Accountability in the National Energy Market

Report for the Public Interest Advocacy Centre

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Table of Contents

Executive Summary

Commission of Report

This report was commissioned by the Public Interest Advocacy Centre as part of the COAG Review of Governance Arrangements for Australian Energy Markets (the 'Governance Review'). It was supported by a grant from Energy Consumers Australia.

The Governance Review is considering the performance of the current governance arrangements for energy markets and will provide advice to the COAG Energy Council on possible institutional reforms.

This report was commissioned to consider the accountability arrangements and appeals mechanisms currently contained in the National Electricity Market ('NEM'), and more specifically, to answer the following questions:

1. To what extent are there clear and agreed levels of accountability and transparency for the NEM institutions and the COAG Energy Council?
2. What are the appeals or challenge mechanisms that exist for decisions made by the NEM institutions and how accessible are these for consumers?
3. To what extent are there sanctions for revealed abuses of power or the failure to provide a satisfactory answer for the NEM institutions (and the COAG Energy Council)?
4. How might the current accountability arrangements be improved in the interests of consumers?

Report Structure

Part I of the Report briefly outlines the NEM's legislative framework and history. It also provides an overview of the accountability values that inform the remaining analysis of the current accountability and appeals mechanisms contained in the NEM.

Part II of the Report reviews the current accountability frameworks for the NEM. It commences with an analysis of the role and accountability of the COAG Energy Council. Second, it considers, from an accountability perspective, the structural design that divides responsibilities between the Australian Energy Market Commission and the Australian Energy Regulator, before turning to an analysis of the individual accountability of those two institutions. Each section within Part II concludes with a critique of the frameworks, identifying areas of concern within the current frameworks and offering possible reform options to address identified deficiencies.

Overview of issues analysis and potential reform options

The analysis in this report is underpinned by the foundational principles against which the NEM institutions must be held to account: those set out in the National Electricity Objective ('NEO'). The NEO emphasises that the single and overarching principle that guides the National Electricity Law is the long-term interests of Australian electricity consumers. Against this background, the report analyses each of the NEM institutions to determine whether there is a robust and responsive accountability framework that provides consumers with real avenues for understanding and participating in the governance of the NEM institutions, and with real power to seek review of their decisions.

Below is a summary of the major issues discussed in this report, together with a consideration of some options for reform.

The COAG Energy Council

COAG Ministerial Councils lack robust transparency and accountability frameworks, and the Energy Council is no different. The COAG Energy Council operates largely behind closed doors with little democratic accountability or public participation. Greater transparency could be achieved within the COAG Energy Council by:

- requiring it to publicly release meeting agendas in addition to Communiques;
- reinstating the requirement for the Energy Council to provide an annual status report to COAG and make these publicly available on its website; and
- reinstating the requirement for the Energy Council to provide an annual work plan to COAG, and make these publicly available on its website.

Public participation in important COAG Energy Council processes could also be increased through the establishment of a public advisory committee, comprised of a majority of consumer representatives, which may either be selected by, or in consultation with, the recently established Energy Consumers Australia. The Council could be required to consult with the advisory committee in the course of:

- any review of the Council's Terms of Reference;
- the drafting of its annual work plan;
- the development of statements of policy principle that bind the AEMC's rule-making or market review functions;
- finalising recommendations on appointments to the AEMC and AER; and
- proposed legislative changes to the NEL.

Another possible role for the advisory committee would be to have the power to put forward possible statements of policy principle for consideration by the COAG Energy Council.

AEMC and AER institutional design

The division of powers between the AEMC and the AER, in theory, checks and disperses power. But its current design and operation raises other fundamental accountability concerns, particularly in relation to the AEMC. Delegating rule-making power to the AEMC rather than the regulator (with its greater technical and operational knowledge) undermines much of the rationale for delegating the rule-making function from the COAG Energy Council/State Parliaments. The division of powers between the two bodies also creates a danger of 'blame-shifting' between the organisations. Finally, the division creates great complexity in the institutional arrangements. Consumers wishing to participate in or challenge the decisions of the different bodies must navigate jurisdictionally different accountability systems and legislation. Through combining the roles of the AEMC and the AER, and thereby reducing the complexity of the regulatory environment, consumers would be more easily able to seek rule-changes, participate in rule-change processes, or seek review of a decision of the AEMC or AER.

It may be that concerns about the division of functions across the AEMC and AER could be partially allayed through other structural changes, including additional mandatory information sharing between the two institutions, and delivering real power to consumers in the AEMC's current rule-making process. However, if the division of functions across the AER and the AEMC is not removed, priority *must* be given to reform of the processes and accountability of the AEMC. The AEMC is the more powerful body within the regime and currently operates with significantly less oversight and meaningful consumer engagement.

The AEMC

The AEMC's current accountability framework is manifestly inadequate.

Consumer voices in the rule-making process are given extensive and ongoing opportunities to be heard but they are given no power in the process, and consultation fails to be meaningful. The report considers a series of reforms to address this. First, reforms to the COAG Energy Council could require consultation with an advisory committee that contains substantial consumer representation prior to making appointments to the AEMC. Consideration could also be given to requiring a consumer representative on the AEMC. Second, requirements to provide public consultation opportunities could be supplemented with positive obligations to actively engage in meaningful consultation activities. Finally, the AEMC may be required not only to *consult* with consumer groups prior to finalising rule changes, but obtain the final *approval* of a representative committee of consumer groups. If approval of the representative committee of consumers is not able to be obtained, an alternative may be

provided so that the AEMC may seek approval from the COAG Energy Council to make the rule changes. In this way, policy decisions that consumer groups do not accept as being in the best interests of consumers are not made by the AEMC alone.

The AEMC's rule-making function is currently not democratically accountable. This raises *serious* accountability concerns. After considering the different options to bring democratic accountability to the body, the report considers the most appropriate form is to bring the AEMC within the oversight of the Commonwealth Parliament. This would place the AEMC's rule-making function on a similar accountability footing as other delegated law-making bodies in Australia.

Finally, while there is currently limited availability to bring judicial review against the AEMC's decisions, the current test for standing may exclude review by some consumer advocacy bodies. The report considers amendments to standing to seek judicial review or intervene in proceedings.

The AER

Overall, the AER sits within a robust accountability framework. The report considers how the current regime might be tweaked to better enhance consumer participation in a number of ways, including:

- Reform of the appointments process to provide a consumer voice in the selection of AER members. Consideration could also be given to requiring a consumer representative on the AER.

- Reform of the standing rules in judicial review proceedings to make certain the standing of consumer groups standing to challenge or intervene in judicial review proceedings.

- Limiting the capacity to have costs awarded against consumers who apply for review under the Limited Merits Review Regime.

- Removal of the availability of merits review if an application is sought for judicial review.

The report also considers whether more significant changes ought to be considered to the Limited Merits Review Regime through the creation of a new review body (rather than merits review in the Australian Competition Tribunal) and the adoption of an inquisitorial-style process. The report considers that these changes have merit, but given the most recent and significant reforms to the limited merits review process, it would appear prudent to observe how they operate before seeking further reforms.

PART I: INTRODUCTION

History and legislative framework

The key foundational document of the National Electricity Market ('NEM') is the Australian Energy Market Agreement ('AEMA'), which sets out the NEM's legislative and regulatory framework. The 2003 report of a comprehensive independent review of Australia's energy market formed the basis of the agreement. The Council of Australian Governments ('COAG') entered into the AEMA in 2004 in recognition of the need to establish a broad national architecture for electricity and gas. The NEM comprises the COAG Energy Council and the three NEM institutions: the Australian Energy Market Commission ('AEMC'), the Australian Energy Regulator ('AER') and the Australian Energy Market Operator ('AEMO').

The NEM is governed by the so-called 'National Energy Laws', which are, relevantly, the National Electricity Law ('NEL') (which is attached as a schedule to the *National Electricity (South Australia) Act 1996*) the National Electricity Rules and the National Electricity (South Australia) Regulations, the *Australian Energy Market Commission Establishment Act 2004* (SA); and the *Competition and Consumer Act 2010* (Cth). Each jurisdiction outside of South Australia (and not including Western Australia and the Northern Territory) has an application Act that gives effect to the South Australian NEM legislation.

The COAG Energy Council, originally called the Ministerial Council on Energy ('MCE') and then the Standing Council of Energy and Resources ('SCER'), is intended to provide national leadership and co-ordination of energy policy development across the NEM. It is made up of all Commonwealth, State and Territory Ministers responsible for energy and resource policy in their jurisdictions. The New Zealand Minister is also a member of the Council.

The AEMC is established by s 5(1) of the *Australian Energy Market Commission Establishment Act 2004* (SA) ('AEMC Act') and is a body corporate.[1] It is given the delegated power to make the National Electricity Rules ('NER') under the National Electricity Law ('NEL'). The AEMC also has a role in conducting reviews and providing government with advice on reform of regulatory and market arrangements in the changing energy market. The AEMC is a national body that is established by South Australian legislation but funded by all state and territory governments.

The AER is an independent statutory authority created under the *Competition and Consumer Act 2010* (Cth).[2] It enforces electricity and gas laws and rules and is in charge of the economic regulation of electricity and gas transmission, distribution networks

1 *Australian Energy Market Commission Establishment Act 2004* (SA) s 2(a).

2 Part IIIA.

and retail markets, including the setting of network prices. It also provides strategic and operational advice to energy ministers.

The AEMO is an independent national market operator of the NEM and of the Victorian wholesale gas market. It is responsible for the day-to-day management of the NEM as well as long-term planning, connection to the Victorian gas and electricity markets, and the development of new markets for the benefit of the energy sector. It is a not-for-profit public company limited by guarantee under the Corporations Act 2001 (Cth), with 60% of its members from government and 40% from industry. Its role and accountability have not been considered further in this Report.

Accountability values

The National Electricity Objective ('NEO') sets out the foundational principles against which the NEM institutions must be held to account. The NEO emphasises that the single and overarching principle that guides the National Electricity Law is the long-term interests of Australian electricity consumers. It states that the objective is 'to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to:

(a) price, quality, safety, reliability and security of supply of electricity; and

(b) the reliability, safety and security of the national electricity system.'[3]

While there are legitimate claims by network service providers and others within the electricity industry to be involved in the development of regulatory rules that govern their business, the National Electricity Law makes it clear that its overriding objective is to serve the consumer. While the process of determining the long-term interests of consumers might be informed by the opinions of industry and experts, the involvement and power of consumers within the NEM processes must be paramount.

To ensure the institutions within the NEM are discharging their responsibilities in accordance with this objective, there must be a robust and responsive accountability framework that provides consumers with real avenues for participation and to challenge the decisions of NEM institutions. This will improve consumer trust in the integrity of the NEM, and its ability to respond to new challenges in a way that accords with their interests.

