if required. It was only the fuller submission requested by Consumer Action/CUAC's legal team that was rejected.

Being unable to access relevant information creates another challenge for consumer groups. For example, information provided to the AER as commercial-in-confidence may be referred to in the issues raised in the Distributors applications for leave and review, but third parties are not granted access to this information when developing their applications for leave to intervene. There *may* be sound reasons for not granting access to commercial-in-confidence information but it nonetheless creates a challenge for a third party aiming to contest the matter being appealed.

> *"It is questionable to what extent receiving information from the Distributors would have helped us. In reality we would not have had the resources to go through it all, so even if the Distributors had come to the table, we probably wouldn't have had the resources to do much about it. Another information barrier was AER's inability to provide us with information in relation to factual matters (such as whether or not the AER did annualise the Bloomberg data in relation to setting the debt risk premium)"*
> *(see footnote 3)*

4.3 Timelines

Chart 2 below illustrates both the short timelines of the review process (purple) and Consumer Action and CUAC's timelines and tasks (green) to participate within this framework. The Tribunal organises the review process according to expectations of a target timeline stipulated in the NEL and although the deadlines and timing may vary somewhat between Tribunal reviews, the following outline of the Victorian Distributors appeal to the Tribunal can demonstrate what typical review timelines mean for various parties.

The AER published its Final Decision on Friday 29 October 2010. Subsequently the Distributors (as well as other potential appellants) had three weeks, until Friday 19 November, to file their initial applications for leave and review by the Australian Competition Tribunal. These initial applications must stipulate the specific matters they seek review on and the grounds for which a review should be granted. However, the initial applications do not contain detailed outlines of the Distributors arguments.

Chart 2 Timelines for the appeals process and Consumer Action/CUAC's 'intervention project'

Consumer groups along with other third parties wishing to intervene had until 15 December to file a notice with the Tribunal.[103] This notice did not need to contain any information about the matters they wished to raise or the grounds for why they should be heard. Any material filed with the Tribunal is made available to all other parties participating in the review process.

The next step was then for the intervener/s to develop their applications for leave. These applications outline the matters they wish to raise, their arguments and the legal grounds for why the applications should be heard. These applications for leave had to be filed on 24 January and, if no application is lodged, the intervener withdraws its notice. The Tribunal heard the applications for leave to intervene, as well as the applications for leave to review, on 19 February. Any party granted leave then has the opportunity to have their case heard by the Tribunal during the review process. The NEL stipulates a 'target timeline' for the Tribunal, which is to make a decision within three months after applications have been granted leave.[104]

That the regulatory periods for Victorian Distributors commence at the beginning of the calendar year instead of the financial year creates a challenge in itself for Victorian consumer organisations wanting to intervene in the merits review process. The timing of the AER's regulatory decision means that consumer organisations have to develop their application for leave over a few weeks in late December and early January. These timelines created a significant challenge for Consumer Action and CUAC's intervention efforts. Scheduled staff leave combined with external expertise (such as senior legal advice) being unavailable for a large proportion of this period hampered the development of their application for leave.

4.4 Costs orders

The Tribunal may order that a party to the review pay all or a part of another party's review costs.[105] However, in order to require an intervener representing

[103] The timelines for applications to intervene were decided by the Tribunal in its directions hearing on 1 December 2010.

[104] NEL 71Q stipulates that the Tribunal must use its best endeavours to make a determination in respect of the application for review within 3 months after the Tribunal grants leave. However, if the Tribunal is unable to make a determination in respect of the application within the standard period, or that period as extended, the Tribunal must, by notice in writing, extend the standard period or that period by a specified period. The timelines for the Tribunal's review of the Victorian Distributors appeals have been extended. The hearing is now expected to take place in July 2011.

[105] NEL 71X(2)

small/medium users to pay the costs of another party, the Tribunal must have due regard to:[106]

- The cost incurred by another party as result of the intervener's conduct; or
- The time the Tribunal spent on hearing the review due to the intervener's conduct; or
- The time another party spent on preparing their case due to the intervener's conduct; or
- The submissions and arguments made to the Tribunal by another party.[107]

This means that a costs order can *only* be made against a consumer group where it has conducted its case without due regard to the costs that would have to be incurred by another party to the review as a result of their conduct, or without due regard to the time required by the Tribunal or another party to hear or prepare their case. In light of legal advice received regarding difficulty in presenting a strong technical basis for intervention through the presentation of new material this risk is not small and would be sufficient to deter many community organisations and their Boards of Directors from proceeding.

