"Inconvenient Guests"? The Consumer Experience of Administrative Review for Electricity Pricing

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Reforms to the national energy market have recently taken centre-stage in Australian politics. Debates have raged about how best to ensure environmental sustainability, security of supply, and affordability of energy costs, especially for vulnerable groups. Against this backdrop, this article reflects upon the consumer experience of legal advocacy to challenge electricity pricing decisions in the Australian Competition Tribunal under the Limited Merits Review (LMR) regime between 2015 and 2017. The article argues that, although consumer advocacy groups were unable to use the LMR system to effect electricity price reductions in this period, they nonetheless made an essential contribution to the legal reviews undertaken of the Australian Energy Regulator's decisions. In light of the recent legislative abolition of LMR, the article also presents the case for reforms to the Administrative Decisions (Judicial Review) Act 1977 (Cth) to ensure that consumer groups can continue to participate in legal reviews of electricity pricing decisions in the future.

I. Introduction

Over the last decade Australian consumers have borne the brunt of sharp increases in their household and retail electricity bills. Yet their ability to seek administrative review of electricity pricing decisions made by the Australian Energy Regulator (AER) has been both limited, and short-lived. In 2013, the COAG Energy Council initiated legislative reforms in the regulation of electricity distribution within the National Electricity Market (NEM). A significant aspect of these reforms was the novel attempt to insert consumer voices into the process of Limited Merits Review (LMR) of distribution decisions in the Australian Competition Tribunal (the Tribunal). Prior to these reforms, LMR challenges had been brought only by the various State-based network companies, and responded to by the AER. In response to the reforms, a number of consumer groups participated in LMR processes in the first post-reform regulatory cycle, between 2015 and 2017. Yet just four years after the reforms, in June 2017, the Commonwealth Government announced that it would abolish the LMR system in its entirety.[1]

Drawing on the experiences of consumer advocacy groups who participated in the post-reform regulatory cycle, this article seeks to evaluate the effect of the 2013 reforms for consumers and assess the likely impact of the Commonwealth's decision to abolish LMR. The authors argue that while the 2013 legislative reforms to the *National Energy Law* (*NEL*) made the regulatory landscape significantly more inclusive of consumers, it was too early to determine whether the reformed LMR system may have, in time, provided an effective mechanism for consumers to challenge price increases to the cost of electricity. Notwithstanding the considerable obstacles that existed for consumers under the LMR system,

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[1] The Hon Malcolm Turnbull (Cth), "Press Conference with the Hon Josh Frydenberg MP, Minister for the Environment and Energy and Matt Canavan, Minister for Resources and Northern Australia" (Media Release, 20 June 2017) <https://www.pm.gov.au/media/press-conference-minister-environment-and-energy-and-minister-resources-and-northern-australia>.

it is submitted that its abolition may exclude consumer voices from review of regulatory decisions and, unless further research and reforms are undertaken, recreate the imbalance across the regulatory system in favour of network companies that the 2013 reforms sought to address.

In order to contextualise their argument, the authors first provide an overview of the NEM and the 2013 reforms before briefly outlining consumer experiences of the first post-reform regulatory cycle in the three key states of NSW, South Australia and Victoria. They then explore the key "wins" that consumers experienced, as well as particular issues that hampered their ability to pursue lower prices through LMR proceedings, including resource imbalances between consumer groups and network companies; a reliance on "business as usual" interpretations of the 2013 reforms; and varied approaches by the Australian Competition Tribunal to the new consumer consultation process. Finally, the potential barriers to consumer participation in reviews in a post-LMR system are examined, and the need for further research into best practice models for consumer participation in regulatory decision-making schemes is outlined.

II. Background to the National Electricity Market

The NEM is a wholesale electricity market that extends across five jurisdictions in eastern and southern Australia: Queensland, New South Wales, Victoria, South Australia and Tasmania. The NEM comprises each of the four distinct parts of the electricity supply chain: generation, transmission, distribution and retail. Certain parts of the NEM operate as natural monopolies requiring regulation. This includes the distribution networks, which are responsible for converting electricity from the high-voltage transmission networks to the medium and low voltages distributed to consumers. There are currently 12 distribution network service providers (DNSPs) in the NEM, each of which operates as a monopoly over a certain geographic area.[2] Effective price regulation of DNSPs is important for consumers, given that the tariffs charged to retailers for the use of distribution and transmission networks comprise between 25 and 55% of a typical residential electricity bill.[3]

In 1996 the *NEL* was passed as cooperative legislation across the jurisdictions participating in the NEM in order to provide for harmonised regulation of the distribution networks.[4] Section 7 of the *NEL* sets out the National Electricity Objective (NEO) which places the "efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers" at the centre of the legislative scheme. The *NEL* also provides for the making of the *National Electricity Rules* (*NER*).[5] Together, the *NEL* and the *NER* provide the core legal framework for regulation of the DNSPs by the AER.

This regulation occurs in five-year regulatory cycles. At the start of each cycle, the AER makes a determination of the maximum revenue each DNSP can recover from consumers. This determination is based on the AER's estimate of the efficient costs likely to be incurred by the DNSP during the regulatory period, including sums for forecast operating expenditure, capital expenditure and corporate tax. The AER uses a variety of tools to make these estimates, including benchmarking. Prior to making the determination, the AER receives revenue proposals from the DNSPs themselves, publishes a draft determination, and accepts comment on the draft determination in the form of revised proposals from the DNSPs. The AER also receives submissions from consumer groups and from governments during this

[2] Australian Energy Market Commission, *Electricity Distribution* (2017) <http://www.aemc.gov.au/Australias-Energy-Market/Electricity/Distribuution>.