There is a sense that the system is not operating in accordance with this objective, and that 'network companies have gouged the current system'.[4] This raises questions about whether the accountability framework within which the NEM institutions operate is sufficiently robust. The proper functioning of the system will be influenced by a combination of its institutional design, the legal accountability framework, and the culture within the institutions. Robust institutional design and the legal accountability framework will, however, have an important influence on that culture.

In this report, the current legal accountability framework is assessed against the following accountability values:

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3 Set out in the National Electricity Law s 7.

4 See, eg, Senate Environment and Communications References Committee, *Performance and Management of Electricity Network Companies: Interim Report* (April 2015), Greens Dissenting Report, [1.3].

1. *Participation:* the need to ensure that consumers are given an opportunity to be consulted and engage meaningfully in the NEM from a position of power;

2. *Transparency:* the need to ensure that the NEM institutions and processes are sufficiently open and transparent. This will increase public/consumer knowledge and understanding of the NEM's operations and support greater participation, as well as facilitating better decision-making on the part of the NEM institutions;

3. *Review/appeal mechanisms:* the need to ensure there are readily accessible and affordable review mechanisms for individuals and groups who wish to challenge the actions of the NEM institutions. This enables individuals to seek redress, as well as providing an important feedback loop into future decision-making processes;

4. *Independent oversight*: the need to ensure that there a framework for independent systemic oversight that can monitor and investigate NEM institutions and processes;

5. *Democratic oversight:* the need to ensure that the chain of accountability between the NEM institutions to democratically elected representatives is effective.

The achievement of these values within the NEM is complicated by its origin as a creature of co-operative endeavour between the States, Territories and Commonwealth. This means that it does not neatly fit within a single State or Commonwealth accountability framework (for example in relation to merits review, judicial review, review of delegated legislation or Ombudsman review).

PART II: ANALYSIS OF NEM ACCOUNTABILITY FRAMEWORKS

COAG Energy Council

Overview

The COAG Energy Council is the high-level policy-maker within the NEM. Energy lies largely outside of the Commonwealth's responsibility. National regulation was achieved through a cooperative arrangement between the States, with an intergovernmental ministerial council given responsibility as primary policy maker.

The Energy Council provides, in theory, the opportunity for the democratically elected representatives – the State and Commonwealth Ministers responsible for energy and resource policy in their jurisdictions – to oversee and contribute to the actions of the NEM institutions.

The Energy Council's mandate is limited to those matters listed in the AEMA, which are:

(a) the national energy policy framework;

(b) policy oversight of, and future strategic directions for the Australian energy market;

(c) governance and institutional arrangements for the Australian energy market;

(d) the legislative and regulatory framework within which the market operates and natural monopolies are regulated;

(e) longer-term, systemic and structural energy issues that affect the public interest; and

(f) such other energy related responsibilities as are conferred by Commonwealth, State or Territory legislation and unanimously agreed by the MCE consistent with this agreement.[5]

The Energy Council has considerable legislative, policy-making and appointing power. It can issue statements of policy principle which binds AEMC's rule-making or market review functions,[6] recommend appointments of commissioners to the AEMC[7] and certain appointments of members to the AER,[8] amend the key energy market legislation, and make regulations pursuant to the legislation, providing there is consensus among

5 *Australian Energy Market Agreement (as amended)* (9 December 2013) clause 4.

6 Ibid, 11 [4.4(a)]; National Electricity Law, s 8.

7 AEMA, [4.4(b)] and [7.1]-[7.2]; *Australian Energy Market Commission Establishment Act*, ss 12-13. Appointments are made by the South Australian Governor-General on the recommendation of the COAG Energy Council.

8 AEMA, [4.4(b)] and 17 [7.3]-[7.6].

the members.[9] The COAG Energy Council also has power to direct the AEMC to conduct reviews relating to the NEM, and determine the terms of reference for such a review.[10]

The Council can establish such rules relating to its operation as it deems appropriate, including rules relating to the regularity of meetings, chairing and making of decisions.[11] Decisions concerning the NEM or the retail energy markets are made by agreement of all of the Ministers on the Council.[12]

Accountability of the Energy Council

Concerns have been repeatedly expressed about the accountability deficit of intergovernmental ministerial councils. The Energy Council is no different.

Professor Cheryl Saunders, writing in 1991, said that the closed nature of intergovernmental relations was 'difficult to accept at a time of increasing support for open, effective and accountable government'.[13] Roger Wilkins, former Secretary of the Attorney-General's Department, remarked in 2006 that COAG 'sidesteps, more or less completely, any sort of democratic scrutiny.'[14] Dr Paul Kildea has identified three concerns with intergovernmental councils such as the Energy Council:

- lack of transparency and information about their processes;
- the marginalisation of Parliament and therefore the undermining of responsible government; and
- the lack of public participation.[15]

Transparency and information

The Energy Council prepares, meets and deliberates behind closed doors. Its preparatory work is also done out of the public gaze. Brief 'communiques' are issued after each meeting.[16] Other documents generated by the Council are generally

9 Ibid [6.6], [6.8].

10 National Electricity Law, ss 41 and 42.

11 AEMA [4.6].

12 Ibid [4.7(a)] and [4.9(a)].

13 Cheryl Saunders, 'Constitutional and Legal Aspects of Intergovernmental Relations in Australia' in Brian Galligan, Owen Hughes and Cliff Walsh, *Intergovernmental Relations and Public Policy* (Allen & Unwin, 1991) 39, 39.

14 Roger Wilkins, 'A New Era in Commonwealth-State Relations?' (2006) 7 *Public Administration Today* 8, 12.

15 Paul Kildea, 'Making Room for Democracy in Intergovernmental Relations' in Paul Kildea, Andrew Lynch and George Williams (eds) *Tomorrow's Federation: Reforming Australian Government* (Federation Press 2012) 73, 76.

16 See, eg, http://www.scer.gov.au/council-meetings/

unavailable. Freedom of information regimes contain exemptions for documents created in the course of inter-governmental relations. These documents are exempt from disclosure provided they meet a public interest test.[17]

Kildea argues that the closed nature of inter-governmental relations means that interested parties are unable to obtain information (and where possible, have their voices heard) equally.[18] In the context of the COAG Energy Council, this may mean that consumers are unable to discern whether there have been developments of interest/concern to them. This lack of information and access is not necessarily uniform, and powerful lobby groups (such as industry) may be at an advantage.

Lack of transparency around the operations of the COAG Energy Council is evident in a number of recent developments. The Energy Council is accountable to COAG through its terms of reference, which define the Council's policy responsibilities, the scope of its power, its work program, and the agencies it is responsible for, among other things. While the Terms of Reference issued by the SCER in 2011 are available, the COAG Energy Council website currently states that its Terms of Reference are under review. The Communiques indicate that the Council has considered Draft Terms of Reference as early as May 2014. These Draft Terms of Reference have not been made publicly available.

Previously, the Council was required to provide an annual status report to COAG on:

- the progress/completion of its priority issues against agreed milestones;
- the contribution made towards meeting the Closing the Gap targets;
- any additional priorities that it believes should be addressed and submitted for COAG consideration;
- key outputs or achievements from other inter-jurisdictional activities; and
- decisions taken as a result of its legislative or governance responsibilities and changes made to legislation or agreements.[19]

These reports are not publicly available. In any event, new guidelines issued in May 2014 with the aim of 'cutting red tape' at COAG provide that Councils no longer need to provide formal reports to COAG, and should raise issues with COAG only when they believe they genuinely require its attention.[20]

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17 See, eg, *Freedom of Information Act 1982* (Cth) ss 11A, 11B, 26A and 47B.

18 Kildea, above n 15, 80-81.

19 COAG Standing Council on Energy and Resources, 'Terms of Reference' (2011) available at <https://scer.govspace.gov.au/about-us/terms-of-reference/> accessed 23 April 2015.

20 Commonwealth Department of Prime Minister and Cabinet, 'Guidance on COAG Councils' (May 2014) 2, available at

According to the AEMA, the Council is also required to provide a draft work plan for the upcoming year on an annual basis. Again, new guidelines issued in May 2014 with the aim of 'cutting red tape' at COAG provide that the Council is no longer required to provide work plans, although it is encouraged to. There is no publicly available work plan for the 2014-2015 financial year.

Marginalisation of Parliament

Because the COAG Energy Council is made up of elected State, Territory and Commonwealth Ministers, the Council is ostensibly subject to ministerial responsibility principles. The effectiveness of ministerial responsibility and parliamentary scrutiny as robust instruments of public accountability is doubtful,[21] and in the context of intergovernmental relations they are even further undermined. Ministerial councils concentrate decision-making power in the executive. For a number of reasons, Parliaments are often reluctant to question and disturb the decisions that have been taken by these councils.[22] In the context of the Energy Council, this might be particularly so for decisions as they must have been unanimously endorsed by all Ministers in the Council. The marginalisation of Parliament has repercussions not only for the operation of ministerial responsibility, but also public participation through parliamentary processes.[23]

When the decisions of the COAG Energy Council require subsequent legislative action, this, in theory, gives State Parliaments an important role. The legislation must pass through normal legislative processes that will often include, for example, committee scrutiny. However, for the same practical reasons outlined above, Parliaments are still effectively undermined even in this instance.

Reduced public participation

As Kildea observes, parliaments are demonstrating an increased tendency to engage the public:

> Australian governments have expended the opportunities available to the public to make contributions to the policy process. Whether the mechanism be a public consultation, community cabinet or deliberative forum, there has been an

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<https://www.coag.gov.au/sites/default/files/files/Guidance%20on%20COAG%20Councils%202014%20-%20May%202014.pdf> accessed 21 April 2015.

21 See, eg, Richard Mulgan, 'Assessing Ministerial Responsibility in Australia' in Dowding, Keith and Lewis, Chris (eds), *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E Press, 2012) 177-193, 177.

22 See further Andrew Lynch and Paul Kildea, 'Entrenching Cooperating Federalism: Is it Time to Formalise COAG's Place in the Australian Federation?' (2011) 39 *Federal Law Review* 103, 116-18.

23 Ibid; Kildea, above n 15, 83.

> increasing willingness among governments to engage citizens and interest groups in the development of policy.[24]

Policy formation within intergovernmental processes, however, sidelines the public's role. This is for a number of reasons, including the failure of intergovernmental institutions to publicise their agendas in advance, allowing for opinions to be expressed, for example in the media, or to local members or Ministers, and be taken into account by policy-makers. There is also the lack of public engagement through other processes such as committee inquiries.