> *"We found the risk of a costs order produced a significant barrier and created an additional constraint under the short timelines. The Distributors are obviously acutely aware of this risk to consumer organisations seeking to intervene as we received letters from the Distributors shortly after the notice of intention to intervene was served that raised the potential costs to the organisations and requested us to immediately produce our information. As all five Distributors appealed the AER's decision, we could potentially face several costs orders against us"*
>
> *(see footnote 3)*

The risk of having a costs order imposed on them is a major concern for third party interveners. A consumer group could potentially be rendered insolvent if it had a costs order imposed on them by the Tribunal. Even if insolvency were not to eventuate, it is not clear that funders (often governments) would view the payment of legal costs for an unsuccessful intervention as consistent with the

[106] *Small/medium user or consumer intervener* means a user or consumer intervener consisting of an association or group of which (a) the members are only small to medium users or end users, or (b) an object or purpose is to promote the interests of small to medium users or end users.
[107] NEL 71X(2) (a to c)

funding purpose generally, or the specific deliverables that are commonly set out in funding agreements. As such, the decision to intervene becomes a major governance issue and company directors will clearly need frank advice on the likelihood of having a costs order imposed on their organisations.[108] This risk assessment thus requires time and resources from an organisation preparing to intervene in Tribunal proceedings.

The Public Interest Law Clearing House (PILCH) (Victoria) has argued for Federal and Victorian Courts to be conferred with the power to make protective costs orders in relation to 'public interest matters'. A protective costs order is a court order that protects a party to a proceeding from an adverse costs outcome and may include orders that:

- a party will not be exposed to an order for costs if it loses at trial;
- the amount of costs that a party will be required to pay if it loses at trial will be capped at a certain amount; or
- that there will be no order for costs whatever the outcome of the trial.[109]

The NEL could incorporate similar principles to ensure that a 'small/medium user or consumer intervener' does not face the risk of a costs order if it only aims to intervene in the Distributors appeal proceedings.

4.5 Reflections

Consumer Action and CUAC's experience with the merits review process allow them to pass on a few tips for any future interveners under the current framework. However, it should be noted that these are merely tips for how to make the process less painful based on hard learnt lessons and it would be overly optimistic to see this as a guide to successful intervention.

Tips for future interveners within the current framework
Start planning the application to intervene early – after Draft Decision stage it is probably too late (e.g. identify legal, economic, financial resources).
Ensure that involvement in EDPR process is documented – keep tables of meetings, submissions made etc. up to date. This material may be included in your affidavit.

[108] The Distributors on the other hand certainly do not face financial barriers when appealing the price review decisions. The cost faced by the Distributors is allowable operational expenditure, meaning that consumers pay for the appeals as well.

[109] PILCH, Submission to the Commonwealth Attorney-General on protective costs orders, April 2009, p 3.

Ensure that internal processes for managing risk and communications with the Board of Directors and key personnel of the consumer organisations are established at an early stage.
Establish a relationship with a pro-bono legal team to ensure you have a common understanding of expectations, purpose (goals), use of public communication and 'branding'.
Contact a wide range of experts to establish: • Whether they are interested to participate • Whether they would be available at that time • Their specific area of expertise • The cost of their involvement • Whether they are willing to sign an affidavit
If seeking funding, ensure that budget contains good margins (for that extra expert etc) and plan for a very resource intense exercise (will internal staff have the time to do what may be required? or do additional resources need to be procured for example, for a project co-ordinator)
Engage an expert with broad expertise from the beginning. This person may not be suitable for an affidavit but he/she will be important to critically discuss the issues identified during the EDPR process.
Ensure the legal team have a detailed understanding of the NEL and the NER.
Start with developing a broad list of issues to raise and discuss them with the legal team at an early stage. It may be difficult to mount a legal argument for some otherwise important economic/consumer issues so do not expect to include all the issues in the application for leave.
Choose issues that are a natural fit with the organisation's interests (e.g. local councils and street lighting). This will make the application more authoritative.
Ensure that all supporting documents are updated and ready to go as early as possible, e.g. organisation's constitution, curriculum vitae for everyone signing an affidavit, outline of involvement in the EDPR process.
Ensure that the experts meet with the legal team as early in the process as possible.
Expect extremely tight timelines for getting material to legal team – factor additional work hours as work outside office hours is almost certain to be required to meet timelines.