[3] Australian Energy Market Commission, "2016 Residential Electricity Price Trends" (Final Report, 14 December 2016) ix and 38 <http://www.aemc.gov.au/getattachment/be91ba47-45df-48ee-9dde-e67d68d2e4d4/2016-Electricity-Price-Trends-Report.aspx>.

[4] South Australia, as the lead legislator in the cooperative legislative scheme, passed the *National Electricity Law* as a schedule to the *National Electricity (South Australia) Act 1996* (SA). Legislation was subsequently passed for the *National Electricity Law* in each of the other participating jurisdictions, eg: *National Electricity (New South Wales) Act 1997* (NSW) s 6. For further background on the creation of the NEM and the passage of the *National Electricity Law*, see KPMG, *National Energy Market: A Case Study in Microeconomic Reform* (2013) <http://www.aemc.gov.au/getattachment/8c426f7d-ea5c-4823-9b86-510dfd4e82dd/The-National-Electricity-Market-A-case-study-in-mi.aspx>.

[5] *National Electricity Law*, Pt 7.

process. Once the AER's final determination has been made, the revenue is "locked in" for the five-year cycle, subject to the potential for review. Prior to the passage in October 2017 of the *Competition and Consumer Amendment (Abolition of Limited Merits Review) Act 2017* (Cth) the mechanisms available for reviews of the AER's decision were LMR and/or judicial review.

III. Limited Merits Review and the 2013 Reforms

In 2008, the *NEL* was amended to provide for LMR of the AER's determinations by the Tribunal. The merits review undertaken was "limited" in the sense that it required the party seeking review to demonstrate an error of fact material to the decision, incorrect exercise of discretion, or unreasonableness on the part of the AER.[6] As described by the Ministerial Council on Energy, the introduction of LMR was intended to allow the Tribunal "to do more than a court can do under judicial review, but … less than a full re-exercise of the power to make the decision".[7] From its initiation, the LMR regime was intended to provide for the participation of consumers, and one of the goals of the (then) Ministerial Council on Energy was to ensure that all stakeholder interests were taken into account by the Tribunal.[8] However, significant energy price rises and criticism from consumer groups regarding the difficulties of participation in LMR prompted the COAG Energy Ministers to appoint an independent expert panel to review the regime and make proposals for reform.[9]

The expert panel delivered their report in two stages in June and September 2012. In their first stage report, the expert panel identified a number of deficiencies in the way that the Tribunal took into account the views and interests of consumers. Specifically, the expert panel found that despite the framing of the NEO, the long-term interests of consumers had not been explicitly considered by the Tribunal when reviewing decisions of the AER. Further, the expert panel found that consumer bodies had felt excluded from the review process, not only because of the cost risks associated with merits review but also because of the formal and legalistic nature of the review process, which they experienced as "hostile".[10] In the words of the expert panel, changes were necessary to ensure that consumers and users feel "if not exactly 'at home' in the process, [that] they are more than simply inconvenient guests".[11]

In their second stage report, the expert panel report provided recommendations to address these deficiencies, which were broadly implemented in a series of reforms to the *NEL* in 2013. Importantly for consumers, the *NEL* was amended to allow those who had made submissions or comments during the AER's determination process ("regulatory review participants") to apply for review before the Tribunal.[12] A new obligation was also inserted in s 71R(1)(b) requiring the Tribunal to "take reasonable steps" to consult with users and consumers before making a determination.[13] Costs provisions were also amended to limit the kinds of costs orders the Tribunal could make against small or medium consumer interveners to the "reasonable administrative costs" of the other party.[14]

In order to ensure that the NEO was expressly considered by the Tribunal in its decision-making, s 71P(2a)(c) was added to clarify that the Tribunal could only vary or set aside the AER's determination if satisfied that to do so would (or would be likely to) result in a decision that would be materially preferable

[6] *National Electricity Law*, s 71C.

[7] Ministerial Council on Energy, "Review of Decision-Making in the Gas and Electricity Regulatory Frameworks" (Decision, May 2006) 22.

[8] Professor George Yarrow, The Hon Michael Egan and Dr John Tamblyn, "Review of the Limited Merits Review Regime" (Stage One Report, 29 June 2012) 8, 43.

[9] South Australia, *Parliamentary Debates*, House of Assembly, 26 September 2013, 7171 (John Rau, Deputy Premier).

[10] Yarrow, Egan and Tamblyn, n 8, 43.

[11] Yarrow, Egan and Tamblyn, n 8, 44.

[12] *Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA) s 7 inserted the definition of "regulatory review participant" in *National Electricity Law* s 71A.

[13] *Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA) s 14.

[14] *Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA) s 16.

to the AER's decision in making a contribution to the achievement of the NEO. In the legislation, this is referred to as a "materially preferable NEO decision".[15] A corresponding requirement was added in relation to the AER's decision-making in s 16(1)(d) of the *NEL*.[16]

In the second reading speech to the amending Bill, these adjustments were touted by the South Australian Deputy Premier, John Rau, as "key in ensuring consumers do not pay more than necessary for the quality, safety, reliability and security of supply of electricity and natural gas under the national energy laws".[17] Mr Rau affirmed the Energy Ministers' intent that the long-term interests of consumers be considered paramount in the regulation of the energy industry. He expressed confidence that the reforms would address existing barriers to consumer participation and ensure subsequent reviews by the Tribunal were "more robust and transparent and importantly more focussed on the outcomes that are in the long term interests of consumers".[18] The first test of these reforms for consumers unfolded in a series of Tribunal reviews, concerning the AER's determinations for the DNSPs operating in New South Wales, South Australia and Victoria, between 2015 and 2017.