Issues analysis and potential reform

The use of a Ministerial Council as the primary policy-making body in the NEM brings with it significant accountability challenges. The closed and executive nature of its processes mean there is little transparency for, and effective parliamentary or public participation in, its processes.

Greater transparency could be achieved within the COAG Energy Council by:

- requiring it to publicly release meeting agendas in addition to Communiques;
- reinstating the requirement for the Energy Council to provide an annual status report to COAG and make these publicly available on its website; and
- reinstating the requirement for the Energy Council to provide an annual work plan to COAG, and make these publicly available on its website.

This greater transparency will facilitate greater awareness of its work in the public and also facilitate better parliamentary scrutiny. In addition to introducing these more positive responsibilities for the publication of information, consideration should be given to publicising on the COAG Energy Council's website the availability of FOI (limited as it may be). At present, the Commonwealth Department of Prime Minister and Cabinet's 'Guidance on COAG Councils', states at [5.2.4.2] that:

> If a member receives a request for a document to be made public (either through a Freedom on Information (FOI) request, a request from a Royal Commission or some other avenue), all members of the Council should be consulted regarding release of the document. For further information on FOI requirement refer to the relevant jurisdiction's FOI legislation.

In addition to transparency, there are other, more proactive, ways that public participation in the process could be increased. One way of achieving this is through the establishment of a public advisory committee. In accordance with the National

[24] Kildea, above n 15, 79.

Electricity Objective, this committee should be comprised of a majority of consumer representatives, which may either be selected by, or in consultation with, the recently established Energy Consumers Australia. There is always a danger with the appointment of a committee or reference group intended to provide a representative voice of a diverse group that some voices will not be heard. Recognising the heterogenous nature of consumers in the energy sector, such a body should contain representatives from across the spectrum of consumers, including from large, medium and smaller consumers cohorts, from across different regions and from groups with different consumer focuses. In 2013-2014, the AER implemented a number of structural reforms to increase participation of consumers in its governance, including a Consumer Reference Group, the design and operation of which could inform the design of an advisory committee at the level of the COAG Energy Council.

The Council could be required to consult with the advisory committee in the course of:

- any review of the Council's Terms of Reference;
- the drafting of its annual work plan;
- the development of statements of policy principle that bind the AEMC's rule-making or market review functions;
- the development of the topic and terms of reference for reviews to be conducted by the AEMC;
- finalising recommendations on appointments to the AEMC and AER; and
- proposed legislative changes to the NEL.

Another possible role for the advisory committee would be to have the power to put forward possible statements of policy principle for consideration by the COAG Energy Council. These statements are an important part of limiting the discretion of the AEMC.

An alternative to an advisory committee might be to require the COAG Council to undertake public consultation, perhaps specifying groups with which it must consult. This would provide a substantially less structured form of public participation and may result in capture by powerful and connected actors at the expense of consumers.

General observations about institutional design of AEMC and AER

Overview

Examination of accountability and transparency of the NEM must be carried out in the context of the AEMA's design, which enshrines a clear institutional separation of powers between legislation and rules, and between rule-making and rule-enforcing.

Peter Nicholas explains in his paper on the subject that the design has employed delegated (subordinate) legislation to provide the necessary technical and detailed supplement the legislative framework agreed upon by the government.[25] This design, in theory, allows democratic accountability for major policy choices to be retained while enabling the subordinate rules to be drafted by technical experts and more responsive to change in the industry.

Another aspect of the institutional design is that the rule-making and rule-enforcing functions are conferred upon different bodies to maintain the separation between the delegated legislative function and the administration function.[26] As Peter Nicholas explains, this means that the AEMC is, in theory, able to 'check' the operation of the AER:

> The key feature and accountability mechanism of these additional requirements is that they always remain subject to the guidance, limitations and constraints imposed by the rules and are subject to amendment through the rule change process. A flexible and market driven process for amending the rules means scrutiny of the outcomes of every AER decision can be assessed to determine if there are any rules which should be amended before their next application to the same or another business. The threat of a rule change needs to be seen as an ultimate administrative law accountability mechanism imposed upon the AER in relation to the exercise of its powers.[27]

Issues analysis and potential reform

While at a theoretical design level, there is merit in an argument that the division division of powers between the AEMC and the AER checks and disperses power, it also raises a number of concerns from an administrative law perspective. First, it undermines much of the rationale for delegating the rule-making function from the COAG Energy Council/State Parliaments. This rationale is that delegation allows the detail of the legislative regime to be completed by the body with greater technical and

25 Peter Nicholas, 'Administrative Law in the Energy Sector: Accountability, Complexity and Current Developments' (2008) 59 *AIAL Forum* 73, 80.

26 Ibid 80.

27 Ibid 80-81.

operational knowledge and expertise. The AEMC is only able to fulfil its mandate as the technical rule-maker with substantial cooperation and information sharing from the regulator, the AER.

The division of powers between the two bodies also creates a danger of 'blame-shifting' between the organisations when complaints arise about the operation of the system as a whole, leading to a reduction in accountability.

Finally, the division creates great complexity in the institutional arrangements, particularly because the AEMC is a South Australian (State) body, and the AER is a Commonwealth body. The Productivity Commission has recently criticised the complexity of the NEM's regulatory and institutional arrangements.[28] In a submission to the Senate's References Committee on the Environment and Communications, the Total Environment Centre summed up the national approach as 'fragmented and cumbersome', a mixture of 'part state and part federal; part public and part private.'[29] Different accountability systems and legislation apply and must be navigated (for example, in relation to freedom of information, Ombudsman review, and judicial review). The division of functions across the different institutions, and the proliferation of statutes, regulations, rules and policies has made it complex and difficult for consumers to understand, and therefore participate in and potentially challenge decisions that are made. The division of functions may also lead to delay and inefficiencies in their exercise.

Combining the roles of the AEMC and the AER, and thereby reducing the complexity of the regulatory environment, consumers would be more easily able to seek rule-changes, participate in rule-change processes, or seek review of a decision of the AEMC or AER. A combination of the functions in a single body provides a simple solution to the need for extensive information sharing about the operational success and difficulties between the rule-maker and rule-enforcer. The Productivity Commission has observed:

> In principle, the second option [combining the AER and the AEMC] could promote closer interaction, communication and coordination between the 'regulators' and the 'rule makers', which could lead to better quality rules and decisions being made.[30]

However, the potential efficiency and efficacy advantages may undermine the accountability advantages of maintaining a separate rule-making and rule-enforcing body. The diffusion of power across different institutions ensures that no single institution is able to control more than one process within the scheme. As Nicholas points out, the AEMC is able to monitor and thereby check the operation of the AER. The Productivity Commission noted that the combination of the AER and the AEMC 'raises

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28 Productivity Commission *Report No 62: Report into Electricity Networks* (2013) 4.

29 Submission, extracted in Senate Environment and Communications References Committee, *Performance and Management of Electricity Network Companies: Interim Report* (April 2015), 97.

30 Productivity Commission *Report No 62: Report into Electricity Networks* (2013) 780.

potential conflicts of interest for the rule makers in the merged agency. For instance, they may be influenced to make rules that ease the task of the regulators in the agency, rather than being beneficial for the wider community.'[31] While the current design gives the AEMC power to review and check the operations of the AER, the AEMC itself is subjected to limited oversight.

It may be that concerns about the division of functions across the AEMC and AER could be partially allayed through other structural changes, including additional mandatory information sharing between the two institutions. Consumer accessibility and participation may be able to be addressed by requiring the rule-maker to actively seek contributions from consumers and give consumers real power in the rule-making process (see discussion of ways to increase consumer voice in the AEMC's processes, below).

It must be emphasised that if the division of functions across the AER and the AEMC is not removed, it becomes particularly important to reform the processes and accountability of the AEMC, which, as the rule-maker, is given a paramount role in the scheme and is currently operating with little oversight and accountability.

31 Ibid.

Overview

The AEMC is the rule-maker and market-developer of the NEM. It is delegated with responsibility for the drafting and final determination of amendments to the National Energy Retail Rules, the National Electricity Rules and the National Gas Rules.[32] The South Australian Minister for Mineral Resources and Energy, who is the Minister responsible to COAG, has the power to make the initial rules,[33] and the AEMC is charged with amending them in accordance with the process set down in the NEL.

The AEMC makes the rules that are applied and enforced by the AER. Under the hybrid, 'fit-for-purpose' decision-making model that the AER is required to follow, the AEMC wields substantial power. It is responsible for creating rules that guide the discretion of the AER.[34] It is imperative therefore that the AEMC operate in a transparent, accountable and genuinely consultative manner that ensures consumer voices are both heard and are given appropriate weight.

The AEMC's role is to consider the merits of amendments to rules proposed by third parties and thereby act as an independent decision maker between opposing views on rules. Under s 88 of the National Electricity Law, the AEMC 'may only make a Rule if it is satisfied that the Rule will or is likely to contribute to the achievement of the national electricity objective.' This gives it an important role in determining policy that will balance the different aspects within the objective. Section 88(2) acknowledges this:

> [T]he AEMC may give such weight to any aspect of the national electricity objective as it considers appropriate in all the circumstances, having regard to any relevant MCE statement of policy principles.

The Productivity Commission has noted the extent of the policymaking functions that the AEMC performs:

> While the respective functions of SCER and the AEMC are ostensibly clear, in practice the roles are blurred.
>
> In many respects, the AEMC is a policymaker. For example, by any standards, the outcomes of the Rule change involving the economic regulation of network service providers (AEMC 2012r) represents a major policy change. Certainly, outside the NEM, a parliamentary Act making similarly sweeping changes in the regulatory environment would be regarded as a fundamental piece of legislation and policy reform. …

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32 *Australian Energy Market Commission Establishment Act 2004* (SA) s 6(a).

33 National Electricity Law, s 90.

34 Nicholas, above n 25, 82.

> The corollary of the above is that the distinction between the AEMC's processes in undertaking major framework reviews and Rule making is more semantic than real. Both involve intensive consultation and the consideration of broad policy issues.[35]

In addition to its rule-making function, the AEMC has a role in conducting reviews of the NEM. More wide-ranging reviews may be conducted at the direction of the COAG Energy Council,[36] or reviews into the Rules may be conducted at its own initiative.[37] Reviews may be conducted in such manner as the AEMC considers appropriate and may (but need not) involve public hearings.[38] In the course of reviews conducted by the AEMC into the Rules (that is, self-initiated reviews), the AEMC may:

(a) consult with any person or body that it considers appropriate;

(b) establish working groups to assist it in relation to any aspect, or any matter or thing that is the subject, of the review;

(c) commission reports by other persons on its behalf on any aspect, or matter or thing that is the subject, of the review;

(d) publish discussion papers or draft reports.[39]

The AEMC consists of 3 Commissioners, appointed by the South Australian Governor on the recommendation of the Minister. The Commissioners are appointed on the following basis:

(a) the Chairperson is appointed based on a nomination by the State and Territory members of the COAG Energy Council;

(b) the second Commissioner is appointed based on a nomination by the State and Territory members of the COAG Energy Council; and

(c) the third Commissioner is appointed based on a nomination by the Commonwealth Minister of the COAG Energy Council.