Review arrangements should not be considered entirely separate from the overall regulatory framework. The review arrangements should complement the regulatory framework in place. The NER stipulates that the AER must use a building-block approach in the economic regulation of the Distributors.[110] A

[110] See NER, Chapter 6, Part C

building-block approach is information and time intensive (and this increases the Distributors opportunity to 'game' the price reviews) and also requires significant regulatory discretion for the decision-making process. This regulatory discretion has been cited as a justification of merits reviews.[111] Both Consumer Action and CUAC have argued that in fact judicial review is a mechanism better suited to a process involving significant regulatory discretion.

The current framework does not adequately represent the interest of consumers. Even if one accepts the argument that a building-block approach to regulation means that access to judicial reviews alone would be inadequate for the regulated entities, and that the regulatory approach itself justifies merits review arrangements, the 'power-balance' between the stakeholders would still need to be adjusted. It is clear that a law that simply allows consumer groups the right to appeal or apply for leave to intervene in the merits review process does not create such a 'power-balance'. Indeed, Consumer Action and CUAC's experience suggests the apparent 'right' is little more than window dressing. There is no strong argument for why the Distributors should have access to merits reviews in the first place. The AER uses discretion in its decision-making process but discretionary decisions do not automatically equate to merits review arrangements. Individuals may have the right to have a decision reviewed on basis of merits (i.e. Centrelink decisions) but there is also a significant imbalance of power between an individual and a government agency. This imbalance is not present in the relationship between the Distributors and the AER. There seems to be an unexplained assumption that the Distributors must have the right to access merits reviews and that simply offering them the opportunity to appeal the AER's decisions to the courts would be unjust.

The result is regulatory appeal arrangements that provide the Distributors with a clear incentive to appeal the AER's decision. Not only does the appeal stage negatively impact on consumers, but there is also a possibility that the likelihood of appeals also influence the AER's decision making in the first instance. As raised by Ross Garnaut, this would burden the regulator's decisions as they face the choice between favouring the Distributors in the decision-making process or increased likelihood of the issue being appealed to the Tribunal.[112]

[111] Paul Fearon, Chief Executive, Essential Services Commission, *A Practitioners Perspective*, in Public Utility Regulation, Melbourne University Law School, 23 January 2006.
[112] Ross Garnaut, Garnaut Climate Change Review – Update 2011, *Update paper eight: Transforming the electricity sector*, p 44

"We found the AER consultation process thorough and although disappointed with the final decision, in comparison to the draft decision, we nonetheless regarded it as a fair decision by the AER. The procedural unfairness became evident when the Distributors then still cherry-picked particular aspects of the decision and sought review by the Tribunal. When the AER published its final decision, we did not consider appealing the AER's decision. It was the appeals process itself, allowing the Distributors to challenge particular aspects of the decision on its merits, which motivated us to seek to intervene in the Tribunal hearings to ensure that the consumer voice was heard"
(see footnote 3)

During a price review process, consumer organisations provide the AER with a consumer voice. As such, all parties have access, albeit not equal, to the decision making process. When Distributors appeal the decision however, the challenges discussed above become a barrier to consumer representation. The tight timelines and resources required simply do not allow for consumer organisations to adequately access, assess and respond to the issues raised in the Distributors' appeals in a manner that allows them to develop a case that meets the expectations of the legal counsel and the Tribunal.

5. Conclusion and recommendation

Consumer Action and CUAC strongly believe a broad review of the regulatory framework *and* associated appeal arrangements is needed. We note that the AER is currently developing a rule change proposal that will seek to address some of the broader concerns within the NER[113], however we understand this will not be addressed at appeal arrangements or that a rule change will of itself be sufficient to address the barriers to consumer participation.

Price review processes will always remain complex and highly technical in nature. However, policy and rules makers should urgently explore new and different approaches to ensure that consumers are engaged and that their voice is represented throughout the process – whether that process ends with the regulator's determination, the court or an appeal panel. The intention of the NEL is clearly to ensure that third party stakeholders can participate, and have their voices heard, in the event of a review process. It is also clearly important that incentives for Distributors to appeal are approximately balanced, that there is potential risk of having the review broadened as well as achieving an adverse outcome. In reality however, a consumer voice is highly unlikely to be present at the appeal stage and the Distributors can quite safely appeal the AER's decisions without facing the risk of consumer groups or the AER broadening the matters considered by the panel. There is thus a discrepancy between the intention of the law and the reality of review processes. If the NEL inclusion of consumers' right to apply for leave to intervene is not purely tokenistic, changes to the current arrangements are required. Further, amendment is required to properly balance roles and incentives for all stakeholders. The power balance between stakeholders (especially Distributors on one side and consumers on the other) will always be imbalanced in distribution price reviews, but the current review arrangements amplify this imbalance significantly. Based on Consumer Action and CUAC's experience with the appeals process, amendments to the NEL are required prior to the next round of EDPR reviews.