IV. Consumer Participation in the 2015–2017 Review Proceedings

In early 2015, the newly established Energy Consumers Australia (ECA) made a decision to fund consumer groups that had participated in the AER's determination processes to seek legal advice in order to participate in LMR challenges to the AER's decisions for the DNSPs. The first (and ultimately, the most extensive) of these challenges was made by the Public Interest Advocacy Centre (PIAC) in relation to the AER's decisions for Ausgrid, Essential Energy and Endeavour Energy ("Networks NSW"). PIAC applied for and was granted leave to appear in the Tribunal as an applicant for merits review,[19] and as an intervener on the reviews sought by Networks NSW.[20] The areas covered by PIAC's applications included challenges to the AER's methodology for return on debt, return on equity, and operating expenditure. The Commonwealth Minister for Resources, Energy and Northern Australia, as well as six other interstate DNSPs from Queensland, Victoria and South Australia[21] were also granted leave to intervene in the reviews, which took place over three weeks in September and October 2015.

In August 2015, the Tribunal held a two-day consumer forum, pursuant to the consultation requirement under s 71R(b) described above. Twenty-one speakers, mostly representatives of community organisations, registered to provide commentary on the electricity determinations under review, with each organisation permitted to speak for approximately 15 minutes and submit up to three pages of written material following the consultation.

In its decisions in February 2016 the Tribunal upheld grounds of review advanced by the NSW networks in relation to three broad issues, namely the return on debt, the value of imputation credits (gamma), and operating expenditure [opex]. The Tribunal ordered that the determinations should be remitted to the AER, to be remade in accordance with the Tribunal's reasons as set out in its lead decision in *Applications by Public Interest Advocacy Centre and Ausgrid* (*PIAC-Ausgrid*).[22] Although the Tribunal commended PIAC's involvement as an applicant and intervener in the matters,[23] its findings did not

[15] *Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA) s 13.

[16] *Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA) s 5.

[17] South Australia, *Parliamentary Debates*, House of Assembly, 26 September 2013, 7174 (John Rau, Deputy Premier).

[18] South Australia, *Parliamentary Debates*, House of Assembly, 26 September 2013, 7174 (John Rau, Deputy Premier).

[19] *Applications by Public Interest Advocacy Centre and Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2.

[20] Leave to intervene was granted by directions made by the Tribunal on 5 August 2015.

[21] AusNet Services (Distribution) and (Transmission) Pty Ltd, CitiPower Pty, Powercor Australia Ltd, SA Power Networks, United Energy Distribution Pty Ltd, and Ergon Energy Corporation Ltd.

[22] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1 (*PIAC-Ausgrid*). The two other determinations, *Applications by Public Interest Advocacy Centre and Endeavour Energy* [2016] ACompT 2 and *Applications by Public Interest Advocacy Centre and Essential Energy* [2016] ACompT 3, adopted the reasoning set out in *PIAC-Ausgrid* on reasons of common concern.

[23] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [58].

automatically result in the changes PIAC had sought. This is because, first, the Tribunal found that PIAC's arguments in relation to opex were but one of a "series of concerns" raised by the applicants and interveners that justified remitting the matter to the AER,[24] and that the AER would have to undertake a wholesale review of the way it made its opex determination, beyond the changes argued for by PIAC. Similarly, the Tribunal's approach to the issue of return on debt meant that PIAC's arguments did not directly arise for determination by it,[25] with their relevance on remittal being contingent on the new approach undertaken by the AER. In relation to return on equity, the Tribunal rejected PIAC's argument in relation to the proper value of equity beta,[26] finding that the AER had not made any reviewable error under s 71C of the *NEL*.[27]

In March 2016, the AER filed applications for judicial review of the Tribunal's decisions on the issues of opex, debt and gamma for Networks NSW.[28] PIAC applied for and was granted leave to intervene in these matters to make submissions in relation to the issues of opex and debt,[29] marking the first time that a consumer organisation had appeared in relation to such an application. Ultimately, however, the Full Federal Court did not find any error in relation to the reasoning of the Tribunal in relation to opex and debt,[30] resulting in those issues being remitted to the AER as provided for by the Tribunal's original directions. As discussed further in Part VI, both the Tribunal and the Court's approach to the matters raised in the community consultation, and to the key legislative reforms in s 16(1)(d) and 71P(2a)(c) of the *NEL* were disappointing for consumer advocates, as they largely failed to embrace PIAC's (and others') submissions about the intention of the 2013 legislative reforms.

In October 2015, while the Tribunal proceedings in relation to Networks NSW were still reserved, the AER released its final determination for SA Power Networks (SAPN) in South Australia. SAPN applied for review in the Tribunal on multiple aspects of the determination, and the South Australian Council of Social Service (SACOSS) applied for review in relation to return on operating expenditure.[31] SACOSS was ultimately refused leave by the Tribunal to pursue this ground of review on the basis that it had not sufficiently raised the matter with the AER prior to the final decision being made,[32] as required by s 71O(2)(c) of the *NEL*.

In June 2016, the Tribunal held a one-day community consultation forum, at which representatives from 14 organisations, including SACOSS, presented short submissions on the matters under review, and written submissions following the consultation.

In October 2016, the Tribunal handed down its decision in relation to SAPN,[33] dismissing each of SAPN's grounds of review, and finding that the AER had made no relevant error under s 71C of

[24] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [472].

[25] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [944].

[26] In this context, "equity beta" is a point value selected by the AER to reflect its assessment of the "riskiness" of a firm's returns compared to the level of risk in the general market: Australian Energy Regulator, *Better Regulation: Equity Beta Issues Paper* (2013) 8 <https://www.aer.gov.au/system/files/AER%20-%20equity%20beta%20issues%20paper%20-%20rate%20of%20return%20guideline%20-%20October%202013.PDF>.

[27] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [813].

[28] Matters NSD 415, 416 and 418 of 2016. The AER also applied for review of the Tribunal's decisions in relation to Actew AGL and Jemena Gas Networks, matters NSD 419 and 420 of 2016 respectively.