Transparency and Consultation in Rule-Making Process

Peter Nicholas has described the AEMC's rule-change process as 'open and transparent'.[40] It contains significant opportunity for public participation and consultation. The strong consultation obligations that the AEMC is subject to, however,

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35 Productivity Commission *Report No 62: Report into Electricity Networks* (2013) 802.

36 National Electricity Law s 44.

37 National Electricity Law s 45.

38 National Electricity Law ss 44 and 45.

39 National Electricity Law s 45(3).

40 Nicholas, above n 25, 81.

has meant that rule-changes are often extraordinarily drawn out processes. The level of consultation and time it takes can place a significant burden on consumers and consumer groups who wish to be involved in the process.[41] Further, there have been suggestions that while there is much formal consultation required within the AEMC's processes, its responsiveness to consumer interests and issues has been poor, demonstrating the need for meaningful consultation not just an opportunity to be heard (how greater consumer participation might be achieved is returned to under 'Issues analysis and potential reform', below).[42]

The AEMC must only consider substantive rule change requests from others, be they individuals or public/private bodies.[43] This is subject to one exception: the AEMC can initiate rule changes when they are of a technical and non-substantive nature.[44] Rule change applications must be accompanied by a justification for the changes proposed.

The standard rule changing process involves initial consideration of the proposal and a two-stage consultation procedure.[45] The AEMC receives the rule change proposal, publishes the proposed rule, and provide a four-week opportunity for anyone to make a submission. It then publishes a draft rule determination, after which there is then another opportunity for submissions before the AEMC publishes the final determination of the rule.[46] The AEMC can also hold public hearings on the proposed rule amendment if it considers it useful.[47]

In making its final determination, the AEMC can only amend a rule if it is satisfied that the rule will pass the rule-making test: that is, that it will, or is likely to, contribute to the achievement of the national electricity objective.[48] In some situations, the AEMC must also have regard to COAG Energy Council statements of policy principles in relation to rule making and reviews.[49] (There are currently no statements of policy principles.) The AEMC's decision must be accompanied by detailed reasons.[50]

There are a number of processes that make the AEMC rule-making function relatively transparent.

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41 See Senate Environment and Communications References Committee, *Performance and Management of Electricity Network Companies: Interim Report* (April 2015), Greens Dissenting Report, 96.

42 See, eg, Visy submission to the Productivity Commission, extracted in the Productivity Commission *Report No 62: Report into Electricity Networks* (2013) 786, see also extracts of submissions on page 789.

43 National Electricity Law, s 91(1).

44 National Electricity Law, s 91(2).

45 There is also provision for fast track processes that waives the initial consultation requirement where another review has already been conducted that involves consultation (s 96A of the NEL) and an expedited process for non-controversial and urgent matters (s 96 of the NEL).

46 National Electricity Law, ss 94-102.

47 National Electricity Law, s 98.

48 The national electricity objective is at s 7 of the National Electricity Law.

49 National Electricity Law, s 88B.

50 National Electricity Law ss 99(2) and 102(2).

First, if a Commissioner in the AEMC has any direct or indirect interest in a matter being considered by the Commission, which could conflict with the proper performance of that Commissioner's functions, they must disclose that interest. That and any decision made in relation to the disclosure by the Commission must be recorded in the minutes of the meeting.[51]

Second, 'every standard, rule, specification, method or document (however described) formulated, issued, prescribed or published by any person, authority or body that is applied, adopted or incorporated by a Rule' must be made publicly available by the AEMC, by either publishing it on the AEMC's website or specifying a place from which the document can be obtained or purchased.[52]

Third, any decision that the AEMC makes in relation to a proposed rule amendment, must be notified to the person who made the amendment proposal. For example, if it decides not to act on an amendment proposal, it must inform the person or body that requested the rule, in writing, with reasons.[53] If the AEMC decides to act on the proposal, it must publish notice of the amendment request, a draft of the proposed rules, and any other document prescribed in the Regulations.[54] The notice must invite written submissions within four weeks from when the notice is published.[55]

Fourth, if the AEMC decides to make a rule of the technical/non-substantive variety of its own volition, it must publicise its intention to do so and allow for requests not to make the rule by any person or body within two weeks. It must not make the rule if it receives a request not to do so, and the reasons in the request are not, in its opinion, misconceived or lacking in substance. If the AEMC decides the reasons are misconceived, it must inform the person of their decision, but if the reasons are not misconceived, the AEMC must publish a notice to the effect that it will make the rule in accordance with that division of the law.[56]

Finally, in relation to the AEMC's separate function of conducting a review into the operation and effectiveness of the Rules or indeed any matter relating to the Rules, the review can be conducted in such a manner as the AEMC deems appropriate and can involve public hearings, consultation with appropriate individuals or bodies, the establishment of working groups, the commission of reports by third parties and the publication of discussion papers or draft reports. After the review, the AEMC must provide a report to the COAG Energy Council and publish the report for the wider public.[57]

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51 *Australian Energy Market Commission Establishment Act 2004* (Cth), s 22.

52 National Electricity Law, s 37.

53 National Electricity Law, s 94(2).

54 National Electricity Law, ss 94(6) and 95.

55 National Electricity Law, s 95.

56 National Electricity Law, s 96.

57 National Electricity Law, s 45.

Democratic Accountability of Rule-Making

The usual accountability framework for delegated rule-making bodies is through a combination of parliamentary review (through scrutiny and disallowance procedures) and limited judicial review. The limited grounds for which judicial review can be sought over delegated rule-making (explained more below) emphasises the importance of robust parliamentary review.

In contrast to other forms of delegated legislation, the AEMC's rule-making functions are not subject to any form of democratic oversight through scrutiny and disallowance by Parliament,[58] or even the COAG Energy Council. The Productivity Commission has observed:

> Unlike other national regulatory bodies such as the Food Standards Australia and New Zealand and the National Transport Commission, the AEMC is not required to have its Rules endorsed by SCER, parliament or government.
>
> Arguably, providing the AEMC with a Rule making power may be an appropriate response to the inertia that is sometimes associated with the difficulties of getting ministerial agreement in COAG bodies. (The struggle to achieve a National Energy Customer Framework exemplifies this concern.)[59]

Peter Nicholas explains that the reason the AEMC's rule-making decisions are not subject to parliamentary disallowance is because of the cooperative nature of the scheme:

> [I]t is not considered appropriate for the Parliament of one jurisdiction to disallow a legislative instrument that applies to all jurisdictions.[60]

Nicholas' position is supported by s 44 of the *Legislative Instruments Act 2003* (Cth), which states that the disallowance procedure does not apply to legislative instruments if the enabling legislation facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one of more States, and authorises the instrument to be made by the body or for the purposes of the body or scheme.

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58 *National Electricity (South Australia) Act 1996* (SA) s 13. Note also 11(5) in relation to the Regulations made under the Act.

59 Productivity Commission, *Electricity Network Regulatory Frameworks, Report No. 62* (2013) 800-801.

60 Nicholas, above n 25, 77.

Accountability to COAG: The COAG Energy Council's Statement of Expectations and the AEMC's Statement of Intent

The OECD's Best Practice Principles for Regulatory Policy states 'A good mechanism for ministers and regulators to achieve clear expectations is for Ministers to issue a statement to each of their regulators.'[61]

The COAG Energy Council's Statement of Expectations for the AEMC, distributed in December 2013, was designed to strengthen governance arrangements as part of energy market reforms undertaken by COAG. In 2012, COAG recommended that the Council develop enhanced budget and performance reporting for the AEMC and the AER. In the statement, the Energy Council declares that it expects the AEMC to put into place a Statement of Intent for each financial year, which will include key performance indicators (KPIs) to measure its progress and an outline of how it will meet the Energy Council's expectations in the statement. The KPIs should include the AEMC's progress on its work program, expenditure against its budget, engagement with stakeholders and improvement of capabilities. It is expected that the AEMC will publish these documents online, in recognition that 'transparent processes are crucial to good governance and accountability of government and government institutions.'[62] The statement of expectations also requires the AEMC to conduct performance reporting against the KPIs yearly and half-yearly where the data is available.

In response to the statement of expectations, the AEMC duly published its Statement of Intent for the financial year 2014-15 on 10 July 2014. The Statement outlines its role in supporting the work of the Energy Council, including providing advice on developing issues, particularly alerting the Council to the potential broader impacts of policy in order to implement policy in an integrated manner; providing timely, relevant and independent advice on specific issues as requested; reporting on projects, budgets and other matters as required; and communicating clearly and promptly with the Energy Council. It also discusses its 'robust and transparent financial management program on which the [the AEMC] reports quarterly to the Minister' (being the South Australian Minister for Mineral Resources and Energy.[63]

This mechanism forms part of the apparatus that can keep the AEMC accountable to those who are subject to its rules. However, there is no formal sanction should the AEMC fail to comply with the Statement of Expectations or its Statement of Intent. Redress is left as a matter for the COAG Energy Council. However, the Statement

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61 OECD's *The Governance of Regulators: Best Practice Principles for Regulatory Policy* (2014) 83.

62 Standing Council on Energy and Resources (now the COAG Energy Council), 'Statement of Expectations for the Australian Energy market Commission' (December 2013) 2, available at <https://scer.govspace.gov.au/workstreams/energy-market-reform/aer-and-aemc-enhanced-budget-and-performance-reporting/> accessed 22 April 2015.

63 Australian Energy Market Commission, 'Statement of Intent of the Australian Energy Market Commission for the Financial year 2014/15' (10 July 2014) 6, available at <http://www.aemc.gov.au/getattachment/51d50777-9999-4c37-af83-71d65812f511/Statement-of-Intent-of-the-Australian-Energy-Marke.aspx> accessed 22 April 2015.

annexes the various statutes with which it expects the AEMC to comply, for which judicial review may be available in the event of a breach.

Accountability via Financial Reporting

In addition to its reporting requirements to COAG, the AEMC must comply with a number of State and Commonwealth laws in terms of financial reporting and information disclosure, including the AEMC Act and the *Public Finance and Audit Act 1987* (SA). Under s 25 of the AEMC Act, the AEMC must, from time to time, prepare and submit to the Minister[64] a performance plan and budget for the next financial year or some other period determined by the Minister. Pursuant to s 26 of the AEMC Act, the AEMC is required to keep proper accounts and prepare financial statements in accordance with the *Public Finance and Audit Act 1987* and the Auditor-General can, at any time, and at least once a year, audit the accounts of the AEMC.