Possible scenarios

Consumer Action and CUAC have considered three broad scenarios in an effort to address this power imbalance for consumers:

[113] Reeves, Andrew June 2011 '*Finding the balance—the rules, prices and network investment*' speech given at Energy Users Association of Australia Energy price and market update seminar

1) To make minor amendments to the NEL and the NER, and allocate financial resources for consumer interveners with the aim to enhance consumer participation in appeals processes.
2) To amend the NEL in order to introduce more risk to the Distributors if they decide to appeal EDPR decisions.
3) To amend the NEL to remove the Distributors' access to merits reviews, with businesses relying on judicial review arrangements.

Scenario 1

As discussed throughout this report, based on the status quo, aspects that may improve consumer groups' ability to successfully intervene in the Tribunal proceedings include financial resources, extended timelines, removal of the requirement to be granted leave and removal of the risk of costs orders.

To enhance consumer organisations' ability to intervene under the current framework, the following measures could be considered:

A) Allocate significant financial resources to ensure consumer organisations have the funds required to effectively participate in EDPR processes as well as appeals.

B) Direct the Tribunal to extend consumer interveners' timelines for developing applications for leave to intervene.

C) Amend the NEL so that consumer groups are not required to be granted leave by the Tribunal.

D) Amend the NEL so that consumer interveners do not face the risk of a costs order.

E) Change the timing of the AER's determinations in Victoria to ensure that interveners are not required to develop their application for leave to intervene over the Christmas/summer holiday period.

F) Provide access to 'commercial in confidence' information of Distributors.

G) The AER to provide intervening parties to 'factual' information throughout the appeals process.

However, the value of tweaking current arrangements to enhance the probability of consumer organisations being able to intervene in merits reviews is likely to continue to represent insurmountable barriers to consumer intervention. Thus

they will also fail to re-balance the incentives for the Distributors to appeal. Consumer Action and CUAC regard these scenarios as 'band-aid' measures as their own experience with the Tribunal process demonstrated that the current arrangements are not actually designed to have consumer participation in the reviews. Acting on scenario 1 will thus result in a change-process that adds very little practical value to the problem that needs to be resolved.

Scenario 2

A recent Garnaut paper discusses the appeal arrangement and questions whether they are overly generous. He notes the lack of risk to the Distributors in appealing the AER's decisions: "Appealing a decision is free to the firm and without a realistic possibility of an adverse outcome".[114] Garnaut argues that:

> The appeals mechanism should impose upon the appellant two-sided risks, and provision should be made for persuasive advocacy of the public interest in low electricity prices. Regulated firms should be required to appeal the judgement as a whole, and not be able to appeal on select issues.[115]

Based on significant distribution price increases and the sheer number of appeals against the AER's EDPR decisions, a review of the overall regulatory framework may be beneficial.[116] A scenario is therefore to task the AEMC with undertaking an extensive review of the regulatory framework and approach, as well as associated appeal arrangements.

There are several scenarios that should be considered to reduce the imbalance and as appeal arrangements are interrelated with the regulatory approach as well as the legal framework, broader implications and need for change should be considered. One approach could be to ensure that the Tribunal considers the entire determination if a Distributor challenges the AER's decision to move away from the "free kick" at increasing revenue by appeal that the Distributors currently enjoy.

However, Consumer Action and CUAC are wary of a solution that broadens the appeal framework further. Appeals are costly and extending its scope and timelines would be resource intensive for all parties involved, and would result in

[114] Ross Garnaut, Garnaut Climate Change Review – Update 2011, *Update paper eight: Transforming the electricity sector*, p 42
[115] Ibid, p 44
[116] Recent distribution price increases have been particularly large in Queensland and NSW.

increased costs to energy consumers.[117] As previously argued by Lowe and Nelthorpe: public interest organisations have limited resources with which to engage in a review process. A lengthy process may not only be costly, but also discourage the involvement of pro-bono participation from the legal and accounting professions.[118] It is thus necessary to be acutely aware of the significance of cost considerations in the decision-making processes if public interest input is to be sought by governments and regulatory agencies.