[29] *Australian Energy Regulator v Australian Competition Tribunal* [2016] FCAFC 144.

[30] *Australian Energy Regulator v Australian Competition Tribunal (No 2)* 345 ALR 1, 100 [386] (opex), 145 [617] (debt).

[31] Both SAPN and SACOSS had also applied for review in relation to the AER's determination of the return on equity. However, these grounds of review were withdrawn following the Tribunal's finding in the *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1 decision that the AER had made no relevant error in its similar determination of the return on equity in relation to Networks NSW.

[32] *Re South Australian Council of Social Service Inc* [2016] ACompT 8, [42]–[43].

[33] *Re SA Power Networks* [2016] ACompT 11. An application was subsequently made by SAPN for judicial review of the decision in the Full Federal Court, and dismissed by the Court in January 2018: *SA Power Networks v Australian Competition Tribunal (No 2)* [2018] FCAFC 3.

the *NEL*. In contrast to the *PIAC-Ausgrid* decision, considerable attention was given in the decision to the submissions made in the community consultations, with the Tribunal finding that, while it was not ultimately necessary to rely on the submissions as no reviewable error was made out, the Tribunal would have been likely to do so were it required to consider whether any alternative decision was in the long-term interest of consumers.[34]

In May 2016, following the *PIAC-Ausgrid* decision, the AER released its final determinations in relation to the five Victorian DNSPs: CitiPower, Powercor, United Energy Distribution, Jemena and AusNet Services. Each of Victorian DNSPs applied to the Tribunal for review of these determinations, with the Minister for Energy, Environment and Climate Change for the State of Victoria also intervening. The Victorian consumer organisation Consumer Utilities Advocacy Centre (CUAC)[35] sought advice with a view to participating as an applicant or intervener in these reviews. However, it ultimately elected to participate in the Tribunal's community consultation process.

As in the previous consultations, the Tribunal held a single public consultation forum in relation to the Victorian DNSPs on 6 October 2016 at which consumer representatives were allocated 15 minutes of speaking time, with an option to submit a subsequent three pages of written submissions. Perhaps in response to the unsatisfactory treatment of consumer submissions in the *PIAC-Ausgrid* Tribunal decision (and the Tribunal's decision in relation to SAPN not yet having been handed down) only three consumer organisations made submissions to the forum, including CUAC and PIAC. CUAC presented submissions on the issue of labour price growth rates raised by CitiPower and Powercor, while PIAC's submissions concerned the construction of s 71R(1)(b), critiquing the adequacy of the Tribunal's consultation process and requesting further opportunity for consumer organisations to provide input. In a direction dated 18 October 2016, the Tribunal responded to these submissions, granting consumers an additional 10 pages of written submissions to be lodged shortly before the commencement of the hearing. Nine consumer organisations made submissions to this second round of consultation. Following the publication of reasons in the Full Federal Court decision for Networks NSW in June 2017, the Tribunal also afforded consumer organisations the opportunity to make further submissions in relation to the relevance of that decision to the Tribunal's task.

In October 2017, the Tribunal handed down its decisions in relation to each of the Victorian DNSPs,[36] dismissing each of their grounds of review, and, as it did in its SAPN decision, made a finding that the AER had made no relevant error to be corrected pursuant to s 71P(2a) of the *NEL*. The submissions of consumer groups were considered by the Tribunal in a number of key areas. In particular, the Tribunal took note of CUAC's submissions on the issues of labour price growth rate for CitiPower and Powercor,[37] and productivity factor for each of the DNSPS;[38] ECA's submissions on gamma for Jemena;[39] and the Queensland Electricity Users Network submissions on the issue of self-insurance for AusNet Services.[40]

V. Was the Intent of the 2013 Reforms Realised?

Reflecting on the extent of the above consumer involvement in the 2015–2017 review proceedings, it is clear that one key objective of the 2013 reforms, to make the LMR process more inclusive of consumer voices, was successfully realised. Each of the decisions made by the AER that became subject to review in the Tribunal had consumer involvement, either as applicants or interveners (in NSW and SA) and/or in the Tribunal's consultation process (in NSW, SA and Victoria). In NSW, PIAC demonstrated that it

[34] *Re SA Power Networks* [2016] ACompT 11, [103].

[35] CUAC has since been replaced by the Consumer Policy Research Centre (CPRC).

[36] *Re ActewAGL Distribution* [2017] ACompT 2; *Re AusNet Electricity Services Pty Ltd* [2017] ACompT 3; *Re CitiPower Pty Ltd* [2017] ACompT 4.

[37] *Re CitiPower Pty Ltd* [2017] ACompT 4, [73], [116].

[38] *Re ActewAGL Distribution* [2017] ACompT 2, [513].

[39] *Re ActewAGL Distribution* [2017] ACompT 2, [297], [303].

[40] *Re AusNet Electricity Services Pty Ltd* [2017] ACompT 3, [158]–[162].

was possible for consumer organisations to appear and prosecute arguments through the LMR process as an applicant and intervener through to a final decision being made by the Tribunal. Furthermore, the amended cost protections for small and medium consumer interveners brought in by the 2013 reforms[41] provided consumer groups participating in LMR with the confidence that they would not be at significant risks of an adverse costs order being made against them in the Tribunal.

The effect that this new level of consumer participation had upon the Tribunal and its members is difficult to quantify, but important not to underestimate. While the focus of the Tribunal's enquiries had previously been to evaluate the strength of the arguments of the DNSPs in favour of increased revenue, having consumer voices at the table provided a balance against the Networks' arguments, reality-testing and giving different perspectives to their claims. For example, in the NSW determinations, the arguments made by PIAC in relation to the value of equity beta selected by the AER (as too high) may have counterbalanced arguments made by the DNSPs that equity beta was too low, ultimately contributing to the Tribunal's decision to uphold that aspect of the AER's determination. In turn, this aspect of the *PIAC-Ausgrid* decision, along with the participation of SACOSS on that same issue in the South Australian proceedings, may have influenced the decision of SAPN to withdraw its equity ground of review from the LMR proceedings. As a result, in both jurisdictions, consumers did not experience price rises on account of equity beyond the level of revenue set by the AER in its Final Determinations.