Judicial Review of AEMC Decisions

'Persons aggrieved' by decisions and determinations of the AEMC under the Electricity Laws, Regulations and Rules can seek judicial review. Judicial review is available in the Supreme Court of a State or Territory where the law applies as a State or Territory law, and the Federal Court where the law applies as a Commonwealth law.[65] Persons aggrieved can also file a judicial claim for a *failure* by the AEMC to make a decision under those statutory instruments, and, additionally, any conduct engaged in, or proposed to be engaged in by the AEMC for the purpose of making such a decision or determination.

The standing requirement that a person be 'aggrieved' can make it difficult for public interest groups to initiate judicial review. The relevant test for standing for public interest groups was established in *Australian Conservation Foundation v Commonwealth*, in the context of an environmental group seeking standing to challenge a development decision. Gibbs J stated:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law

64 Being the South Australian Minister for Energy and Resources.

65 National Electricity Law, s 70.

> generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor [standing].[66]

This test has been applied by the Courts by examining the particular facts of every case, assessing in each instance 'the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter.'[67] It has been applied in such a way that 'peak' and 'significant and responsible' bodies have been granted standing,[68] where the body represents individuals that have a strong interest in the matter (such as a union),[69] or where the body is long-established and well recognised.[70]

Judicial review of delegated legislation is provided only on limited grounds to reflect the nature of the decision as legislative – and therefore often involving policy choices – rather than an administrative decision applying a rule to a particular case. For example, there is no review on the basis that the decision maker took into account irrelevant considerations, failed to take into account relevant considerations, acted under dictation or inflexibly applied policy. There is no review for failure to provide a hearing (procedural fairness) in relation to delegated legislation (although the statutory requirements for consultation by the AEMC provide the public with a number of opportunities to be heard during the rule-making process).

Delegated legislation can only be reviewed on the basis that the provision in the primary Act does not support the piece of delegated legislation.[71] The empowering provision for the AEMC is s 34 of the National Electricity Law, which provides the AEMC with a broad discretion. In addition, s 32 requires the AEMC to have regard to the NEO when exercising its functions (including its rule-making function) and s 33 requires the AEMC to have regard to the statements of the COAG Energy Council in making a Rule.

The main grounds that judicial review could be sought against the AEMC would be that its rule making decision exceeded the scope of the grant of power in s 34 (which would then necessitate an interpretation of the terms of ss 34 and 32, including the NEO), that its rule making decision was 'so oppressive or capricious that no reasonable mind can justify it',[72] or that its decision was not proportionate to the purpose of the delegation.

The limited nature of judicial review of delegated legislative decisions underscores the importance of providing robust parliamentary scrutiny for the AEMC's rule-making capacity.

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66 (1980) 146 CLR 493, 530.

67 *Onus v Alcoa* (1981) 149 CLR 27, 42 (Stephen J).

68 *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492.

69 *Shop, Distributive and Allied Employees Association* (1995) 183 CLR 552.

70 See, eg, *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1.

71 Dennis Pearce, 'The Importance of Being Legislative' (1998) 21 *AIAL Forum* 26, 30.

72 *City of Brunswick v Stewart* (1941) 65 CLR 88, 98 (Starke J).

Judicial review of *administrative decisions* made under the National Electricity Law is also, in theory, available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[73] However, the decisions made by the AEMC are predominantly legislative in nature,[74] meaning review will not usually be available under the federal Act. Review of decisions of the AER may be sought under this legislation.

Operation of freedom of Information and other accountability mechanisms

The AEMC is subject to the *Freedom of Information Act 1991* (SA). This places obligations on the AEMC to publish certain information,[75] including a description of the structure and functions of the AEMC, how that affects members of the public, arrangements that exist to enable members of the public to participate in the agency's policy and functions, a description of the documents held by the agency and a description of how the public can obtain that information. It also creates a right to access information held by the AEMC.[76] A number of exemptions apply to this right of access that may inhibit access to large amounts of information that is held by the AEMC, including:

- a conditional exemption for documents affecting inter-governmental relations (sch 1, cl 5);
- a conditional exemption for documents affecting business affairs (sch1 , cl 7);
- an exemption for internal working documents (sch 1, cl 9);
- an exemption for documents containing confidential information (sch 1, cl 13).

Employees of the AEMC are also protected by the *Whistleblowers Act 1991* (SA), which protects them from making certain disclosures that reveal illegal and otherwise improper conduct on the part of public officials within the AEMC.

Issues analysis and potential reform

The important role played by the AEMC in the NEM scheme, and its capacity to affect the operation of the AER, mean that its accountability must be robust, and the opportunities for consumer participation in its processes meaningful. The AEMC's accountability framework is lacking in two fundamental respects, consumer voices in the rule-making

73 See schedule 3.

74 See definition of legislative power set out in *Minister for Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325, 331: 'The general distinction between legislation and the execution of legislation is that legislation determines the conduct of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

75 *FOI Act 1991* (SA) s 9.

76 *FOI Act 1991* (SA) s 12.

process should be given more power (rather than simply an opportunity to be heard) to ensure meaningful consultation is achieved, and the rule-making function of the AEMC should be made subject to greater democratic accountability. There is also scope for amendment to the judicial review regime to ensure that all relevant consumer groups have standing to challenge, or become a party to, these proceedings.

(a) Strengthening consumer voices in rule-making process

The current rule-making process is both transparent and contains extensive consultation requirements. The consultation requirements, however, provide an opportunity for the public, and consumers, to be heard, without necessarily providing them with any enforceable *power* in the process. There are a number of ways that consumers could be provided with a more powerful voice in the rule-making process.

First, as discussed above, reforms to the COAG Energy Council could require consultation with an advisory committee that contains substantial consumer representation prior to making appointments to the AEMC. Consideration could also be given to requiring a consumer representative on the AEMC. A precedent exists for a similar type of appointment requirement in the ACCC. Section 7(4) of the *Competition and Consumer Act 2010* provides:

> At least one of the members of the Commission must be a person who has knowledge of, or experience in, consumer protection

Second, the requirements to provide public consultation opportunities could be supplemented with positive obligations to actively engage in meaningful consultation activities. An analysis of different methods of engagement can be found in the Consumer Utilities Advocacy Centre Ltd's Report, *Meaningful & Genuine Engagement: Perspectives From Consumer Advocates* (November 2013). They include direct engagement through focus groups, working groups, customer consultative committees and public forums; web-based forms such as webinars, social media and emails; telephone; and mail-outs. This report also emphasises that for such consultation to be meaningful, strategies need to be employed not just to ask people their views, but to break down complex issues for consumers and their representatives.

Finally, the AEMC may be required not only to *consult* with consumer groups prior to finalising rule changes, but obtain the final *approval* of a representative committee of consumer groups.[77] This would empower consumers not simply through the exercise of the power, but it will offer a strong incentive for the AEMC to engage in more meaningful and genuine consultation prior to finalising the rule-making process.

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77 While a process for approval by a non-government body is unusual, a similar type of arrangement was in place in the *Wheat Marketing Act 1989* s 57, where the approval of the Australian Wheat Board. See discussion of the regime in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

Recognising that there may be a conflict between large and smaller consumers, it may be that the committee must (a) represent both and (b) a minimum number of representatives from each would have to agree with the proposal.

If approval of the representative committee of consumers is not able to be obtained, an alternative may be provided so that the AEMC may seek approval from the COAG Energy Council to make the rule changes. This reform would mean that where consumer groups consider rule changes acceptable, no further involvement by the COAG Energy Council is required, but where consumer groups refuse to endorse rule changes, the final policy decision rests with the COAG Energy Council. In this way, policy decisions that consumer groups do not accept as being in the best interests of consumers are not made by the AEMC alone.

In addition to these reforms, consideration should be given to making information more readily available to consumers regarding the current accountability regimes (for example, the availability of FOI and judicial review). This information is currently not readily available in a single place on the AEMC's website.[78] Recently, the Senate References Committee on Environment and Communications recommended that:

> [T]he Australian Energy Market Commission and the Australian Energy Regulator jointly develop and publish consolidated guidance on the regulatory determination process to better inform members of the public, consumer groups and other energy user stakeholders.[79]

If such a publication were developed, an important aspect of it would be to explain the review mechanisms available to the public and consumers against decisions of the AEMC and the AER.

(b) Enhancing Democratic Accountability

The lack of democratic scrutiny and responsibility for the rule-making function by the AEMC creates serious accountability concerns. While it may be accepted that the creation of the AEMC through an intergovernmental agreement means there is no single Parliament that is obviously responsible for reviewing exercises of the delegated legislative power, the current position where the AEMC is simply accountable to *no* legislature is unusual and it creates a large lacuna in the accountability regime.

There are a number of possible reform options that might address this concern.

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78 Information on availability of FOI is reasonably well publicised, but other review mechanisms are not: http://www.aemc.gov.au/About-Us/Engaging-with-us/Freedom-of-information

79 Senate Environment and Communications References Committee, *Performance and Management of Electricity Network Companies: Interim Report* (April 2015) xiv.

First, individual State Parliaments could exercise disallowance powers over the rules as they operate in their jurisdiction. However, there are a number of disadvantages to this proposal. It would either lead to a fragmentation of the rules across the country, if individual State Parliaments were to disallow the rules; or be scrutiny and disallowance in name only, with State Parliaments unwilling to exercise their powers because they are reluctant to undermine the national scheme. Further, the position that prevails in many jurisdictions where State governments are the network service providers subject to the rules, creates a conflict of interest. State Parliaments may seek to protect and further their own interests rather than the best interests of consumers.

Second, a single State Parliament (South Australia being the obvious choice, given the origin of the AEMC in that jurisdiction's statute) could exercise disallowance powers. This would also appear undesirable, either because South Australia might disallow rules that apply nationally where the people of other States have no representative voice; or because the South Australian Parliament would be unwilling to exercise its powers of disallowance because of a reluctance to change the rules across the country.

Third, the COAG Energy Council could perform a disallowance-type function. However, as discussed in greater length above, the COAG Energy Council suffers democratic accountability problems, and therefore its involvement would not address the deficit identified in relation to the rule-making process.