Consumer Action and CUAC acknowledge that the framework currently in place in Great Britain reduces the Distributors ability to 'cherry-pick' and that recent developments can promote regulatory accountability, as well as improve the power balance between the various parties participating in price reviews. As such it is preferable to Scenario 1. However the cost impacts on interveners (as well as the regulator and consumers) means this scenario is undesirable.

Scenario 3

Section 4 of this report outlines several significant barriers to consumer groups wishing to intervene in the Tribunal's merits review process. This could be addressed by undertaking the measures outlined in Scenario 2, however this will add enormously to the costs of an already costly process. The lack of financial resources, lack of access to legal and technical expertise as well as information, stringent timelines and major risks (such as receiving a costs order) are barriers that effectively ensure that no consumer group should expect to successfully participate in an appeals process. The preferable scenario is thus to remove the right to apply for merits reviews from *all* stakeholders.

As previously noted by the Ministerial Council on Energy (MCE), judicial reviews instead of merits reviews may in fact reduce the Distributors opportunity to 'game' the process.

> [A] judicial review... may reduce the influence of service providers on the review scheme and thus result in less incentive in 'gaming' from service providers and a just review system for end users. This scenario may allow the regulator to favour consumer interests more in the initial decision.[119]

[117] The cost faced by the Distributors is allowable operational expenditure, meaning that consumers pay for the appeals as well.

[118] Lowe and Nelthorpe, *Grounds for appeal: representing the public interest in the review of regulatory decision making in the energy market*, September 2006, p 16.

[119] MCE, Regulatory Impact Statement, Review of Decision-Making in the Gas and Electricity Regulatory Frameworks, p 16 available at www.ret.gov.au/Documents/mce/_documents/RIS_Merit_Review20051206105031.pdf

The MCE in its initial review measured the effectiveness of a merits review vs judicial process against a number of indicators; accountability, regulatory certainty, correct initial decisions, including stakeholder views, minimising gaming, minimising delays and costs. At the time, the MCE concluded that the current framework best satisfied the chosen indicators, however the framework was necessarily untested.

As evidenced in this report, Consumer Action and CUAC's attempt to intervene in the merits review process has proved that consumer organisations do not have the resources to successfully participate in merits reviews, and that the merits review therefore does not adequately address the indicators above. The current review arrangements are designed around the theoretical principle that all parties *may* achieve standing to participate in appeals processes, to be a legitimate option for consumers, it must instead be designed around the principle that it has a *real* ability to ensure that all parties can participate in the appeals process in an effective manner.

The significant increases in distribution costs and the number of appeals made to the Tribunal since the AER became the economic regulator, and all NEM jurisdictions obtained access to merits reviews, are clear signals that the current arrangements are not working in the interest of consumers. Rather, they are clearly working against the interest of consumers.
As addressing consumers needs appears unachievable in Scenario 1, and too costly in Scenario 2, the only remaining scenario is to minimise the Distributors' opportunity to game the regulatory framework to the cost of end users[120], whilst protecting them from serious regulatory error.

The risk of significant regulatory error is adequately managed by a right to judicial review, as such, the right of Distributors to a merits review of the AER's electricity price determination must be removed. EDPR reviews are extensive, thorough and consultative. This cannot be replicated in a relatively short Tribunal process.

Recommendation:

Repeal the provisions in the NEL that enable businesses access to the merits review. Distributors should instead use their rights to judicial review.

[120] Similar principles were argued by Lowe and Nelthorp. Lowe and Nelthorpe, *Grounds for appeal: representing the public interest in the review of regulatory decision making in the energy market*, September 2006.

If there is concern regarding the scope of review available under judicial review, this can be addressed by enhancing the legislation relating to the way in which the AER makes a price determination, thus expanding the scope of the judicial review. For example, ensuring standing to organisations representing the public interests, as well as providing guidance to the AER in relation to its decision making parameters and methodologies as consistent with the MCE's desired scope of review.

Recommendation:

Expand the scope of the NEL to ensuring standing to organisations representing the public interests, as well as providing guidance to the AER in relation to its decision making parameters and methodologies, as consistent with the desired scope of the review.