It is clear that, in this way, the potential for consumer involvement in reviews changed the risk profile for DNSPs seeking review of the AER's decisions, because while there had previously only been two possible outcomes from challenging the decision (the same or greater revenue) consumer involvement as parties in reviews initiated by the Networks raised the possibility of reviews resulting in decreased revenue.

Notwithstanding these important shifts, consumer involvement in LMR processes in the first post-reform regulatory cycle did not lead to price reductions beyond the levels of revenue set by the AER. In the authors view, this does not necessarily represent a failing on the part of consumer parties involved in LMR processes, or a failure of the LMR regime overall, but rather, the slow pace with which legislative reform translated into qualitatively different decision-making by both the AER and the Tribunal. Nevertheless, in order to properly evaluate how well the LMR system operated for consumers, as well as to consider what should now replace it, it is important to reflect upon the obstacles for consumers in pursuing and achieving price reductions under the LMR system.

VI. The Obstacles to Effecting Consumer Price Protection through LMR

The first key obstacle to consumer success in the LMR system arose from the considerable resource and information asymmetry between consumer organisations and DNSPS. While the amendments to the standing and cost rules in the *NEL* and the *NER* ostensibly put consumer applicants on the same footing as DNSPs challenging the AER's decisions, in reality, the organisations that were most heavily involved as consumer advocates in the first post-reform regulatory cycle – PIAC, SACOSS and CUAC – continued to face a structural disadvantage when compared to the other parties to reviews. The nature of the AER's decision-making is extremely complex, and analysing the correctness of its proposals requires lawyers with expertise in both the *NEL* and the *NER*, as well as economists with expertise in the regulation of electricity markets, and engineers with expertise in energy-related infrastructure. Obtaining this advice externally (as it is rarely available in-house) over the course of a determination period is both time-consuming and costly for consumer organisations. Yet, as has been identified by other commentators, weak engagement with the Tribunal's evaluation of technical evidence was a key limitation to consumer participants' success in the appeals process.[42]

[41] *National Electricity Law* s 71X–71Y.

[42] Sophie Li, "Public Interest Advocacy in the Australian Competition Tribunal" (2017) 87 *Australian Institute of Administrative Law Forum* 101.

This issue was also related to a broader challenge that was faced by consumer organisations participating in LMR processes: that these small organisations rarely had consistent and guaranteed funding or staff available to participate continuously in the AER's reset processes over the 2–5-year timeframe required.[43] Indeed, for most consumer organisations, engagement with the AER's processes was only one of the advocacy initiatives that they were involved with over the relevant time period.

As a result of these factors, consumer groups were often hampered in their capacity to organise quickly and robustly enough to make their own applications for review of the AER's decisions (as opposed to simply contributing their perspectives on the challenges made by the DNSPs). In turn, this diminished the capacity of consumer organisations to actively seek price reductions beyond the AER's determinations, as opposed to simply staving off price increases sought by DNSPs in review processes.

The second challenge to the achievement of price reductions for consumers under LMR was the "business as usual" approach taken by the Tribunal to the construction of the *NEL*, most particularly in the *PIAC-Ausgrid* decision for the NSW DNSPs. A primary issue of concern for consumers in the 2015–2017 reviews was what impact, if any, the legislative amendments relating to the NEO in s 7 of the *NEL* would have on LMR proceedings. Section 7 provides:

> The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to-
>
> (a) price, quality, safety, reliability and security of supply of electricity; and
> (b) the reliability, safety and security of the national electricity system.

As noted in Part III, although s 7 predated the 2013 changes, two important reforms to the law appeared to put the focus of both the AER and the Tribunal more squarely on the NEO as the touchstone for other decision-making powers. With respect to the AER, s 16(1)(d) mandates that in making its regulatory decisions, the AER must:

> (i) make the decision that the AER is satisfied will or is likely to contribute to the achievement of the national electricity objective to the greatest degree (the **"preferable reviewable regulatory decision"**); and
> (ii) specify reasons as to the basis on which the AER is satisfied that the decision is the preferable reviewable regulatory decision.

With respect to the Tribunal, s 71C(1a) provided that any applicant for review must specify in its application how the fresh decision sought would be likely to result in a materially preferable NEO decision, while the new s 71P(2a)(c) of the *NEL* circumscribed the Tribunal's powers, allowing it to only vary or set aside a decision of the AER if it was satisfied that to do so would be likely to advance the NEO:

> (2a) Despite subsection (2), the Tribunal may only make a determination-
>
> (a) to vary the reviewable regulatory decision under subsection (2)(b); or
> (b) to set aside the reviewable regulatory decision and remit the matter back to the AER under subsection (2)(c),
>
> if-
>
> (c) the Tribunal is satisfied that to do so will, or is likely to, result in a decision that is materially preferable to the reviewable regulatory decision in making a contribution to the achievement of the national electricity objective (a **"materially preferable NEO decision"**) (and if the Tribunal is not so satisfied the Tribunal must affirm the decision)

[43] For example, during the time in which it was involved in the consumer consultations for the Victorian LMR proceedings, CUAC was subject to a review of both its functions and funding, which made its future direction as a centre highly uncertain. This uncertainty was only resolved after the conclusion of the hearing of the Victorian proceedings, with the government announcing new funding, and a new strategic direction, for the Centre: The Hon Marlene Kairouz MP, "New Research Centre to Help Protect Consumers" (Media Release, 9 December 2016). Likewise, the Queensland Electricity Users Network indicated that its members would have benefited from early technical and legal advice about the LMR process, and would have considered seeking review of the AER's decisions for Ergon and Energex had such assistance been available: Queensland Electricity Users Network, Submission to COAG Energy Council, *Review of Limits Merits Review Regime*, 3 October 2016.