Finally, the Commonwealth Parliament could be empowered to exercise disallowance powers over the rule-making function of the AEMC. This might be achieved, for example, through amending the *Legislative Instruments Act 2003* (Cth) (soon to be the *Legislation Act 2003* (Cth)) and inserting a similar provision to that contained in schedule 3 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to bring administrative decisions taken by the AEMC and the AER within the jurisdiction of that legislation.[80] The advantage of this reform option is that the Commonwealth Parliament is representative of the whole Australian constituency. Further, the Commonwealth Parliament has no commercial interest in the scheme (unlike many of the States).

Bringing the AEMC's rule-making function within the full parliamentary scrutiny process of the *Legislative Instruments Act* places it on a similar accountability footing as other pieces of delegated legislation operating in Australia. The AEMC would be required to table the legislation in Parliament and it would be subject to disallowance by either House of Parliament.

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80 It is likely that the Commonwealth Parliament would have legislative power to scrutinise this legislation under the corporations powers (s 51(xx)). To avoid doubt, a referral of power from the States under s 51(xxxvii) could be sought.

(c) *Expanding standing in judicial review proceedings*

The current test for standing to commence judicial review proceedings may exclude review by some consumer advocacy bodies. Given the difficulty individual consumers confront in navigating and funding judicial review proceedings, amendments to s 70 of the *National Electricity Law* ought to be considered to ensure that consumer groups are able to seek review. The definition of 'affected or interested person or body', already used in the limited merits review jurisdiction over the AER, could be adopted and modified (see further discussion of the expanded standing test in the limited merits regime below). This would guarantee standing to 'a user or consumer association'.[81] A similar provision expanding standing has operated in the Administrative Appeals Tribunal.[82] While these relate to merits review, the expansion of standing has occurred in judicial review, for example, in the New South Wales Land and Environment Court.[83]

Consideration should also be given to allowing these bodies to intervene in judicial review proceedings that might be commenced by others. Again, the limited merits review regime provides an example of how this might occur.

(d) Strengthening consumer voices in AEMC reviews

At present, the AEMC is not required to conduct public hearings or consult with consumer groups in the course of conducting a review, unless directed by the COAG Energy Council to do so. Reviews can be wide-ranging into the operation of the NEM, or in relation to the Rules. They will be of importance to consumers, and consideration should be given to including a mandatory requirement for consultation with the public and/or specified consumer groups, or even a representative committee of consumer groups.

81 See further definitions in *National Energy Law* s 71A.

82 See *Administrative Appeals Tribunal Act 1975* (Cth) s 27(2).

83 See *Environmental Planning and Assessment Act 1979* (NSW) s 123.

Overview

The AER enforces electricity laws and rules and is in charge of the economic regulation of electricity transmission, distribution networks and retail markets, including the setting of prices. It also provides strategic and operational advice to energy ministers.[84] Ultimately, the Commonwealth has responsibility for the activities of the AER[85] although the COAG Energy Council decides upon and oversees the AER's governance, functions, powers and duties.

The AER has three members: two representing States and Territories and one representing the Commonwealth. State and Territory members of the AER are appointed by the Governor-General by written instrument. In order to be eligible for appointment, prospective members must have knowledge of industry, commerce, economics, law, consumer protection or public administration and have been nominated for appointment in accordance with the AEMA. [86] The AEMA requires two of the three members to be recommended for appointment by agreement of at least five COAG Energy Council Ministers representing the States and Territories (but not NT or WA).[87]

Commonwealth members are also appointed by the Governor-General, but must already be members of the ACCC in order to be eligible.[88] The AEMA requires that they be recommended for appointment by the Chair of the ACCC.[89] AEMA Members cannot hold office for longer than five years.[90] One member of the AER is appointed Chair by the Governor-General on the recommendation of the COAG Energy Council, which requires agreement by the Commonwealth Minister and a simple majority of the State and Territory Ministers.[91]

84 Standing Council on Energy and Resources, 'Statement of Expectations for the Australian Energy Regulator' (December 2013) 1, available at <https://scer.govspace.gov.au/files/2014/02/AER-Statement-of-Expectations1.pdf> accessed 24 April 2015.

85 *Competition and Consumer Act 2010* (Cth) s 44AE(3)(b).

86 *Competition and Consumer Act 2010* (Cth), s 44AP.

87 AEMA, 17 [7.3].

88 *Competition and Consumer Act 2010* (Cth), s 44AM.

89 AEMA, 17 [7.3].

90 *Competition and Consumer Act 2010* (Cth), ss 44AP and 44AM.

91 AEMA, 17 [7.6].

Statutory Accountability Obligations

The AER is a body corporate established under s 44AE of the *Competition and Consumer Act 2010* (Cth) ('CC Act')[92] however it is defined in that Act as specifically *not* a body corporate for the purpose of finance laws.[93] It is a constituent part of the Australian Competition and Consumer Commission ('ACCC') although it is a separate legal entity to the ACCC.[94] Confusingly, the combination of the AER and the ACCC is defined as a listed entity for the purposes of the finance laws,[95] and because the AER is staffed and funded through ACCC, it is subject to administrative accountabilities to ACCC corporate structures pursuant to the *Public Governance, Performance and Accountability Act 2013* (Cth) ('PGPA Act') and the *Public Service Act 1999* (Cth).[96]

The AER and the ACCC together fall under the definition of a Commonwealth entity in s 10 of the PGPA Act. This means they are subject to a number of different accountability mechanisms in relation to corporate governance and reporting. The 'accountable authority'[97] of the AER is (probably) the Chair of the AER Board,[98] who has a responsibility under the PGPA Act to govern the AER in a way that promotes the proper use and management of public resources, the achievement of the purposes of the AER and the financial sustainability of the AER. They also have a duty to inform the Minister and the Finance Minister in relation to the activities of the AER. Under the PGPA Act, the Chair of the AER must prepare a corporate plan[99] and an annual performance statement.[100]

Section 63 of the *Public Service Act 1999* (Cth) and s 46 of the PGPA Act require the AER to present to the Minister an annual report. The reports are extensive; the 2013-2014 report ran to 398 pages.[101] The reports address the AER's progress on its goals of maintaining and promoting completion in wholesale energy markets, building consumer confidence in energy markets, promoting efficient investment in, operation

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92 However, its functions are described in the National Energy Laws rather than in the *Competition and Consumer Act 2010* (Cth).

93 That is, within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth): *Competition and Consumer Act 2010* (Cth) s 44AE(3)(c).

94 AEMA, 22 [9.5].

95 Again, within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth): *Competition and Consumer Act 2010* (Cth), s 44AAL.

96 *Public Governance, Performance and Accountability Act 2013* (Cth) s 10(1)(d).

97 See *Public Governance, Performance and Accountability Act 2013* (Cth) s 12(2) Item 4.

98 The *Public Governance, Performance and Accountability Act 2013* (Cth) and the *Competition and Consumer Act 2010* (Cth) do not define who AER's 'accountable authority' is. The accountable authority of the Clean Energy Regulator is its Chair (*Clean Energy Regulator Act 2011* (Cth) s 11(2)(b).

99 *Public Governance, Performance and Accountability Act 2013* (Cth) s 35.

100 *Public Governance, Performance and Accountability Act 2013* (Cth) s 39.

101 Australian Competition and Consumer Commission and the Australian Energy Regulator, 'Annual Report 2013-14' (2014), available at <https://www.accc.gov.au/system/files/866_Annual%20Report_2013-14_COMPLETE_FA_WEB.pdf> accessed 21 April 2015.

and use of, energy networks and services for the long-term interests of consumers, and strengthening stakeholder engagement in energy markets and regulatory processes. It also attaches the AER's agency and outcome resource statements,[102] and all of the financial statements for the ACCC for that financial year, as audited by the Australian National Audit Office. As the AER's finances stem entirely from the ACCC, this seems to adequately fulfil its obligations to give annual financial statements to the Auditor-General under s 49 of the (now superseded) *Financial Management and Accountability Act 1997* (Cth) and under ss 48-49 of the PGPA Act. The report also responds to the framework in the Treasury portfolio budget statements, against which the ACCC and the AER measures its 'deliverables'.

Current and Future 'Performance Frameworks'

The regulatory landscape of the AER is changing. The ACCC has been working with the Australian government to develop the Commonwealth Performance Framework for the purpose of improving the quality, reliability and availability of information about the non-financial performance of Commonwealth entities.[103] The Performance Framework is one of the core objectives of the newly enacted PGPA Act.[104]

On 29 October 2014, the government released a new Regulator Performance Framework ('RPF'):[105]

> The RPF establishes a common set of performance measures that will allow for the assessment of regulator performance and their engagement with stakeholders. All Commonwealth regulators will be assessed against six key performance indicators **(KPIs)**, being:
>
> - regulators do not unnecessarily impede the efficient operation of regulated entities;
> - communication with regulated entities is clear, targeted and effective;
> - actions taken by regulators are proportionate to the risk being managed;
> - compliance and monitoring approaches are streamlined and coordinated;
> - regulators are open and transparent in their dealings with regulated entities; and

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102 Ibid 310-11.

103 Mark Pearson and Simon Haslock, 'Measuring and Assessing the Performance of Regulators' (2014) 52 *Network* 1, 3.

104 *Public Governance, Performance and Accountability Act 2013* (Cth), s 5(b).

105 Australian Competition and Consumer Commission, 'Australian Government releases Regulator Performance Framework' (2014) 61 *Regulatory Observer* 2.

- regulators actively contribute to the continuous improvement of regulatory frameworks.

The KPIs are outcome-based and look at the impact and consequences of regulators' actions. Regulators will have to show how they have met each indicator by providing evidence of their activities.

These KPIs and the related performance report will be published annually by regulators based on externally validated data, with the report certified by the regulator's CEO, Board or relevant accountable authority. Relevant Ministerial Advisory Councils will validate the KPIs as well as the results of each regulator's performance reports.

The Department of Prime Minister and Cabinet will issue guidance on implementation, including on engagement with stakeholder groups, by 1 January 2015. There will be a six-month transition period for regulators to align internal policy and practice to the RPF prior to the commencement of the first assessment period on 1 July 2015.

The Energy Council's Expectations of the AER

As in the case of the AEMC, the Energy Council's expectations of the AER operate as a form of guidance for the actions of the AER, but contain no apparent mechanisms for the enforcement of expectations, or for holding the AER to account if it fails to fulfil expectations.

The Statement of Expectations outlines the role and responsibilities of the AER, including the fact that it acts in concert with the ACCC in relation to issues of common interest under the CC Act;[106] the organisation's relationship with the COAG Energy Council; stakeholder engagement and financial reporting, which includes annual and half-yearly reporting where possible. Again, the Council expects the AER to develop and publish its Statement of Intent, in which it should outline its KPIs and how it intends to address them.