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Appendix A
Consumer Action and CUAC's participation in the EDPR process and reasons to intervene

CALC and CUAC's participation in the EDPR process

Consumer Action and CUAC were active participants in the EDPR process. The organisations' involvement in the EDPR review ranged from capacity building activities in the sector, to research and advocacy, to providing media commentary.

Both organisations provided expert input as participants on the Australian Energy Regulator's Consumer Consultative Forum (CCF) for the Distribution Determination. At the four CCF meetings, Consumer Action and CUAC provided feedback on the issues under consideration by the AER throughout the distribution price review process. Consumer Action and CUAC also participated in the two public forums held by the AER on the electricity distribution price review.

To further develop their knowledge of the EDPR process, in early 2010 Consumer Action and CUAC applied for funding from the Consumer Advocacy Panel to organise an education session for consumer advocates on distribution pricing. As part of this project, Consumer Action and CUAC also requested that the AER provide education sessions to consumer advocates across the NEM. Such a session was held in Melbourne in August 2010 and 19 Victorian consumer advocates attended, and subsequent sessions have now also been held in Hobart, Sydney and Adelaide.

Consumer Action and CUAC actively engaged with other consumer advocates, including VCOSS, as the distribution price review process progressed to enhance collective understanding and to share knowledge.

Consumer Action also applied for and received funding from the Consumer Advocacy Panel to engage a consultant to prepare material for the EDPR process, and to engage with interested consumer and community groups.[121]

Consumer Action and CUAC both submitted written responses to the Distributors proposals and the AER's draft decision, and both organisations published articles about the price review in their respective newsletters.[122] Consumer Action also

[121] Three meetings were held at Consumer Action for this purpose.

[122] Consumer Action Submission to the Review of initial Distribution Network Service Providers' Proposals for the 2011 - 2015 Regulatory Period, 16 February 2010; Consumer Action Submission to the AER's Victorian Draft Distribution Determination 2011- 2015, 19 August 2010; CUAC

provided extensive media commentary on issues arising during the review and after the final decision was published.

Consumer Action and CUAC allocated significant resources to participate in the EDPR process. Combined, the two organisations allocated financial resources to the value of approximately $75,000 to represent consumer interests in the review. In total, staff spent 45 days FTE to work on EDPR matters over a one year period.[123]

Reasons for Consumer Action and CUAC's intervention in the Tribunal process

Consumer Action and CUAC's 'intervention project' initially set out to investigate the Distributors' appeal applications with the view to intervene in the Tribunal proceedings if warranted. The reasons behind the two organisations' decision to commence this project were grounded in procedural fairness and the need for the consumer voice to be heard.

Consumer Action and CUAC believed that reports released by the AER indicate that the Distributors have made significant additional profits to those forecast, intended and set during past relevant regulatory revenue and price determination processes. It thus appears to be a case of Victorian consumers having been paying substantially more for their electricity distribution than is fair or efficient.

Electricity prices have been rising significantly over the last few years for a number of reasons and are causing a financial strain for many ordinary consumers, especially low-income households. With distribution prices representing an average of 40% of a consumers' bill, the EDPR is one of the few inputs into rising prices that consumer representatives can influence, and by doing so, help to mitigate financial pressure on households.

In addition to the price review process and the impact it has on household bills, Consumer Action and CUAC strongly believe the merits review process, established under the NEL, is itself proving problematic and have expressed concern that it simply encourages regulated electricity businesses to contest the AER's price determinations. NSW distribution businesses appealed the AER

Response to the Victorian distribution businesses regulatory proposals, 17 February 2009; CUAC Submission in response to the AER draft electricity distribution determination for Victoria and the distribution businesses revised revenue proposals, 19 August 2010; *Victorian Distribution Price Review* in Consumer Action Law Centre, On the Wire, June 2010, Edition 25; and *Heading in the right direction - the AER distribution price determination*, in CUAC Quarterly Newsletter, August 10, Issue 19.

[123] From December 2009 to mid-November 2010

decision on the NSW distribution price review, and both of the Queensland Distributors and the South Australian Distributor followed suit in respect of their final determinations. And now, so have Victorian Distributors.