Although the insertion of these sections led consumers to expect that Tribunal decisions would be more favourable to their interests, the Tribunal's decision in *PIAC-Ausgrid* did not adopt the construction of either section for which consumers agitated in the proceedings.

With respect to the AER's decision-making, PIAC argued that the insertion of s 16(1)(d) implicitly widened the grounds of review in s 71C(1) of the *NEL*, in that it restricted the discretions otherwise available to the AER in the *NER*, and placed an obligation upon the AER to ensure that the decision made was the one that was most NEO-advancing. Were these submissions to have been accepted, the Tribunal's evaluation of the correctness of each discretionary regulatory decision would have focused on an inquiry of whether the long-term interests of consumers were served. However, this argument was not adopted by the Tribunal in its reasons, with the Tribunal finding that it was not "necessary or helpful … to give any expanded meaning to the available grounds of review".[44] Likewise, PIAC's submissions as to the proper construction of s 16(1)(d) were rejected by the Full Federal Court on review.[45]

With respect to the Tribunal's power to vary or remit the AER's decisions under s 71P(2a), PIAC argued that the advancement of the NEO meant *the promotion of* the long-term interests of consumers, and that any putative decision by the Tribunal that would not advance these interests (as identified through the engagement and participation of user and consumer groups in the Tribunal) should be rejected.[46] However, the Tribunal found that the premise of the NEO was simply that the long-term interest of consumers would be served by regulation that advances economic efficiency,[47] and by a system that allows network providers to recover at least their efficient costs for the services they provide.[48] In this manner, the Tribunal gave very different emphasis to the word "for" in "for the long term interests of consumers" than the interpretation sought by consumers. The Tribunal's interpretation of the phrase was that efficiency (for which the AER's regulation provides a proxy) should be pursued *because it is in* the long-term interests of consumers. Effectively, this meant that the question to be answered by the Tribunal under s 71P(2a)(c) (would another decision be in the long-term interests of consumers?) could be answered in the affirmative if the Tribunal was satisfied that errors in regulatory judgment would be corrected, and the appropriate revenue for DNSPs could therefore be determined.[49]

It is evident from the Tribunal's reasons in the *PIAC-Ausgrid* decision that it may have favoured this interpretation because it found the "long term interests of consumers" a difficult concept to apply empirically, given that some elements of the NEO appeared to be in conflict. Reflecting on the views presented in the consumer consultation, the Tribunal noted that the desire by some consumers for lower prices needed to be balanced against the need of others for high levels of safety and security of supply.[50] Since the Tribunal found "consumers" should be treated as a generic group, and that the needs of particular consumer groups could not be prioritised over others,[51] it is easy to sympathise with the Tribunal's conclusion that the real answer to be determined must lie in matters of correct regulatory judgment. However, in the authors' view, the Tribunal's finding in *PIAC-Ausgrid* that "the 2013 legislative amendments give rise to a multifaceted regulatory regime calling for a balance between the interests of consumers on the one hand and the interest of the DNSPs on the other"[52] demonstrated that it sidestepped what consumers submitted was at the heart of the 2013 legislative reforms: because the interests of the DNSPs, unlike the interests of consumers, are no part of the NEO.

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[44] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [108].

[45] *Australian Energy Regulator v Australian Competition Tribunal (No 2)* (2017) 345 ALR 1, 40 [158]–[159].

[46] PIAC, "PIAC 'Framework' Submissions", Submission to *Applications by Public Interest Advocacy Centre (Ausgrid)* [2016] ACompT 1, *Applications by Public Interest Advocacy Centre and Endeavour Energy* [2016] ACompT 2 and *Applications by Public Interest Advocacy Centre and Essential Energy* [2016] ACompT 3.

[47] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [77].

[48] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [787].

[49] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [1220].

[50] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [1180].

[51] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [61].

[52] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [466].

Although the nature of the Tribunal's decisions in relation to the South Australian and Victorian DNSPs did not lend itself to a freestanding consideration of the NEO in the same manner as the *PIAC-Ausgrid* decision (because these decisions wholly affirmed the AER's determinations) it is interesting to contrast the findings in *PIAC-Ausgrid* with the dicta of the Tribunal in *Application by SA Power Networks*. In the latter decision, when referring to the long-term interests of consumers, the Tribunal clearly accepted the contentions of the organisations appearing before the consumer consultation process that price was the key factor of concern to them in the balancing of the NEO factors.[53] While these later decisions demonstrate that the centrality of consumer views and the NEO may have increased in Tribunal decisions, the rate of change appears to be slow.

A third issue arising for consumer involvement from the perspective of price reduction in LMR challenges was the varied manner in which Tribunals incorporated the consumer consultation process in their decision-making. Inserting a requirement for the Tribunal to consult with consumers was a crucial limb of the 2013 reforms, designed to enhance consumer participation and centre consumer interests in the Tribunal's decision-making. Importantly, the consultation process was intended to provide an informal mechanism for consumer participation that was accessible for smaller organisations with few financial or personnel resources. However, there was little clarity in the decisions of the Tribunal as to how either the Tribunal itself, or the parties to reviews, could properly make use of the materials put before them, and how (if at all) consumer groups could respond to further submissions put on by parties that were adverse to their interests.