In terms of financial reporting, the Statement of Expectations explains that, as the AER's accounts are consolidated into those of the ACCC, the Council does not expect disaggregated financial statements but the AER should provide 'clear guidance on how the funds have been spent.'[107] This is a rather vague requirement for something as onerous and crucial to accountability as financial reporting. Instead, the Council seems

106 Standing Council on Energy and Resources (now the COAG Energy Council), 'Statement of Expectations for the Australian Energy market Commission' (December 2013) 2, available at <https://scer.govspace.gov.au/workstreams/energy-market-reform/aer-and-aemc-enhanced-budget-and-performance-reporting/> accessed 22 April 2015.

107 Ibid 2.

satisfied that, as long as the AER is carrying out financial reporting pursuant to the relevant energy legislation and rules and the Treasury Portfolio budget papers, then their reporting obligations will be fulfilled.

Again, nowhere in the statement of expectations is there information about any sanctions or penalties for failure to meet expectations.

In response to the Statement of Expectations, the AER published its Statement of Intent, in which it referenced the 'Stakeholder Engagement Framework' it developed in 2013. The framework outlines the principles that will guide its public engagement with consumers, energy business and other stakeholders affected by its activities.[108] In the framework, it pledges to provide clear, accurate and timely communication, be accessible, inclusive and transparent, and develop measurable criteria to assess its engagement activities.[109]

Consumer consultation

The AER has introduced a number of proactive measures to more readily engage consumers throughout its processes, particularly its determinations. These informal moves by the AER undoubtedly strengthen consumer involvement and therefore the consumer voice in the AER's processes.

The AER has established a Customer Consultative Group that provides it with advice on its functions. It is comprised of representatives from consumer groups. As part of a wider set of regulation reforms, the AER established a Consumer Challenge Panel (CCP) on 1 July 2013. The CCP provides advice to the AER during regulatory determinations, particularly on advising whether the network's proposal is justified, acceptable and valuable from a consumer perspective, whether it is in the long-term interests of consumers, and the effectiveness of the network's consumer consultation. The AER has also drafted *Service Provider Consumer Engagement Guidelines*, which create non-binding guidelines for networks for conducting consultation with consumers in the preparation of proposals for pricing determinations.

108 Australian Competition and Consumer Commission and Australian Energy Regulator, 'AER Stakeholder Engagement Framework' (2013) available at <http://www.aer.gov.au/sites/default/files/AER%20Stakeholder%20Engagement%20Framework_2.pdf> accessed 24 April 2015.

109 Ibid 8-12.

Judicial Review

The decisions of the AER are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*').[110] Under the Commonwealth legislation, any person aggrieved by a decision of the AER can seek judicial review under one of the grounds contained in s 5 of that Act. This is a similar standing test as required for the judicial review of AEMC decisions, discussed at greater length above.

The grounds available for judicial review of administrative decisions are far more extensive than those available for judicial review of delegated legislation (see discussion of limited grounds for judicial review of the AEMC's rule-making powers above). They are listed in s 5(1) and (2) of the *AD(JR) Act*:

> (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
>
> (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
>
> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
>
> (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
>
> (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
>
> (g) that the decision was induced or affected by fraud;
>
> (h) that there was no evidence or other material to justify the making of the decision;
>
> (i) that the decision was otherwise contrary to law.
>
> (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
>
> (a) taking an irrelevant consideration into account in the exercise of a power;
>
> (b) failing to take a relevant consideration into account in the exercise of a power;

[110] *ADJR Act* Schedule 3; National Electricity Law, s 70. See, eg, *Ergon Energy Corporation Ltd v Australian Energy Regulator* [2012] FCA 393.

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

The possible remedies available are: the decision is quashed or set aside, an order referring the decision back to the person who made the decision for further consideration (subject to direction from the court), a declaration of the rights of the parties, an order requiring the parties to do or refrain from doing something.[111]

Limited Merits Review Regime

In limited circumstances, the decisions of the AER made under the National Electricity Law are subject to merits review in the Australian Competition Tribunal ('the Tribunal').[112] This includes review for legal error as well as for determining whether a preferable decision has been made, and provides more substantive review (that is, review of the merits of the decision rather than simply the legality of it) than judicial review in the Courts. It is therefore an important and supplementary aspect of the accountability framework.

Between 7 March and 30 September 2012, the COAG Energy Council completed a review into the merits review regime of the NEM, which led to a number of amendments to the relevant parts of the National Electricity Law and the National Gas Law, which came into effect on 19 December 2013. The regime is set for review again in 2017. These amendments were intended to further limit the limited merits review regime, and were targeted at two deficiencies that had been identified in the regime as it was:

(a) The Tribunal's tendency to focus narrowly on a single error in deciding whether to overturn a decision, rather than the effect of that error on the overall outcome;

111 *ADJR Act* s 16.

112 The merits review frameworks are contained in Part 6, Div 3A of the National Electricity Law.

(b) The absence of a statutory requirement for the Tribunal to assess the determination it was reviewing against the long term interests of consumers (the NEO).[113]

The major concern of the Review Panel was that the limited nature of the review 'set up a contest or "game" focussed less on reaching a preferable decision and more on changing the distribution of economic resources between NSP owners and customers or energy consumers, a contest in which consumers are at a distinct disadvantage.'[114] It has been estimated that appeals to the Tribunal have added $2 billion to $3 billion to the overall network costs paid by consumers.[115]

When it was originally proposed, consumer groups expressed their concerns about the availability of merits review over the AER's decisions.[116] Many of these concerns were made out in the course of the Tribunal's operations and formed the basis of the 2012 review. Nicholas summarised the concerns of consumer groups during the MCE's consultation prior to the introduction of the merits review process as follows:

(a) regulated service providers are able to 'cherry pick' key aspects of a decision because of their asymmetric information advantage over other parties. The result is all upside for the regulated business;

(b) regulated service providers have a direct interest in improving every aspect of a regulatory decision whereas the costs to end users of these changes will be minimal in overall terms (i.e. a minor change in the rate of return would have a huge financial impact to the service provider but would be smeared over the customer base);

(c) the ordinary standing arrangements prohibit broad involvement of end users in the process whereas the regulator's decision has been the result of extensive consultation and consideration over a year;

(d) a regulated service provider will essentially pass on the costs of litigation through its regulated fees and charges with the implication that customers pay twice in opposing a merits review challenge;

(e) regulated service providers may forum shop between judicial and merits review to take advantage of the relative complexities;

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113 George Yarrow, Michael Egan and John Tamblyn, *Review of the Limited Merits Review Regime: Stage Two Report* (30 September 2012) 2.

114 Ibid 2.

115 George Yarrow, Michael Egan and John Tamblyn, *Review of the Limited Merits Review Regime: Stage One Report* (29 June 2012) 18-21.

116 Nicholas, above n 25, 74; 87.

(f) a tribunal, which necessarily has less staff and access to expertise than the regulator, may misapply the complexities or facts of particular cases to the detriment of consumers; and

(g) the concern that the fear of complex and expensive merits review challenges will make the regulator err in favour of regulated service provided who are most likely to appeal.

Many of these concerns have been addressed by the reform of the merits review process after the 2013 amendments.

In terms of the possibility of regulated service providers being able to manipulate the review process for their advantage, with little advantage for the consumer, the legislation limits the scope of review and sets a threshold for seeking review.

Reviewable regulatory decisions are limited to specific categories of decisions,[117] including decisions that are prescribed by the Regulations to be reviewable regulatory decisions.[118] Review is only by leave of the Tribunal,[119] and it cannot grant leave to review the decision unless there is 'a serious issue to be heard and determined' and a prima facie case that a variance or remit of the decision for re-making would result in a materially preferable decision 'in making a contribution to the NEO'.[120] There is also a monetary threshold that must be met for network revenue or pricing determination where the ground for review relates to the amount of revenue that may be earned by a NSP. This must exceed $5,000,000 or 2 percent of the average annual regulated revenue of the RNSP.[121]

The laws specify that only particular grounds of review can be used for merits review. They are:

(a) the AER made an error of fact in its findings of facts, and that error of fact was material to the making of the decision;

(b) the AER made more than 1 error of fact in its findings of facts, and that those errors of fact, in combination, were material to the making of the decision;

(c) the exercise of the AER's discretion was incorrect, having regard to all the circumstances;

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117 National Electricity Law, s 71A.

118 For the sake of transparency in the review process, the AER is obliged to keep a written record of the decision-making process in relation to a reviewable regulatory decision or one that has been delegated as such, including draft decisions, submissions, and transcripts of any hearing conducted for the sake of making a decision: National Electricity Law, s 28ZJ.

119 National Electricity Law s 71B.

120 National Electricity Law, s 71E; 71P(2a)(c).

121 National Electricity Law s 71F.

(d) the AER's decision was unreasonable, having regard to all the circumstances.[122]

The applicant must specify the grounds of review they are relying on in their application.[123] Interveners may raise new grounds of review, even if not raised by the applicant.[124]

In merits review proceedings, applicants for review and interveners may only raise those matters that were raised in submissions before the original decision maker.[125] The Second Reading speech to these Acts clarify that this limitation is imposed to 'make the original decision making process meaningful.'[126] In contrast, the original decision maker, being the AER, may raise other matters, as long as it relates to a ground of review raised by the applicant or intervener or in support of a ground of review raised by the applicant or intervener.[127]

The Tribunal can only set vary or set aside the decision and remit the matter back to the AER if to do so will, or is likely to, result in a decision that is 'materially preferable' to the original decision 'in making a contribution to the NEO'.[128] In deciding this, the Tribunal must consider the decision 'as a whole',[129] not just whether a ground for review has been made out.[130]

Concerns over standing have also been largely ameliorated. The laws allow an 'affected or interested person or body' to apply to the Tribunal for review of a 'reviewable regulatory decision.'[131] An 'affected or interested person or body' is defined to mean:

> (a) a regulated network service provider to whom the reviewable regulatory decision applies;
>
> (b) a network service provider, network service user, prospective network service user or end user whose commercial interests are materially affected by the reviewable regulatory decision;
>
> (c) a user or consumer association;

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122 National Electricity Law, s 71C.

123 National Electricity Law, s 71B(2).

124 National Electricity Law s 71M.

125 National Electricity Law, s 71O; National Gas Law, s 258.

126 Second Reading Speech for the *National Electricity (South Australia) (National Electricity Law – Miscellaneous Amendments) Amendment Act 2007* (SA): South Australia, *Parliamentary Debates*, House of Assembly, 27 September 2007, 967 (The Hon. P.F. Conlon), in Tom Howe, 'In the Matter of the Limited Merits Review Regimes in the National Electricity Law and the National Gas Law' (Opinion submitted to the COAG Energy Council's Review of the Limited Merits Review Regime, Australian Government Solicitor, 12 September 2012) 4.

