

FALLING DOWN THE RABBIT HOLE

REVIEW OF REGULATORY DECISIONS: WHAT HAS HAPPENED
AND CAN WE GET BACK ON COURSE?

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2016-2017: REGULATORY WONDERLAND

- Decisions of the Federal Court, the Australian Competition Tribunal and the Australian Energy Regulator during 2016-2017 have left many feeling a little like Alice in Wonderland
- These decisions included:
 - ❖ AER distribution determinations applying to the NSW / ACT electricity distributors
 - ❖ Tribunal determinations following merits review of the NSW / ACT electricity distributor decisions
 - ❖ Federal Court decisions following the AER's application for judicial review of the Tribunal determinations
 - ❖ AER distribution determinations applying to the South Australian and Victorian electricity distributors
 - ❖ Tribunal determination following the application for merits review brought by the South Australian electricity distributor

Alice: Would you tell me, please, which way I ought to go from here?

The Cat: That depends a good deal on where you want to get to

Alice: I don't much care where.

The Cat: Then it doesn't much matter which way you go.

Alice: So long as I get somewhere.

The Cat: Oh, you're sure to do that, if only you walk long enough.

WHERE HAVE WE ENDED UP AND WHY?

- Benchmarking operating expenditure and wages
 - ❖ AER to make decision on opex for NSW / ACT electricity distributors again including assessing whether proposed forecast opex reflects opex criteria, using a broader range of modelling and benchmarking against Australian businesses and including a “bottom up” review
- Return on debt
 - ❖ For NSW and ACT electricity distributors - AER to make decision again in accordance with the reasons of the Tribunal in that merits review process
 - ❖ Other service providers? Same AER decision, materially different reasons
- Value of imputation credits (gamma)
 - ❖ Federal Court decision – decision based on a submission as to consistency of measurement of “market-based” parameters
 - ❖ Tribunal decision in South Australia – decision based on matters the AER does not rely on

Alice: “Curiouser and curiouser!”

IMPACT OF THE 2013 AMENDMENTS

- The merits review framework was amended with effect from December 2013, with amendments to the framework designed to:
 - ❖ maximise accountability, drive continual improvement in decision-making
 - ❖ maximise regulatory certainty
 - ❖ achieve the best decisions possible
 - ❖ minimising the risk of gaming
 - ❖ minimising time delays and cost
- Why were the objectives of the amendments not realised?
 - ❖ Were the causes of the difficulties with the framework properly identified?
 - ❖ Were the amendments made to the framework properly directed to the difficulties that were identified?
 - ❖ Was the problem a lack of “regulatory deference” in Tribunal determinations?

The Cat: By-the-bye, what became of the baby?

Alice: It turned into a pig.

The Cat: I thought it would.

OFF WITH THEIR HEADS: THE END OF MERITS REVIEW

- On 14 July 2017 the Energy Council noted that the Commonwealth will abolish limited merits review and agreed to ensure greater certainty by requiring the AER to develop a binding rate of return guideline
- Presumably this will limit review of regulatory decisions to judicial review
- Again, have the causes of the difficulties with the regulatory framework been properly identified and will removal of merits review and the introduction of a binding rate of return guideline address those difficulties
- Are there other elements of the framework that need to be considered:
 - ❖ rule making
 - ❖ decision making
- Will outcomes be different? Should outcomes be different?

The Caterpillar: What size do you want to be?

Alice: Oh, I'm not particular as to size, only one doesn't like changing so often, you know.