For example, in the *PIAC-Ausgrid* decision, the Tribunal found that notwithstanding that the consumer consultation process had served to "identify and inform the Tribunal significantly as to the matters of concern to significant sections of the consumer community and how some consumer representatives regarded the long-term interests of consumers were best served",[54] the Tribunal did not need to address those concerns separately, given that the role and submissions of PIAC "encompassed" the matters arising from the consultation.[55]

This position was a difficult one for many of the organisations who presented at the consultation to accept, given that many had put on materials that were outside the scope of those put forward by PIAC in its applications. In contrast, over 50 paragraphs[56] were devoted to submissions made by consumer parties in *Application by SA Power Networks*, to inform the Tribunal's assessment of whether any amended or remitted decision would be in the long-term interests of consumers.[57] Likewise, in the proceedings for the Victorian DNSPs, the Tribunal's responsiveness to community groups' call for the opportunity to make further and more extensive submissions about the issues under review, and the ultimate consideration of those submissions alongside those of the parties to the matters, were welcome signs that the Tribunal recognised the relevance of such submissions to its statutory task.

Certain important statutory questions (such as the proper application of s 71O to the consumer consultation process) were left unanswered by the Tribunal in its decisions between 2015 and 2017. Notwithstanding this, the authors' view is that, in time, the consumer consultation process would have continued to increase in significance as part of the LMR process. However, with the abolition of LMR, the ways in which this might have occurred is now purely an academic question.

VII. An Old Paradigm, or a New One?

As is clear from the above analysis, consumers were left with a mixed picture at the close of the first post-reform regulatory cycle. While the 2013 reforms had facilitated improved participation from consumer parties in LMR challenges, several obstacles, including resources, funding, and the approach of courts and tribunals to the 2013 amendments, had stymied consumers seeking price reductions beyond the level

[53] *Re SA Power Networks* [2016] ACompT 11, [59].

[54] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [62].

[55] *Applications by Public Interest Advocacy Centre and Ausgrid* [2016] ACompT 1, [64].

[56] *Re SA Power Networks* [2016] ACompT 11, [50]–[103].

[57] *Re SA Power Networks* [2016] ACompT 11, [103].

of revenue determined by the AER in its final decisions. In light of these obstacles, consumer groups began to lobby for further changes to the LMR system that would improve their prospects of success in future reviews.

On 19 August 2016, the COAG Energy Council tasked its Senior Committee of Officials (SCO) with reviewing the effectiveness of the LMR regime since the introduction of the 2013 reforms. Section 71Z of the *NEL* required such "a review of the Tribunal's role" to be initiated before 1 December 2016. However, the Energy Council's review went beyond this legislative requirement by inviting the SCO to "explore all feasible options, including the removal of limited merits review".[58] The SCO considered submissions from over 30 stakeholder groups, including consumer groups, DNSPs and the AER.[59] Ultimately, the SCO did not accept that LMR should be abolished, but tasked the Commonwealth Department of Environment and Energy with consulting stakeholders to determine which aspects of the system should be reformed prior to the next round of determinations taking place.[60] However, consultations on these potential reforms were put on hold following the Commonwealth's June 2017 announcement that LMR would be abolished.[61]

Following the October 2017 passage of the *Competition and Consumer Amendment (Abolition of Limited Merits Review) Act 2017* (Cth), which abolished the LMR regime, judicial review is the only remaining legal mechanism available to challenge the AER's decisions in future determination periods. This is of concern to consumer organisations, because a system in which the only avenue of review is judicial review may not significantly reduce the ability of DNSPs to challenge aspects of the AER's decisions. It will, however, present many more obstacles to consumer participation in reviews than were present in reviews under LMR.

In its submission to the SCO, the AER advocated for the abolition of the LMR regime, arguing that judicial review was a sufficient check on its power, and that the abolition of LMR would protect the integrity of the AER's determination processes.[62] Likewise, in announcing the abolition of the LMR regime, the Prime Minister argued that the DSNPs' use of the LMR system had resulted in "about a $6.5 billion cost to consumers" over recent regulatory cycles.[63] However, it is submitted that it is not yet clear whether the removal of LMR will, as the Prime Minister has implied, result in fewer challenges to the AER's decisions and lower costs for consumers, or just in "forum shifting" of the DNSPs' legal challenges from merits review to judicial review. These concerns are grounded in experience: it has been common, upon release of the AER's final decisions, for DNSPs to lodge concurrent judicial review applications alongside their applications for review under LMR, often covering much of the same grounds.[64]

Furthermore, it appears that to date, little consideration has been given as to the effect of removing laws that enshrined consumers' rights to challenge the AER's decisions through LMR, along with the potential (if not yet realised) for downward pressure on prices that the system provided. With the removal of LMR, particular changes will therefore be necessary to ensure that consumers continue to have the capacity to influence regulatory outcomes in the electricity market, including in appeal processes. Because of the particular nature of small consumer organisations, it is not clear that participation in complex,

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[58] COAG Energy Council, "Review of the Limited Merits Review – Terms of Reference" (19 August 2016) <http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Limited%20Merits%20Review%20Terms%20of%20Reference%20-%20August%202016.pdf>.

[59] COAG Energy Council, "Review of the Limited Merits Review Regime: Consultation Paper" (6 September 2016) <http://www.coagenergycouncil.gov.au/publications/review-limited-merits-review-regime-consultation-paper>.

[60] COAG Energy Council (Meeting Communique, 14 December 2016) 2.

[61] The Hon Malcolm Turnbull (Cth), n 1.

[62] Australian Energy Regulator, Submission to COAG Energy Council Senior Committee of Officials, *Review of the Limited Merits Review Regime*, 4 October 2016, ii.

[63] The Hon Malcolm Turnbull (Cth), n 1.