127 National Electricity Law, s 71O(1).

128 National Electricity Law, s 71P(2a).

129 National Electricity Law s 71P(2b)(c).

130 National Electricity Law s 71P(2b)(d)(i).

131 National Electricity Law, s 71B(1).

(d) a reviewable regulatory decision process participant.[132]

In addition, there is a wide standing test for users or consumers (or user or consumer groups) to intervene in reviews before the Tribunal, with the leave of the Tribunal.[133] Any person who made a submission in the regulatory decision-making process can also intervene.[134]

Further, s 71R(1)(b) provides that the Tribunal must, before making a determination, take reasonable steps to consult with (in such manner as the Tribunal thinks appropriate):

(i) network service users and prospective network service users of the relevant services; and

(ii) any user or consumer associations or user or consumer interest groups

that the Tribunal considers have an interest in the determination, other than a user or consumer association or a user or consumer interest group that is a party to the review.

Service providers are now prohibited from passing on the costs of litigation by s 71YA of the National Electricity Law. Other provisions limit the costs orders that are available against user or consumer interveners,[135] but not user or consumer applicants.

Concerns that the Tribunal lacks the expertise and resources of the AER may not be able to make the same calibre of decisions have been addressed by s 71P(2a)(d), which provides that the Tribunal may only decide to vary the decision (rather than send it back to the AER to remake the decision) where 'the Tribunal is satisfied that to do so will not require the Tribunal to undertake an assessment of such complexity that the preferable course of action would be to set aside the … decision and remit the matter to the AER to make the decision again.'

Ombudsman review

The AER is subject to the jurisdiction of the Commonwealth Ombudsman, as a prescribed authority under the *Ombudsman Act 1976* (Cth). This is stated in the AER's Service Charter, which is available on their website.[136] Ombudsman review is a cheap and often effective accountability mechanism to deal with individual complaints against an administrative decision-maker.

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132 National Electricity Law s 71A.

133 National Electricity Law s 71L.

134 National Electricity Law s 71K.

135 National Electricity Law ss 71X and 71Y.

136 See <https://www.aer.gov.au/sites/default/files/AER%20Service%20Charter.pdf>

The Ombudsman has the power to investigate administrative actions of the AER where a complaint is made to the Ombudsman, or instigate own motion investigations.[137] While there is no standing requirement for a complaint, the Ombudsman may dismiss a complaint if satisfied that the individual does not have a sufficient interest in the subject-matter of the complaint.[138] The Ombudsman has extensive investigatory powers, and the cost of that investigation is not borne by the complainant. The Ombudsman can mediate and conciliate disputes, as well as provide public reports in relation to the office's findings.

Transparency and Freedom of Information

The AER is subject to the *Freedom of Information Act 1982* (Cth), which places publication obligations on it for certain kinds of information (including details of its structure, functions and powers, appointments, details of arrangements for public engagement, contact details for FOI requests, and the agency's operational information).[139] It also creates a right of access to the public to documents held by the AER.[140] However, there are exemptions to this right that would make access to much of the AER's information difficult, in particular:

- the exemption for documents containing material obtained in confidence (s 45)
- the exemption for documents containing trade secrets or commercially sensitive information (s 47)
- the conditional exemption for documents that would affect Commonwealth-State relations (s 47B)
- the conditional exemption for documents that would reveal the deliberative processes of government (s 47C);
- the conditional exemption for documents that would affect the business affairs of an individual or organisation (s 47G).

The National Electricity Law also establishes a regime that allows (without requiring) the AER to disclose information given to it in confidence.[141] Decisions made by the AER about information disclosure may be reviewed in the Australian Competition Tribunal by a person whose interests are adversely affected by the decision.[142]

137 *Ombudsman Act 1976* (Cth) s 5.
138 Ombudsman Act 1976 (Cth) s 6.
139 *FOI Act 1982* (Cth) s 8.
140 *FOI Act 1982* (Cth) s 11.
141 National Electricity Law ss 28W-28ZB.
142 National Electricity Law s 71S-71W.

Finally, employees of the AER are protected by the *Public Interest Disclosure Act 2013* (Cth), which provides some protection for AER employees who make specified types of public interest disclosures that reveal illegal and otherwise improper conduct on the part of public officials within the AER.

Issues analysis and potential reform

Overall, the AER sits within a robust accountability framework, and is subject to pre-existing federal accountability mechanisms. The 2013 amendments to the Limited Merits Review Regime structurally addressed significant failings in the scheme, particularly from the perspective of consumer advocates, as it then stood.

(a) Tweaking the current regime to encourage greater consumer participation

There are, however, a number of small reforms that could be considered to enhance the existing accountability regimes, with a particular focus on requiring or encouraging greater consumer participation:

1. Reform of the appointments process to provide a consumer voice in the selection of AER members. This could be achieved by requiring consumer consultation by the COAG Energy Council prior to appointment. Consideration could also be given to requiring a consumer representative on the AER (see discussion above in relation to the Energy Council).

2. Easily accessible information about the different ways that consumers may challenge the decisions of the AER must be provided. At present, for example, the AER's website does not provide information on judicial review or the limited merits review process, and the information on the ability to seek FOI or Ombudsman review is found on the second page of its Service Charter. A single factsheet on consumer involvement in, and capacity to challenge, the decisions of the AER that includes information on judicial review, limited merits review, Ombudsman challenge and freedom of information should be included prominently on the AER's website.

   As proposed above in relation to the AEMC, this information should be contained in any publication developed by the AEMC and AER about the regulatory determination process.

3. Consideration should be given to changing the standing rules in judicial review proceedings to make certain the standing of consumer groups standing to challenge or intervene in judicial review proceedings. Further explanation of these possible reforms is provided above, in relation to judicial review of AEMC rule-making decisions.

4. Consideration should be given to amending the capacity to have costs awarded against consumers under the Limited Merits Review Regime. One concern that remains with the regime is the potential for a costs order to be made against user and consumer applicants that is not limited to reasonable administrative costs where the applicant has conducted themselves in a responsible way. This creates a potential barrier for engagement of consumers in the merits review process, and is in contrast to the position of user/consumer interveners that conduct themselves responsibly (as defined in the statute).[143]

5. The availability of both judicial review and limited merits review of AER determinations creates a potential for well-financed network providers to strategically seek review in both forums. This would place time and financial pressures on the AER and consumer groups, who would be forced to stretch their resources to engage with both challenges. Reform should be considered that reduces the possibility of the system being used in this way, for example, by removing the availability of merits review if an application is sought for judicial review.

(b) More significant change to the merits review process

In addition to these 'tweaks' of the current system, the 2012 review of the Limited Merits Review Regime recommended a number of more significant structural changes that the government did not implement.

The 2012 review panel made a recommendation that the Tribunal adopt a more inquisitorial-style process.[144] The panel considered the nature of the issues at stake in a price/revenue determination to be fundamentally different from binary decisions (for example, to grant or refuse a licence). The adoption of a more inquisitorial style process, with statutory obligations to invite all interested parties to contribute to a review, would facilitate a high level of consumer participation in the process. It would also reduce the likelihood that financially powerful parties can 'game' the adversarial system to the disadvantage of government and consumer litigants.

The second and even more fundamental change that was not adopted was the creation of a new review body, outside the tribunal system, that would be able to adopt a more inquisitorial, speedy and informal process,[145] and allow it to be staffed by appropriately qualified experts rather than judicially qualified tribunal members. There are significant benefits to this proposal, particularly insofar as it would require the Tribunal to actively

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143 National Electricity Law s 71X(2) and (3); 71Y(2).

144 George Yarrow, Michael Egan and John Tamblyn, *Review of the Limited Merits Review Regime: Stage Two Report* (30 September 2012) 42.

145 George Yarrow, Michael Egan and John Tamblyn, *Review of the Limited Merits Review Regime: Stage Two Report* (30 September 2012) 48-56.

seek contributions and perspectives from consumers in the course of its investigations. The 2012 review also recommended that this new review body be hosted by the AEMC. The justification for this recommendation was that the AEMC currently operates to constrain and check the discretion of the AER as the regulator; this would complement the purpose of the review body.[146] However, this proposal raises serious concerns about concentration of power in the AEMC as both rule-maker and review body.[147]

Given the most recent and significant reforms to the limited merits review process, it would appear prudent to observe how they operate before seeking further reforms. The approach of the Senate's References Committee on Environment and Communications was as follows:

> Although some stakeholders expressed concern that recent amendments to the merits review process did not go far enough, the committee considers that further changes should only be made if it has been demonstrated that the recent changes have not been effective. It is necessary for the changes to be tested before any consideration can be given to further enhancements to the limited merits review regime.[148]

146 George Yarrow, Michael Egan and John Tamblyn, *Review of the Limited Merits Review Regime: Stage Two Report* (30 September 2012) 52.

147 Contra the review's position at George Yarrow, Michael Egan and John Tamblyn, *Review of the Limited Merits Review Regime: Stage Two Report* (30 September 2012) 53.

148 Senate Environment and Communications References Committee, *Performance and Management of Electricity Network Companies: Interim Report* (April 2015) 94.

APPENDIX 1: About the researchers

Consultant: Dr Gabrielle Appleby is an Associate Professor at the University of New South Wales, is the Co-director of The Judiciary Project at the Gilbert + Tobin Centre of Public Law and is currently a Chief Investigator on the Australian Research Council Discovery Project, *Law, Order and Federalism*. She researches and teaches in Australian public law. Her work focuses on the nature, exercise and accountability of executive power. She has published widely in administrative and constitutional law in leading national and international journals. She has published a number of books, including *Government Accountability* (Cambridge University Press, 2015) with Judith Bannister and Anna Olijnyk, *Australian Public Law* (now in its second edition, Oxford University Press, 2014) with Alexander Reilly and Laura Grenfell, and *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) with Nicholas Aroney and Thomas John, and *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014) with John Williams and Patrick Keyzer. She regularly provides submissions and evidence to government and parliamentary inquiries. In 2012, Gabrielle completed her PhD on 'The Constitutional Role of the Solicitor-General', which was awarded the University Medal and the Bonython Prize. She received her LLM from the University of Melbourne in 2009 and her LLB (with first class honours) from the University of Queensland in 2005. Gabrielle has previously worked in the Queensland Crown Law office and the Victorian Government Solicitor's Office.

Research Assistant: Sophie Duxson is a graduate of UNSW Law School. She has previously worked as a tipstaff to Justice Rachel Pepper in the Land and Environment Court of NSW and is currently a Research Assistant to Professor Jane McAdam and Professor Dimity Kingsford-Smith at UNSW.