Given that the Distributors choose which aspects of the AER's decision they wish to review, the businesses can essentially 'cherry-pick' the least advantageous matters in the AER's overall decision for review, without having to contest any elements of the decision they want retained. This means that, for a Distributor, there is little to lose in applying to the Tribunal for review, as the worst outcome of an appeal is that the AER's decision is maintained. As such there is no risk factor that the Distributors need to consider as part of their decision to intervene. Whilst the Distributors pay legal costs and may risk a costs order if no element of their appeal succeeds, these costs are tax deductible and a cost of doing business and as such are recovered from consumers. Further, the Distributors practical experience has been that any legal costs are outweighed (by several orders of magnitude). By contrast, the worst-case scenario for the AER (and consumers) is a reversal of important aspects of the AER's decision and an increase in approved revenue and thus electricity prices.

Upon the announcement of the Distributors to appeal against the AER's decision on 19 November 2010, Consumer Action and CUAC decided that by attempting to intervene in the Tribunal proceedings they would aim to secure two important outcomes for consumers: Firstly, it would ensure that the consumer voice was heard in the merits review process for electricity distribution decisions under the NEL, and would hopefully assist in protecting consumers from unfair and inefficient price rises. Secondly, it would build consumer understanding of, and capacity to engage with, this complex and technical part of the regulatory arrangements and advocate for improvements in the interests of consumers.

Appendix B
About Consumer Action and CUAC

Consumer Action

The Consumer Action Law Centre (Consumer Action) is a campaign-focused consumer advocacy, litigation and policy organisation. Based in Melbourne, it was formed in 2006 by the merger of the Consumer Law Centre Victoria (CLCV) and the Consumer Credit Legal Service and is funded jointly by Victoria Legal Aid and Consumer Affairs Victoria.

As a community legal centre, Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. As well as working with consumers directly, Consumer Action provides legal assistance and professional training to community workers who advocate on behalf of consumers.

Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly. Consumer Action is represented on a number of national and state-based regulators' consumer consultative committees, including the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Australian Energy Regulator and the Essential Services Commission (Victoria) as well as a range of government, industry and community sector working groups, Ministerial roundtables, boards, consultative committees and roundtables.

Consumer Action (and through its predecessor CLCV) has been actively involved in energy advocacy work in Victoria and nationally since the 1990s. Regulation and policy development relating to energy markets was becoming increasing national, so since June 2003 Consumer Action (formerly CLCV) has received funding for national energy advocacy from the Consumer Advocacy Panel, enabling the employment of dedicated energy advocacy staff.

CUAC

The Consumer Utilities Advocacy Centre Ltd (CUAC) is a specialist consumer organisation established in 2002 to represent Victorian energy and water consumers in policy and regulatory processes. Since that time, CUAC has been active in energy and water reform in Victoria and, representing Victorians, at a national level. CUAC is unique in that it is the only consumer organisation in Australia specifically focussed on energy and water issues. Consequently, CUAC has valuable knowledge about the impact of reforms, policy and regulatory decision making on energy and water consumers. CUAC's work is informed by its reference group, comprised of Victorian community, consumer and business organisations, and through regular contact with community members and organisations. CUAC takes an evidenced-based approach to advocacy, undertaking research itself or with partners to inform its policy positions.

In 2010-2011 CUAC made 37 submissions on consumer utilities issues, mostly directed towards Victorian and national regulators. The bulk of CUAC's energy-related submissions dealt with smart meters; the National Energy Customer Framework; direct marketing; climate change and energy efficiency; distribution pricing; the Energy Retail Code and exempt electrical activities.

In 2010-2011 CUAC was represented on 23 government, regulatory, industry, consumer and other stakeholder committees, including the following energy-related committees: Victorian government smart meter consultative committees; Energy Safe Victoria's Powerline Safety Taskforce Stakeholder Reference Group; the Australian Energy Regulator Customer Consultative Group; the Essential Services Commission's Customer Consultative Committee and the Energy and Water Ombudsman (Victoria) Case Handling Advisory Committee.

CUAC's work on distribution issues including pricing

CUAC has had an extensive history of involvement in energy and water price reviews. In 2009-2010 CUAC was a member of the Australian Energy Regulator's Customer Consultative Forum for the Distribution Price Review. In 2010 CUAC participated in consultation forums conducted by the AER relating to the Distribution Price Review and made two submissions to the review.

In 2009-2010 CUAC provided submissions to the Australian Energy Market Commission on the Review of National Framework for Electricity Distribution Network Planning, and the Review of Effectiveness of NEM Security and Reliability Arrangements in Light of Extreme Weather Events. CUAC also made submissions to the Essential Services Commission in this period, including a submission on Electricity Distributors' Communications in Extreme Supply Events.

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