[64] See, eg, the Applications for Judicial Review lodged with the Federal Court by Networks NSW concurrently with their applications for Limited Merits Review in the ACT: NSD 609, 610 and 611 of 2015.

expensive and time consuming legal challenges is the best practice model for consumer participation in regulatory determination processes in the long term. However, it is also the case that the absence of consumer participation in legal challenges to the AER's decisions could recreate the imbalance across the regulatory system in favour of the DNSPs that was present prior to the 2013 reforms, by recreating a system where the only possible outcomes of legal reviews for DNSPs are greater or equal revenue to that decided by the AER. For that reason, it is the authors' view that under the present model of regulation, a number of legislative changes are required to ensure that consumer organisations can continue to challenge the AER's decisions, including through judicial review processes in the Federal Court.

In relation to standing, the *Administrative Decisions (Judicial Review) Act 1975* (Cth) requires a potential applicant for judicial review establish it is a person "aggrieved" by a decision under review,[65] in the sense that the decision affects its legal rights and obligations. As this is a test that has generally been construed narrowly,[66] it appears unlikely that a consumer group which had made submissions to the AER's determination process would ordinarily fulfil this criterion. As the AER itself suggested in its submission to the SCO, in a post-LMR environment, legislation may be necessary to guarantee consumer groups a right of standing in judicial review applications in relation to the AER's decisions,[67] as was the case in LMR proceedings under ss 71A and 71B of the *NEL*.

Such legislation should also guarantee a right of intervention for consumer groups in judicial review applications brought by DNSPs, as was provided for in LMR proceedings by s 71L of the *NEL*. Without explicit legislative amendments, interveners would need to demonstrate to the Court that they are persons "interested"[68] in the proceedings, and that that their contribution would be "useful and different" from the other parties and not "unreasonably interfere" with the ability of the parties to conduct the proceeding as they wished.[69] While, as has been noted above, PIAC successfully applied to intervene in the AER's judicial review applications in relation to the Tribunal's decisions for NSW Networks in 2016,[70] its "interest" was at least in part established by virtue of its involvement in the LMR proceedings below. Clearly, this is not a situation that consumers will be able to replicate in the future, in the absence of LMR proceedings.

Absent specific legislative protections for consumer groups, the authors consider that the risk of an adverse costs order will be a significant deterrent to consumer groups seeking judicial review or wishing to intervene in Federal Court proceedings. As has been noted above, the existence of considerable costs risks in LMR proceedings was acknowledged to be a significant barrier to consumer participation in the expert panel's report on LMR in 2012, and was the reason that cost protections for consumers were added to the *NEL* for LMR proceedings as part of the 2013 reforms. While cost protections mechanisms, such as cost caps, are currently provided for by the *Federal Court Rules*,[71] cost caps are granted in few cases and only at the discretion of the court. Without legislative reform specifically protecting consumers from adverse costs in similar terms to that provided for by s 71X and 71Y of the *NEL*, it is considered that the cost risks of participating in judicial review proceedings will be prohibitive for prospective consumer parties. This is particularly the case since, in addition to the risk of an adverse costs order, consumer groups seeking to participate in any review process will have to, in any event, bear their own legal costs.

In October 2017, the Senate's Environment and Communications Committee conducted an inquiry into the *Competition and Consumer Amendment (Limited Merits Review) Amendment Bill.* It is pleasing

[65] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1).

[66] See, eg, *Right to Life Association (NSW) Inc v Secretary, Department of Human Services & Health* (1995) 56 FCR 50.

[67] Australian Energy Regulator, Submission to COAG Energy Council Senior Committee of Officials, *Review of the Limited Merits Review Regime*, 4 October 2016, v, 22, 25.

[68] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 12(1).

[69] *Federal Court Rules 2011* r 9.12(2).

[70] *Australian Energy Regulator v Australian Competition Tribunal* [2016] FCAFC 144.

[71] *Federal Court Rules 2011* (Cth) r 40.51.

that, alongside recommending the abolition of LMR through the passage of the Bill, the Committee unanimously recommended that mechanisms be put in place to ensure standing in judicial review for stakeholders such as consumer groups, as well as protection against adverse cost orders.[72] The authors understand that the Commonwealth Department of Environment and Energy is currently developing its policy position on the resourcing of consumer organisations participating in the AER's determination processes. It is strongly recommended that the Department incorporate the Senate Committee's recommendation into policy reform.

VIII. Conclusion

As has been noted throughout this article, the legislative architecture for electricity pricing enshrines the long-term interests of consumers as the primary objective of regulation. As reform processes for this system shift once again over the coming months, policy makers should approach the question of how best to protect consumer interests with an understanding of the way in which consumers have been active in LMR proceedings in the 2015–2017 period.

There is a clear need for further research on what model of participation in the AER's regulatory process would best serve consumer interests in the long term, and on other mechanisms by which consumer organisations might influence the development of the *NEL* and *NER* outside of judicial review proceedings. Nevertheless, it is anticipated that under the current arrangements, judicial review will be central to the finalisation of determinations in a post-LMR system. As has been outlined, it is concerning that, absent further reform taking place, the combination of issues regarding standing, the risk of adverse cost orders and the paucity of funding available for consumers will make it less viable for consumers to be involved in any review of the AER's decision than was the case under LMR.

The 2013 reforms were designed to ensure that consumer voices were present in any review of the AER's decisions, so as to ensure that a focus of decision makers on the long-term interests of consumers was maintained at every stage of a determination process, including in legal reviews. Although it appears no longer possible that consumers will be able to build on the progress made in the 2015–2017 LMR review cycle in future determination periods, it would also be richly ironic if the abolition of the LMR system, ostensibly in favour of consumer interests, in fact created a regulatory imbalance in the review system in favour of the DNSPs. It is now incumbent on policy makers to ensure that this does not occur.

[72] Senate Environment and Communications Committee, Parliament of Australia, *Competition and Consumer (Abolition of Limited Merits Review) Bill 2017*, 33 [2.97].